IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 04TH DAY OF DECEMBER 2020 / 13TH AGRAHAYANA, 1942

CRL.A.No.2477 OF 2006

AGAINST THE ORDER/JUDGMENT IN SC 1078/2004 DATED 28-11-2006 OF ADDITIONAL SESSIONS COURT (ADHOC)-II, KOZHIKODE

APPELLANT:

BABU,
S/O. APPU,
KACHERI THARAMMAL HOUSE,
KUNNUMMAL AMSOM,
MOKERY DESOM.

BY ADV. SRI.SUNNY MATHEW

RESPONDENT:

STATE OF KERALA
THROUGH THE SUB INSPECTOR OF POLICE,
KUTTIADY POLICE STATION,
REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY PUBLIC PROSECUTOR

OTHER PRESENT:

SRI.K.B.UDAYAKUMAR, SR.PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04.12.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.V.KUNHIKRISHNAN, J.
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Crl.A. No.2477 of 2006
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Dated this the 4th day of December, 2020

J U D G M E N T

The appellant is the accused in Sessions Case No.1078/2004 on the file of the Additional District and Sessions Judge, Fast Track (Adhoc-II), Kozhikode. The above case is charge sheeted by the Kuttiyadi Police Station against the appellant alleging offence punishable under Section 55(a) of the Kerala Abkari Act.

2. The prosecution case is that, on 01.04.2003, the Sub Inspector of Police, Kuttiady and his party were conducting law and order duty. It is alleged that the accused was found in possession of Indian made foreign liquor brought from Mahe. According to the prosecution, 5 bottles of 375 ml "Port Bridge Fine Brandy" and 5 bottles of

180 ml of the same brand was seized from the appellant.

3. Heard the learned counsel for the appellant and learned Public Prosecutor.

4. The learned counsel for the appellant submitted that, even if the entire allegations are accepted, the offence under Section 55(a) of the Abakri Act is not attracted in this case. The learned counsel submitted that, there is absolutely no evidence to show that the appellant imported or exported contraband articles. The learned counsel also submitted that, there is two days delay in producing contraband articles before the Court. On that reason, the appellant is entitled to the benefit of doubt

5. The learned Public Prosecutor submitted that, there is oral and documentary evidence to prove the offence under Section 55(a) of the Abkari Act. The learned Public Prosecutor submitted that, this Court may not acquitt the accused on technical ground.

6. The point for consideration in this case is whether the accused committed the offence under Section 55(a) of the Abkari Act.

7. The admitted prosecution case is that, the accused was found in possession of 2.75 litres of Indian made foreign liquor. According to the prosecution, the Indian made foreign liquor seized from the accused is intended for sale in Pondichery. Therefore, the prosecution says that, the accused imported the same from Mahe. This Court considered this point in detail in ***Narayanan Nair V. State of Kerala 2011 (3) KLT 722.*** This Court held that simply because a person is in possession of Indian made foreign liquor intended for sale in another state, there is no presumption that, the appellant imported or exported the same. This Court observed that, the prosecution has to prove that the appellant imported or exported the same to attract the offence under Section 55(a) of the Abkari Act. The relevant portion is extracted here under;

> "22. In the light of the arguments advanced and the nature of findings entered into by the court below, I am bound to examine whether confirmation of the conviction by appellate court on the finding that accused was "transporting" foreign liquor is sustainable or not. "Transport" is defined under S.3(18) of the Act. "Transport", under the Act means, to "move" from one place to another within the State. It is not a mere journey of a person in a vehicle in which, a contraband article is kept which makes him liable for

"transportation" of liquor. He must "move" the article with intention to move it.

23. The prosecution must also allege and prove that accused not only "moved" the contraband article from one place to another but both such places lie within the State of Kerala to constitute "transport". Prosecution does not have a case that petitioner "transported" the article, within the meaning of S.3(18) of the Act, and in violation of S.10 of the Act. On the other hand, its case is that he "imported" IMFL. Charge was also framed for offence under S.55(a) of the Act read with R.9 of the Rules which involves "import" and not "transport". Therefore, the conviction entered against petitioner on the finding that he "transported" IMFL is clearly illegal.

24. "Import" and "transport" are two acts which are totally different from each other and mutually exclusive. To constitute "transport" under the Act, the place from which, and the place to which, liquor is "moved" must lie within the State itself. But in the case of "import", one of such places must be situated in Kerala and the other must lie outside Kerala. While "bring" is the act which is relevant in "import", what is relevant in "transport" it is, "move".

25. The courts shall not loosely use the expressions, "transport" "import" "possess" etc., without understanding import of those expressions under the Act and convict an accused under some provision under the Act stating that he committed one of the above acts. The court shall not, at any rate, proceed on the assumption that expressions like "possession," "transport", "import", etc., referred to in the Act mean the same thing. Each act is a separate act calling for separate punishment. A person cannot be found guilty for transporting or importing liquor only because he is in possession of the same.

26. Referring to "transport" and "possession", Supreme Court in *Puranmal Agarwalla v. State of Orissa* (1959 SCR 1162), considered the question whether "transport" and "possession" (under the Opium Act) are same acts, and it was held that both

are different acts. "Transport" is defined identically in Opium Act and Abkari Act. Though "possession" is not defined under either of the Acts, the expression "possession" under both Acts connotes same acts, as seen from the various precedents. If acts of import, transport or possession are proved, each such act will call for separate punishment, since those do not connote same acts.

27. A portion from *Puranmal Agarwalla v. State of Orissa* (1959 SCR 1162) can be extracted as follows:

> "The provisions of the Opium Act make it clear that possession of opium and transport of opium contrary to the provisions of the Act or any other enactment relating to opium or to rules framed under the Act, are two separate offences. Mere possession of opium may not, on the proved facts of a particular case, involve any question of transporting it. Transport of opium may, in certain circumstances, include the element of possession, while in other cases, it may not. A person may transport opium through various agencies and yet not be in possession of it at the time it was transported. On the other hand, a person may transport opium and yet be in possession of it. In the latter case, such a person would be guilty both of transporting opium and being in possession of it. Under the Act, 'transport' means 'to remove from one place to another within the same State.' A person may remove opium and be in possession of it while removing it, and he can also remove it from one place to another within the same State in circumstances when while removing it he is not in possession of the opium. The intention of the Legislature appears to have been that neither possession of opium nor transporting of opium was permissible, if such possession or transporting was in contravention of the provisions of the Opium Act or any other enactment relating to opium, or rules framed under the Opium Act".

28. It is also necessary to mention here that even the mere proof of "transport", "import" or "possession" of liquor does not constitute any offence under S.55(a) of the Act. "Possession", "transport" or "import" of liquor becomes an offence, only if a person is proved to have committed any of such acts, in contravention of the provision of the Act or Rules under which, such act is prohibited. A person cannot be convicted on the mere finding that he was transporting, importing or was in possession of liquor. Prosecution must prove that such acts are done in contravention of the Act, Rules or Order.

29. While S.10 of the Act prohibits "transport" of liquor, S.6 prohibits "import" of liquor. "Import" of foreign liquor is specifically prohibited under R.9 of the Rules. "Possession" of excess quantity of liquor is prohibited under S.13 of the Act but, there is no total ban of possession of liquor under the said section. Therefore, the courts must be cautious, while dealing with offences under the Act. It must pay special care and attention not only to find out what is the act or omission allegedly committed by the accused but it must also confirm under which provision such act is prohibited under the Act, Rules or Order. It is only if any of the acts referred to in the various sub-sections of S.55 is committed by a person, in contravention of the provision of the Act, Rules or Order such person can be convicted under S.55.

30. At any rate, a person cannot be convicted for offence under S.55(a) of the Act read with R.9 of the Rules, on the finding that he "transported" IMFL or was in "possession" of the same. Only if the court finds that accused "imported" IMFL, as defined under S.3(16) and in violation of R.9 of the Rules, he can be convicted under S.55(a) of the Act read with R.9 of the Rules.

31. To sum up, I hold that courts below committed serious illegality in convicting petitioner for offence under S.55(a) of the Act read with R.9 of the Rules, on the finding that he was in "possession" of IMFL or that he was "transporting" the same. Prosecution failed to prove that accused imported IMFL, in violation of R.9 of the Rules. Hence, the

> conviction and sentence passed against revision petitioner under S.55(a) of the Act read with R.9 of the Rules are unsustainable. In the result, the following order is passed:
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> 1. The conviction and sentence passed against the revision petitioner for offence under S.55(a) of Abkari Act read with R.9 of foreign Liquor Rules are set aside.
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> 2. The revision petitioner is found not guilty and he is acquitted of offence under S.55(a) of Abkari Act read with R.9 of foreign Liquor Rules.
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> 3. Petitioner is set at liberty forthwith. Petition is allowed ".

8. In the light of the above judgment, I think the appellant can not be convicted under Section 55 (a) of the Abkari Act.

9. More over there is a delay of two days in producing the contraband articles before the Court. There is no proper explanation from the prosecution for the same. On that reason also, I think the appellant is entitled to the benefit of doubt. This point is also considered by this Court in ***Sukumaran v. State of Kerala (2019 (3) KLT 920), Ravi v. State-Sub Inspector of Police, Meppadi (2018 (5) KHC 352) and Vikraman v. State of Kerala (2018***

(1) KLT 822). Relevant portion of the judgment in Ravi's case (supra) is extracted hereunder:

> "8. In order to support the argument, the learned counsel for the appellant cited the ruling in Ramankutty v. Excise Inspector, Chelannur Range, 2013(3) KHC 308 : 2013(3) KLJ 434 : ILR 2013 (3) Ker. 535 : 2013(3) KLT SN 83 wherein it is held that 'in the absence of satisfactory explanation by the prosecution showing the cause of delay, even delay of one day is fatal to the prosecution and therefore, the accused is entitled to the benefit of doubt.
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> 9. In the instant case, there is a delay of four days in producing the contraband articles before the Court. According to the evidence of PW4, it was kept under his safe custody. But, he has to explain that these contraband articles were produced before the Court with tamper proof. Moreover, Ext.P6 is the copy of the forwarding note. It does not contain the seal, which was alleged to have affixed on the sample. So, without verifying the sample seal, the Court cannot act upon Ext.P6 copy of the forwarding note."

10. In the light of the above discussions, the appellant is entitled to the benefit of doubt.

Therefore, this Criminal Appeal is allowed. The conviction and sentence imposed on the appellant as per

the judgment dated 28.11.2006 in S.C. No.1078/2004 on the file of the Additional District and Sessions Judge, Fast Track (Adhoc-II), Kozhikode is set aside. The appellant is set at liberty. Bail bond, if any, executed by the appellant is hereby cancelled.

(Sd/-)
P.V.KUNHIKRISHNAN,
JUDGE

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