IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

CRL.A.No. 205 of 2006 ( )

AGAINST THE JUDGMENT IN SC 87/2005 of ADDITIONAL DISTRICT AND SESSIONS COURT (ADHOC) FAST TRACK-III, PATHANAMTHITTA.

APPELLANT(S)/ACCUSED:

RAJENDRAN, S/O.CHANDRAN,
KONATHU VADAKKU VALIYAVILA PUTHENVEEDU,
PARAKKODU MURI,
ADOOR TALUK, ADOOR VILLAGE.

BY ADV. SRI.RATHEESH.P.R.

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, THROUGH THE EXCISE
INSPECTOR, ADOOR, REPRESENTED BY THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 205 of 2006

Dated this the 26th day of November, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 8(1) and (2) of the Abkari Act. He was found guilty and he was convicted and sentenced to undergo simple imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for three months.

2. The prosecution case is that on 21.6.2002 while P.W.1 was working as Preventive Officer of Excise Range Office, Adoor, he along with his colleague officers had gone on patrol duty. When they reached near Government Welfare L.P. School, they found the accused coming along the road carrying a can. They stopped near him and seized the can. By taste and smell, the content was identified as arrack. The can had a capacity of 10 litres and it contained 7 litres of arrack. Arrest memo was prepared by him, which is produced as

Ext.P1. He speaks about having taken sample of 200 ml arrack in a bottle having capacity of 375 ml. and having affixed seal containing the signature of the accused, P.W.1 and the witnesses. He speaks about having sealed and labelled the balance contraband article. P.W.1 then produced the accused, the thondi articles and the documents before P.W.2. P.W.2 was only an Assistant Excise Inspector at the relevant time. He prepared occurrence report, the property list and produced the articles before court and filed the forwarding note. Investigation was done by P.W.5 who recorded statements of witnesses, obtained chemical analysis report and laid charge before court.

3. The court, before which final report was laid, took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Pathanamthitta. The said court made over the case to Additional District and

Sessions Court (Adhoc) Fast Track-III, Pathanamthitta for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Sections 8(1) and (2) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 5 examined and had Exts.P1 to P9 marked. M.O. 1 was got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

5. On appreciation of the materials, the court below, mainly based on the testimony of P.Ws.1 and 2 found

the accused guilty.

6. Assailing the conviction, learned counsel appearing for the appellant pointed out that one of the essential ingredients to convict the accused, i.e., availability of forwarding note is conspicuously absent in the case on hand, and that is fatal to the prosecution case. Learned counsel pointed out that there is absolutely no evidence to show that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused and in that respect, the accused is entitled to succeed. Learned counsel also contended that P.W.2 was only an Assistant Excise Inspector and he is not an authorized officer under the Abkari Act and he could not have conducted any part of the investigation and any investigation done by him is non-est. Learned counsel relied on the decisions reported in Unni v. State of Kerala (2009(2) KHC 661) and Sabu v. State of Kerala (2007(3) KHC 753).

7. Learned Public Prosecutor on the other hand tried to support the finding of the court below and pointed out that the evidence of P.W.1 is sufficient to show that the contraband articles were seized from the possession of the accused. It is true that the accused, articles and the documents were handed over to P.W.2, who is incompetent to act in accordance with law. After all the investigation was completed and final report was laid by P.W.5. There is no flaw in the evidence of P.Ws. 1 and 2. Merely because the forwarding note is not produced may not be a ground to acquit the accused and there is clinching evidence regarding the seizure. At any rate, the lower court accepted the evidence of P.Ws. 1 and 2 and there is no ground to reverse the said finding.

8. Evidence regarding detention is confined to the evidence of P.W.1. He was then Preventive Officer of Adoor Excise Range. It is seen from his evidence that as usual he had

gone on routine patrol duty and on the way he came across the accused with a can. He stopped the vehicle and then had the can seized. On examination of the contents, it was found to be arrack. He speaks about having taken sample, sealed and labelled the sample as well as the balance contraband article and the label contained the signature of the accused, witnesses and P.W.1. He then says about having handed over the accused, the articles and the documents to P.W.2.

9. P.W.2, it must be noticed, was at the relevant time functioning as Assistant Excise Inspector at Adoor Excise Range Office. He, going by 1965 notification, is an incompetent officer under the Abkari Act and his acts have no sanction of law. It is he who prepared property list, forwarding note, produced the accused before court etc. All these activities by him are without sanction of law. Be as it may, final report was filed by P.W.5 who was a competent officer. However, the fact remains that a good part of the

investigation was done by an incompetent officer.

10. Very shocking is the fact that no forwarding note is seen marked in the case even though time and again this Court has highlighted the necessity and importance of having the forwarding note produced before court with sample seal. This issue has been dealt with in various decisions. It is useful here to refer to the decisions reported in Krishnan v. State (2015(2) K.L.T. SN 8) and Majeedkutty v. Excise Inspector (2015 (1) K.L.T. 624).

11. In the absence of sample seal, it is not possible for the court to come to the conclusion that the sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused. In the light of the principles laid down in the decisions referred to above, the conviction cannot stand.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.