

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 16TH DAY OF SEPTEMBER 2015/25TH BHADRA, 1937

CRL.A.No. 1639 of 2005

SC 105/2003 OF ADDITIONAL SESSION COURT (ADHOC), KALPETTA.
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ACCUSED/APPELLANT:

**N.M.SHAJI, S/O.MANI, AGED 28 YEARS,
NADUMUTTOM HOUSE, PAYYAMPILLY VILLAGE,
KOILLERY DESOM, MANANTHAVADY TALUK,
WYNADU DISTRICT.**

**BY ADVS.SRI.V.S.CHANDRASEKHARAN
SRI.A.J.VARGHESE**

RESPONDENT/COMPLAINANT:

**STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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'CR'

K.RAMAKRISHNAN, J.

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Crl. Appeal No.1639 OF 2005

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Dated this the 16th day of September, 2015

JUDGMENT

The accused in SC No.105/2003 on the file of the Additional Sessions Court (Adhoc-1) Kalpetta is the appellant herein. The appellant was charge sheeted by the Excise Inspector Mananthavady in Crime No.15/1999 of the Excise Range, Mananthavady under Section 55(a) of Abkari Act.

2. The case of the prosecution in nutshell was that on 16.8.1999 at about 2.25 pm, the accused was found to be in possession of 41 bottles of brandy having 180 ml. each intending to be used in Mahe and transporting the same in a bus by name 'Theertham' with Registration No.KL-11-B 4127 from Thalassery side to Manthavady side at Peria 38 in violation of the provisions of the Abkari Act and thereby he had committed offence punishable under Section 55(a) of the Abkari Act.

3. After investigation, final report was filed and it was taken on file before the Judicial First Class Magistrate Court-1 Mananthavady where it was taken on file as C.P.No.3/2002. Thereafter the case was committed to Sessions Court, Kalpetta by the learned Magistrate under Section 209 of the Code of Criminal Procedure (hereinafter referred to as the Code). The learned Sessions Judge has taken the case on the file as SC No.105/2003. Thereafter it was made over to the Additional Sessions Court (Adhoc-1) Kalpetta for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Sections 55(a) of Abkari Act was framed and the same was read over and explained to him and he pleaded not guilty.

5. In order to prove the case of the prosecution, PWs1 to 10 were examined and MO1 series and MO2 were marked on their side. After closure of the prosecution evidence, the accused was questioned under Section 313 of

the Code and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that no article was seized from his possession and in fact since he was found in the bus after consuming alcohol, on a mistaken identity, he has has been taken by the officials implicated him as accused. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code, the accused was called upon to enter on his defence. But no defence evidence was adduced on his side. After considering the evidence on record, the court below found the appellant guilty under Section 55(a) of Abkari Act and convicted him thereunder and sentenced him to undergo Rigorous Imprisonment for one year and also to pay a fine of Rs.1,00,000/-in default to undergo rigorous imprisonment for one month more. Set off was allowed for a period of detention undergone by him under Section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court

below.

6. Heard Sri. V.S. Chandrasekharan counsel appearing for the appellant and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

7. The counsel for the appellant submitted that the entire story of seizure alleged to have been done by the Excise officials appears to be artificial and unbelievable. The independent witnesses though admitted the signature and seizure of Indian Made Foreign Liquor from the bus, they did not even support the case of the prosecution that it was seized from the possession of the accused. The driver and conductor of the bus had stated that one fat person with black complexion had entered the front entry of the bus and placed the same behind the driver's seat and thereafter he went back side and left. The excise officials had seized the same and since the accused was found with the smell of alcohol on suspicion, he was taken and in fact no article was seized from his possession. When

independent witnesses did not support the case of the prosecution and they have put up a specific case of seizure then it is not safe to rely on the evidence of the official witnesses alone is the contention raised by the counsel for the appellant. He had also argued that it is not possible for the accused to keep the article on his lap as claimed by the prosecution and even according to the prosecution a person was sitting near the accused at that time and he would have been the best person to speak about the incident and it was the cleaner who was allowing person to get into the vehicle and he was not even questioned. All these things throw suspicion and court below ought to have disbelieved the case of the prosecution and acquitted the accused. He had also argued that the sentence imposed is harsh.

8. On the other hand, the learned Public Prosecutor submitted that the evidence of PWs 1 and 2 coupled with the admission of even the hostile witnesses regarding the seizure of the contraband articles from the vehicle will go to

show that the prosecution has proved the case against the accused beyond the reasonable doubt. Further there was no delay in producing the articles and as such court below was perfectly justified in convicting the appellant for the offence alleged.

9. The case of the prosecution as emerged from the prosecution witnesses was as follows:-

On 16.8.1999 at about 2.25 pm PW1 the Excise Inspector of Mananthavady Excise Range along with PW2, the Preventive Officer and others were doing patrol duty and when they reached near Periya-38, they stopped the bus which was proceeding from Thalassery to Mananthavady with name 'Theertham' with Registration No.KL 13/B - 4127 and when they were conducting examination of the vehicle, they found the accused sitting in the rear seat of the bus with MO2 big shopper on his lap. On examination of the big shopper, it contained 41 bottles out of which one bottle was taken and opened and tasted and they were convinced

that it was Foreign Liquor and on verification of the label, it was found that it was intended to be sold at Mahe and the accused was not having any document with him as well. So they arrested the accused and sealed the opened bottle and affixed label containing the signature of the accused, witnesses and PW1 and sealed the other bottle in the same fashion and seized the same along with MO2 as per Ext.P1 mahazar. He prepared Ext.P2 arrest memo. Thereafter they came to Excise office along with the accused and contraband articles and PW1 registered Ext.P3 occurrence report as Crime No.15/1999 of Mananthavady Excise Range against the appellant under Section 55(a) of the Abkari Act. He prepared Ext.P4 property list and Ext.P5 forwarding note and produced the article before the court on the next day itself. They requested to send the sample for analysis. He produced the accused along with remand report and he was remanded to custody. Thereafter the investigation is conducted by PW6 who prepared Ext.P9 scene mahazar in

the presence of witnesses. He questioned the witnesses and recorded their statements and obtained Ext.P10 chemical analysis report and filed the final report against the accused.

10. PW2 is the co-passenger in the bus, who was travelling in the bus at the relevant time. He had also admitted that the Excise party inspected the vehicle and seized foreign liquor from the bus. He had admitted that the mahazar was prepared from the bus and he had signed the mahazar from the bus but he had denied the factum of the seizure from the possession of the accused. PW4 is the driver of the vehicle. He had also more or less gave evidence in the tune with the evidence given by PW 3. PW4 is the conductor of the bus. He had also deposed in the same fashion and both these witnesses have admitted that Foreign Liquor was seized from the bus on that day and the accused was arrested from the bus on that day and taken to custody. They have also put up a case at the time of

examination that one black short healthy person had entered the bus through the front door and placed a packet behind the driver's seat and thereafter went to rear side and left and it was that article which was seized by the Excise officials. But it may be mentioned here that they have no such case when they were questioned by the Excise inspector and none of the passengers have raised any objection regarding arrest of innocent person for alleged to have committing such a grave offence as well and that goes against the normal conduct of persons who travelled in the bus and also the crew of the bus. Further the accused also did not make any complaint to any of the higher authorities for he being wrongly implicated in the case as well. So all these things will go to show that the independent witnesses who had really seen the seizure from the possession of the accused are now trying to help the accused and that was the reason why they are not supporting the case of the prosecution.

11. Though PWs 3 to 5 were hostile regarding the factum of actual seizure from the presence of the accused, but their evidence can be relied on by the court for the purpose of proving the seizure of the contraband article from the bus on that particular day and the mahazar was prepared from that bus itself and they have signed the mahazar from the place of seizure itself that strengthen the case of the prosecution of seizure of the article from the bus and from the accused.

12. PW1 is the detecting officer and Excise inspector. He had deposed that he had stopped the vehicle and conducted search of the bus and found MO2 big shopper bag on the lap of the accused and he verified the contents and satisfied that it was Indian Made Foreign Liquor and it contains a label that it was intended to be sold at Mahe. It is also brought down in his evidence that he had tested the same by smelling and tasting and convinced that it was Foreign Liquor. He took one of the bottle as sample and

sealed the other bottles and sealed the sample bottle and affixed the label containing signatures of the accused, witnesses and himself and seized the same along with MO2 big shopper bag as per Ext.P1 mahazar. The evidence of PW1 was corroborated by the evidence of PW2, the preventive officer who accompanied him as well. It is settled law that merely because the independent witnesses to the seizure did not support the case of the prosecution, the court need not rely on the seizure and doubt the genuineness of the seizure. The court can rely on the evidence of official witnesses on this aspect if the court is satisfied with the genuineness and trustworthiness of the evidence given by the Excise officials in this regard. So under the circumstances, the court below was perfectly justified in coming to the conclusion that the prosecution was able to establish beyond reasonable doubt that the accused was arrested by the Excise officials on 16.8.1999 at about 2.25 pm along with MO1 series Indian Made Foreign

Liquor of 180 ml each which was intended to be sold at Mahe.

13. The articles were produced before the court on the next day itself. PW1 had categorically stated that he was in actual possession of the articles till it was produced before the court. The property list also shows that it was produced in a tamper proof condition. So under the circumstances, the defence taken by the accused that the articles which were alleged to have been seized were not the articles produced before the court and Ext.P10 did not relate to the sample taken from the contraband article seized from the possession of the accused has no substance. Once it is proved by the prosecution that Indian Made Foreign Liquor intended to be sold at Mahe was found transported in a bus then it will amount to export or import as provided under Section 55(a) of Abkari Act, from one State to another State and presumption under Section 64 of the Abkari Act will be attracted and it can be presumed

unless contra evidence is adduced that it was intended for sale. So under the circumstances the court below was perfectly justified in convicting the appellant for the offence under Section 55(a) of the Abkari Act and the finding does not call for any interference.

14. It is merely because the cleaner of the bus was not examined, it is not a ground for doubting the genuineness of the prosecution case. The conductor and driver of the bus were examined and one passenger travelling in the vehicle was also examined as a witness, who is a signatory to Ext.P1 Mahazar as well. It is not the number of witnesses that has been examined but a quality of the witnesses examined that has to be considered by the court to come to the conclusion as to whether the prosecution has established beyond reasonable doubt the case against the accused. So under the circumstances, the finding of the court below that the appellant had committed the offence punishable under Section 55(a) of Abkari Act is

perfectly justified and the finding does not call for any interference.

15. As regards the sentence is concerned, the court below has sentenced him to undergo rigorous imprisonment for one year and also to pay fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for one month more. Though the article seized was Indian Made Foreign Liquor, since minimum fine was fixed as Rs.1,00,000/-, the fine imposed cannot be considered to be said to be harsh. It is high time for the Government to consider the question of slashing down the sentence as far as the case of Indian Made Foreign Liquor is concerned. Even if an Indian Made Foreign Liquor intended to be sold in another State was sold in State of Kerala, that may only affect the revenue and it cannot be said to be an illegally manufactured liquor causing danger to the public on consumption. This court as well as the Apex court in similar matter had expressed its anguish of heavy punishment being imposed on offences

relating to Indian made Foreign Liquor. But in spite of that no steps have been taken by the Government to reduce the punishment in such cases. But however, considering the nature of contraband articles seized, this court feels that the sentence imposed by the court below appears to be harsh and considering the fact that the amount of Rs.1,00,000/- has been imposed fine which is the minimum fine that can be imposed under the Act, reducing the substantive sentence to one month simple imprisonment and also default sentence of one month simple imprisonment will be sufficient and that will meet the ends of justice. So the substantive sentence of one year rigorous imprisonment and also default sentence of one month rigorous imprisonment are set aside and the same is modified as follows:

The appellant is sentenced to undergo simple imprisonment for one month and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment

for one month.

So the appeal is allowed in part. The order of conviction and sentence of fine of Rs.1,00,000/- and default sentence of one month are hereby confirmed. But the substantiate sentence and nature of substantive sentence of default sentence are set aside and the same is modified as follows:-

The appellant is sentenced to undergo simple imprisonment for one month and also to pay a fine of Rs.1,00,000/- in default to undergo simple imprisonment for one month. The period of detention already undergone by him is set off against the substantive sentence under Section 428 of the Code.

Office is directed to communicate this order to the concerned court immediately.

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV