IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 8TH DAY OF DECEMBER 2015/17TH AGRAHAYANA, 1937

CRL.A.No. 175 of 2006 ( )
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AGAINST THE JUDGMENT IN SC 826/2003 of ADDL.DISTRICT & SESSIONS COURT FAST TRACK, (ADHOC)-II, KOZHIKODE DATED 19.12.2005

APPELLANT/ACCUSED::
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MANOJAN, S/O. KUMARAN,
KUNIYIL HOUSE, THIRUR AMSOM, THAVULLA KOLLY DESOM
VADAKARA TALUK.

BY ADV. SRI.P.VKUNHIKRISHNAN

RESPONDENT/COMPLAINANT & STATE::
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STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

R BY PUBLIC PROSECUTOR SMT.LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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**P.BHAVADASAN, J.**

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**Crl.Appeal No.175 of 2006**

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**Dated this the 8th day of December, 2015**

**JUDGMENT**

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo simple imprisonment for 1½ years and to a pay fine of ₹1,00,000/- with a default clause of simple imprisonment for a further period of two months. Set off as per law was allowed.

2. The incident which gave rise to the present prosecution occurred on 10.06.2000. On that day, PW1 was functioning as the Excise Range Inspector, Nadapuram Excise Range and PW3 was the Excise Guard of the same Range. PWs.1 and 3 along with other officers were on patrol duty and when they reached the market at Kaivali, they happened to see the accused coming with a can in his hand. Seeing the Excise Officers, he tried to turn around and walk back. At that time, the officials became suspicious and they intercepted the accused. The can was seized and its contents were examined. They were convinced, by taste and smell that, it was arrack. PW1 took a sample of 300 ml in a bottle of 375 ml capacity and sealed it and also prepared Ext.P1 seizure mahazar. Arrest memo is Ext.P2. On the lables affixed on the sample and the balance contraband article, the signature of the accused, witnesses

and PW1 were affixed. He returned to the station and on the basis of the materials, registered Crime No.6 of 2000 as per Ext.P3 occurrence report. The accused, documents and the articles seized were produced before the court on the very same day. Property list was also produced as Ext.P5. During the period from 10.06.2000 to 12.06.2000, PW1 asserted that the contraband was in his custody. He also prepared a forwarding note to the court concerned, which is marked as Ext.P6 and the chemical analysis report received thereon is marked as Ext.P7. PW5 is the Investigating Officer. He recorded the statement of witnesses, completed the investigation and laid charge before the court.

3. The court, before which the final report was laid, took cognizance of the offence and on finding that the offence is one exclusively triable by a court of Sessions, committed the case to Sessions Court, Kozhikode under Section 209 Cr.P.C., after following the necessary procedures. The said court made over the case to the Additional District & Sessions Court, Fast Track, Ad-Hoc-II, Kozhikode for trial and disposal.

4. The latter court on receipt of records and appearance of the accused, framed charge for the offence punishable under Section 55 (a) of the Abkari Act.

5. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PW1 to PW5 examined

and Exts.P1 to P8 marked. MO1 was identified and marked.

6. After the close of the prosecution evidence, the accused was questioned under Section 313 of Cr.P.C. He denied all the incriminating evidence put to him and maintained that he is innocent. Finding that, the accused could not be acquitted under Section 232 of Cr.P.C., he was asked to enter on his defence. He examined DW1.

7. On appreciation of the evidence, probably greatly influenced by the evidence of PW1 and PW3 taken along with contents of Ext.P1 mahazar prepared at the spot and also the act of producing the documents, the accused and the materials seized before the court on the very same day, the court below came to the conclusion that the prosecution has established its case. Therefore, conviction and sentence followed.

8. Assailing the conviction and sentence, the learned counsel appearing for the appellant Sri.P.V.Kunhikrishnan raised only one point for consideration. The learned counsel drew the attention of this Court to the property list which is marked as Ext.P5. Attention was drawn to the endorsement therein, wherein it is mentioned that, the two items of properties produced before the Magistrate is recommended to be returned to the Excise Range Office, Nadapuram for safe custody and it was so done as per the endorsement. The learned counsel then drew the attention of this

Court to Ext.P7 chemical analysis report and pointed out that, the samples seen to have been sent for chemical analysis on 12.06.2000 itself. The learned counsel also pointed out that, there is no endorsement in Ext.P5 that the sample bottle produced before the Magistrate was directed to be retained in court for sending it for chemical analysis. In such circumstances, according to the learned counsel, the Thondi Clerk ought to have been examined and it should have been established that the sample had not been returned. The learned counsel relied on the decisions reported in ***Ravi v. State of Kerala [2011 (3) KLT 353] and Joseph v. State of Kerala [2009 (4) KHC 537]***. If the endorsement on Ext.P5 is correct, there is no reason as to why it should not be so, then obviously the date shown in Ext.P7 is incorrect. It is for the prosecution to explain the anomaly. In the absence of any acceptable explanation, it has to be taken that the sample analysed is not the sample collected from the contraband article seized from the possession of the accused.

9. Meeting the above contentions of the learned counsel for the appellant, the learned Public Prosecutor contended that the evidence of PW1 and PW3 unerringly pointed to the fact that, 5 liters of arrack was seized from the possession of the accused and their testimony gets ample support from Ext.P1 mahazar. Further, the prompt production of the articles, the accused and the documents

before the court on the very same day, lends credence to the prosecution version. When viewed as a whole, it is very clear that, the prosecution has established its case beyond any reasonable doubt. It is contended that no interference is called for.

10. As rightly pointed out by the learned counsel for the appellant and the learned Public Prosecutor, the evidence regarding the seizure of the contraband article remains confined to the testimony furnished by PWs.1 and 3. They do give a uniform version of the incident and also they are in consistent form. While narrating the facts as the evidence of PW1 has already been adverted to, it is unnecessary to repeat the same here. Suffice it to say that, the evidence of PWs.1 and 3 mutually complements each other with regard to seizure, sampling and labelling. It is true that the independent witness turned hostile. However, if corroboration is required, it comes in the form of Ext.P1 mahazar prepared at the spot by PW1. It is a contemporaneous document containing all the details of what transpired on the date of incident. If any further assurance is required, that is given by prompt production of the accused, documents and articles before the court. Here begins the anomaly. PW1 would say that the material objects were produced on 10.06.2000 itself and he was asked to produce it on another day orally by the learned Magistrate, so he has taken them back. He had them brought back to the court on 12.06.2000 as is evident

from the property list, Ext.P5. PW1 has stated that, on those two days i.e., 10th and 11th the articles were in his safe custody.

11. Ext.P5 is the property list, which shows that both the balance contraband seized and the sample collected in bottle were taken to the court. The note seen in Ext.P5 shows that the articles were directed to be returned to the Excise Inspector, Nadapuram. That communication is dated 12.06.2000.

12. When one looks at Ext.P7 chemical analysis report, it could be seen that, the communication from the learned Magistrate is also dated 12.06.2000. There is nothing in Ext.P5 to indicate that contrary to the direction therein, item No.2 was retained by the Clerk and Item No.1 alone was returned. As rightly pointed out by the learned counsel for the appellant if that was so, there should have been appropriate endorsement in Ext.P5. As it now stands, Ext.P5 would indicate that both items were returned to the Excise Inspector.

13. In the decision reported in ***Ravi v. State of Kerala*** [***2011 (3) KLT 353],*** it was held as follows :

> *"13. It is difficult for us to believe that PW4 had produced the properties on 25.08.1997 and the Thondy Section Clerk refused to receive the properties on the ground that he was too busy. Even assuming that such a thing happened, we would have expected the prosecution to examine the Thondy Section Clerk to substantiate the above explanation. For reasons best known to the prosecution the*

*Thondy Section Clerk was not examined. If so, it cannot be assumed that the property was in the safe custody of PW4 until their production before Court after 16 days. There is the possibility that the properties would have been tampered with. The prosecution, in a case of this nature can succeed only if it is shown that the contraband liquor which was allegedly seized from the accused ultimately reached the hands of the Chemical Examiner by change of hands in a tamper-proof condition. (Vide State of Rajasthan v. Daulath Ram (AIR 1980 SC 1314) and Valsala v. State of Kerala (1993 (2) KLT 550 (SC). No conviction can be entered against the accused in a prosecution as the present one unless it is proved that the sample which was analysed in the Chemical Examiner's laboratory was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused (See Sathi v. State of Kerala (2007(1)KLT SN 57 (C.No.82) and Sasidharan v. State of Kerala (2007(1) KLT 720). There is no satisfactory link evidence to show that it was the same bottles seized from the appellant which eventually found their way into the hands of the Chemical Examiner and that there was no meddling or tampering with the bottles while they were in the custody of PW4. Hence, the result of Ext.P7 Chemical Analysis cannot be applied against the appellant."*

14. It is true that some confusion is created due to the entries in Ext.P5. As rightly pointed out by the learned counsel for the appellant, if the properties were directed to be returned for safe custody and it was so done and it was taken possession of by PW1, then it is virtually impossible that, the court could have sent the same for chemical analysis on the very same day. There is nothing to indicate that, while returning the articles for safe custody, the

court intended Item No.1 and directed item No.2 to be retained in the court itself.

15. The learned Public Prosecutor pointed out that, that is only a clerical error which need not be given undue importance. Probably the court what meant was that item 1 should be returned and item 2 should be sent for chemical analysis. In a criminal proceedings, the scope for “if” and “but” is very little. The learned counsel for the appellant may be justified to a considerable extent in his submission that in the light of the anomaly seen in Exts.P5 and P7, it could be said that sample analysed is not the sample taken from the contraband seized from the possession of the accused. As rightly pointed out, the Thondi Clerk ought to have been examined.

For the above reasons, this court is unable to uphold the conviction and sentence passed against the accused under Section 55(a) of the Abkari Act. This appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the charges levelled against him. He stands acquitted of the offences. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
**P.BHAVADASAN, JUDGE**

AV

/True Copy/

P.A to Judge