**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE P.D.RAJAN**

**FRIDAY, THE 31ST DAY OF JULY 2015/9TH SRAVANA, 1937**

**CRL.A.No. 1783 of 2005 ( )**

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**AGAINST THE JUDGMENT IN SC 17/2005 of ADDL. SESSIONS COURT, FAST TRACK-II, PALAKKAD**

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**APPELLANT(S)/1ST ACCUSED:**

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**RAMAKRISHNAN, 32 YEARS,**
**S/O.RAMANKUTTY GUPTAN, PADINJAKKARA VEEDU,**
**VAKKADAPURAM, KARAKKURISSI, MANNARKAD.**

**BY ADVS.SRI.RENJITH THAMPAN**
**SMT.P.A.ANITHA**

**RESPONDENT(S)/COMPLAINANT:**

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

**2. SUB INSPECTOR OF POLICE,**
**KONGAD POLICE STATION, PALAKKAD.**

**R1 AND R2 BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**STK**

**P.D. RAJAN, J.**

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**Crl.Appeal 1783 of 2005**

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**Dated this the 31st day of July, 2015**

**JUDGMENT**

The appellant, who is the accused in S.C.17/2005 on the file of Addl. Sessions Judge, (Fast Track) No.II, Palakkad challenges the conviction and sentence under Section 55(a) of the Abkari Act. The appellant was convicted and sentenced to undergo rigorous imprisonment for one year and a fine of Rupees One lakh, in default of payment of fine, simple imprisonment for 6 months.

2. The facts necessary for indictment were that on 23.08.2004 at 6 pm, the Sub Inspector of Police, Kongad Police Station got reliable information that the appellant was conducting sale of arrack. He arrived at the place of occurrence, the appellant and other accused were found in the possession of 7 litres of arrack near Thuppanad river Kadampazhipuram II Village, Pathayakallu. They were arrested and contraband articles were seized after preparing mahazar. Sub Inspector registered a crime and

after investigation, he laid charge before the Judicial First Class Magistrate-II, Palakkad. From there, the case was committed to Sessions Court, Palakkad.

3. To prove the offence, prosecution adduced both oral and documentary evidence. Oral evidence consists of the evidence of PW1 to PW5 and documentary evidence consists of Ext.P1 to P10. The material objects were marked as MO1 to MO3. The trial court, after analyzing the evidence, convicted the first accused under Section 55(a) of the Abkari Act and acquitted the second accused.

4. The learned counsel appearing for the appellant contended that there is no evidence to show that the sample was properly taken from the seized article at the time of seizure and it was forwarded for chemical examination. The detecting officer has not disclosed, who took the sample and what happened to the sample. The Investigating Officer also not stated about the sample. The mere allegation that arrack was seized from the possession of the appellant is not sufficient to prove the offence. The learned counsel appearing for the appellant

relied the decisions in **Lalitha V. State of Kerala 2012 (1) KLT 550, Ravi V. State of Kerala 2011(3) KLT 353** and **Rajamma V. State of Kerala 2014(1) KLT 506.**

5. This court in **Rajamma V. State of Kerala (2014(1) KLT 506)** held that, "mere arrest of the accused with the material objects is not sufficient to establish that the accused has committed the offence punishable under Section 55(a) of the Abkari Act". Here the facts show that PW1 took 3 samples and PW5 produced it before court. But the nature of sampling was not disputed. The identity of the sample is also not disputed. Therefore, the above decision is not applicable, since independent witness PW2 supported the alleged seizure. PW5 deposed that after preparing the forwarding note, he submitted the contraband articles before court. In **Lalitha V. State of Kerala (2012(1) KLT 550)** this court held that, "in the absence of any evidence as to who took the sample, no reliance can be given to the report of the Chemical Examiner to conclude that the liquid is

arrack."

6. The seizure of the arrack was made by PW1. In the light of the argument made by the appellant, I have gone through the oral testimony of the Sub Inspector who detected the offence. His evidence shows that on 23.08.04, he detected the offence while conducting the patrol duty. On the basis of information, he arrived near Thuppanad river at 5.45 pm, appellant and another person were found near the bank of the river. On seeing the excise party, they tried to flee from there. PW1 intercepted them and inspected the cannas in their possession. During inspection, they detected 7 litres of arrack in a black cannas. He arrested them and contraband articles were seized. He took 180 ml in 3 bottles and sealed. The remaining arrack, he affixed signature in the label and affixed in the cannas and sample bottle. Ext.P1 is the seizure mahazar. Ext.P2 and P3 are the arrest memos. Ext.P4 is the FIR in Crime No.221/2004. The seized articles were produced before court as per Ext.P5 property list. Further investigation

was conducted by Sub Inspector of Police, Malampuzha. MO1 is the balance arrack in the cannas. MO2 is the glass tumbler and MO3 is the currency. Even though, these witnesses were cross-examined by the defence counsel, no question was asked with regard to the nature of sampling and even though PW1 was cross-examined by the counsel there was no challenge about the sampling and seizure. The seized articles were kept under the safe custody of the police station.

7. PW2 attested Ext.P1 mahazar and identified MO1 cannas. He also identified signature in MO1 and MO2. PW2 is an autorikshaw driver, who knew the appellant and the other accused. He signed in Ext.P1 at the place of occurrence. Appellant and other person were also found there. A close scrutiny of the evidence of PW2 shows that he was present at the place of occurrence after seizure and he identified the accused and seized article before court. PW3 attested Ext.P6 mahazar. PW4 admitted that he issued Exts.P7 scene plan. The investigation was conducted by the Sub Inspector of Police, Malampuzha,

he deposed that as per the direction of C.I. of Police, Hemambika Police Station, he conducted the investigation in Crime 221/2004 of Kongad Police Station. He arrived at the place of occurrence and prepared Ext.P6 mahazar. The accused were produced before court as per remand application. Contraband articles were produced before court, which was forwarded to chemical examination lab, for that he prepared Ext.P9 forwarding note. He affixed his specimen seal in it. After completing investigation, he laid charge before court. Ext.P10 is the chemical analysis report. Here also, the appellant did not cross-question the nature of sampling, nature of seal and everything for doubting the credibility of alleged seizure. He admitted that there were signature in the label.

8. The evidence of PW1 and Ext.P1 shows that sample was taken by PW1. Ext.P9 shows that in Ext.P5 forwarding note, the specimen seal of PW5 was affixed, which was forwarded to chemical examination lab and Ext.P10 is the Chemical Examination report. It shows that the sample contained 18.70 of ethyl alcohol by volume.

9. Analysing the evidence in this case, it shows that an offence under Section 8(1) and (2) of the Abkari Act is committed in this case. In **Gopan V. State of Kerala 2007(3) KLT 443,** it was held that, "mere possession of arrack in any form without any authority would attract Section 8 of the Abkari Act. Therefore, the conviction under Section 55(a) of the Abkari Act is set aside. The appellant is convicted under Section 8(1) and (2) of the Abkari Act.

10. The Apex Court in **Sasikumar V. State of Kerala 2012 (4) KLT 867(SC)** held that:

> "Before parting with the record of the case, we would like to point out that S.8(2) of the Abkari Act does not fix any upper limit for the fine but lays down that the fine shall not be less than ₹.1,00,000/-. Since the minimum amount of fine prescribed by the law is kept so high, the courts naturally give the default sentence of imprisonment for a substantially longer period. As noted above, the trial court has given the default sentence of one year which was reduced by the High Court to six months. We may note that in cases where poor people like the appellants who may only be the carrier of the

> arrack or who may be trying to eke out a living from the illegal trade are caught committing the offence, they are hardly in position to pay the fine of ₹.1,00,000/- and for them the default sentence becomes an additional period of incarceration. In a way, fixing the minimum fine at such a high amount, regardless of the countless possible variables in the commission of the offence under S.8(1), leads to discrimination in favour of those convicts who have sufficient means to pay the fine and, thus, avoid any default imprisonment and the small fries for whom the default sentence would invariably mean an additional sentence of imprisonment. To our mind, it is desirable to leave the Court free in exercise of judicial discretion in the matter of imposition of fine."

11. Therefore, in my mind it is desirable to exercise judicial discretion and the appellant is sentenced as follows;

a) The appellant is sentenced to undergo imprisonment for three months and to pay a fine of Rupees one lakh, in default of payment of fine, simple imprisonment for 15 days.

b) The period of detention, if any, undergone by him

during the investigation, inquiry or trial shall be set-off against the term of imprisonment.

This appeal is partly allowed.

Sd/-
**P.D. RAJAN,**
**JUDGE**

STK

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**P.A. TO JUDGE**