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. 237 of 2006 ( )

AGAINST THE JUDGMENT IN SC 445/2002 of ADDITIONAL DIST. & SESSIONS COURT (ADHOC)-II, KOLLAM DATED 21-01-2006

AGAINST THE ORDER/JUDGMENT IN CP 74/2001 of JUDICIAL FIRST CLASS MAGISTRATE COURT- I, KARUNAGAPPALLY

APPELLANT :

VENU, S/O.PEETHAMBARAN,
VENU BHAVAN, PAYIKUZHIMURI, OACHIRA VILLAGE
KARUNAGAPPALLY TALUK, KOLLAM DISTRICT.

BY ADVS.SRI.S.SUDHEESHKAR
SRI. K.SIJU

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY KARUNAGAPPALLY EXCISE RANGE OFFICER
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

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:

AV

P.BHAVADASAN, J.

Crl.Appeal No.237 of 2006

Dated this the 8th day of December, 2015

JUDGMENT

Put in the dock for the offence under Section 55(g) of the Abkari Act, the accused was found guilty and was therefore convicted and sentenced to undergo rigorous imprisonment for one year and to pay a fine of ₹1,00,000/- under Section 55(1) of the Abkari Act with a default clause of rigorous imprisonment for one year.

2. The incident which gave rise to this case is said to have occurred on 21.04.1999. On the relevant day, PW1 was functioning as the Excise Inspector of Karunagappilly Excise Range. PW2 was working as the Preventive Officer in the same Range. PWs.1 and 2, on the date of incident, along with the other officers were on patrol duty and when they reached Eramath Kavu, they found a person coming with a can on his one shoulder along the road. Feeling suspicious, he was intercepted and the can was seized. The can had a capacity of 35 litres and it contained about 25 litres of liquid. By taste and smell, it was recognized as wash. The accused was arrested on the spot. PW1 took a sample of 600 ml in a bottle of 750 ml capacity and that was also seized. The rest of the wash was destroyed at the spot. Mahazar prepared is Ext.P1 and thereafter Crime No.43 of 1999 was registered against the accused as per

Ext.P2 occurrence report. On the same day, the accused, the documents and the contraband was produced before the court. Ext.P3 requisition slip was produced before the court for sending the sample for chemical analysis and the report so received is Ext.P4. Subsequent investigation was done by CW6. PW3 took over the investigation, recorded the statement of the witnesses, verified the records, 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 exclusively triable by a court of Sessions, committed the case to Sessions Court, Kollam. The said court made over the case to Additional Asst.Sessions Court, Kollam for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused, framed charges for the offence punishable under Section 55(g) of the Abkari Act. The accused pleaded not guilty to the charge levelled against him and claimed to be tried. Therefore, the prosecution had PWs.1 to 4 examined and Exts.P1 to P4 marked. MOs.1 and 2 were identified and marked.

5. After the close of the prosecution evidence, the accused was questioned under Section 313 of Cr.P.C. He denied all the incriminating circumstances brought out in evidence against 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 chose to adduce no evidence.

6. Considerably impressed by the evidence of PWs.1 and 2 and also the mahazar prepared by PW1, the court below held that the offence has been clearly established and the conviction and sentence followed.

7. Assailing the conviction and sentence, the learned counsel appearing for the appellant contended that the sample taken by PW1 has been tampered in court and there is no guarantee for the fact that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. Further adding to the agony of the prosecution, it is contended that, no forwarding note is seen produced and therefore the specimen of the sample seal is also not available. He relied on the decisions in ***Joseph v. State of Kerala [2009 (4) KHC 537], Majeedkutty v. Excise Inspector [2015 (1) KLT 624] and Krishnan v. State [2015 (2) KLT SN 8]*** to support his contention regarding the absence of forwarding note. It was therefore contended that, the conviction cannot be sustained.

8. The learned Government Pleader on the other hand placed considerable reliance on the testimony of PWs.1 and 2 and attempted to sustain the conviction. But there was no answer to the two contentions raised by the learned counsel for the appellant. It

is rather strange to note the act of the court in tampering the sample produced by PW1. The evidence of PW1 is clear to the effect that he had taken a sample of 600 ml in a bottle of 750 ml capacity and sealed and labelled the same. He claims to have preferred a forwarding note also. Any how that is not before the court. Be as it may, without any requisition from the excise officer or without any statutory backing, the court tampers with the sample produced by PW1 and takes another sample on its own and send it for chemical analysis. One fails to understand the authority of the court to do such things. It is therefore amply clear that the sample produced by PW1 has been tampered with and if that be so, the contention by the learned counsel for the appellant that there is no guarantee regarding the samples sent for chemical analysis has to be upheld. Normally this would have been sufficient to dispose of this case, but since the consequence of the absence of forwarding note was also argued, it is being considered in the light of the decisions reported in ***Joseph v. State of Kerala [2009 (4) KHC 537], Majeedkutty v. Excise Inspector [2015 (1) KLT 624] and Krishnan v. State [2015(2) KLT SN 8]*.**

In the decision reported in **Joseph** v. **State of Kerala** (2009 (4) KHC 537), it was held as follows:

> *"18. Yet another infirmity in the prosecution case is that there is no request forwarding note either produced or marked to indicate that a*

request was made to the Magistrate to send the sample bottle to the chemical examiner for analysis. P.W.6 who conducted the investigation, has no case that he had made any such request or had filed any forwarding note. Likewise, P.W.1 also has no case that he had made a request to the Magistrate to send the sample bottle to the chemical examiner. Ext.P4 certificate of chemical analysis dated 24.11.1997 is relied on by the prosecution to show that the sample bottle was duly despatched to the chemical examiner for analysis. In the absence of any forwarding note or requisition, it is not explained as to how the Magistrate forwarded a sample bottle to the chemical examiner as per his covering letter dated 19.8.1997 referred to in Ext.P4 certificate. Even the office copy of the covering letter has not been produced. The thondi section clerk who was the custodian of the properties before the Magistrate, was not examined to prove matters such as the date of receipt of the property before the Magistrate, the condition in which those properties were received in court including the fact whether a sample bottle was received and if so, whether the seals if any on such bottle were in tact, the date of despatch of the sample to the chemical examiner and the nature of the custody of the sample bottle until then. The prosecution can succeed in securing a conviction against the appellant only if it is shown that the sample which was subjected to chemical analysis as *evidenced by Ext.P4 certificate was the very same sample which was drawn from the bulk quantity of contraband liquor allegedly held by the accused and which after change of hands, eventually reached the hands of the chemical examiner."*

9. In the decision reported in **Krishnan** v. **State** (2015 (2) KLT SN 8), it was held as follows:

"Ext.P5 is a copy of the Forwarding Note submitted before the court for sending sample for subjecting it to chemical analysis. A specific space is provided in the Forwarding Note for affixing the sample seal. No such sample seal was affixed on Ext.P5. Whether the sample seal was affixed on the original of Ext.P5 sent to the Chemical Examiner? Normally, if the sample seal is not appearing in the copy of the Forwarding Note, in this case it is Ext.P5, it has to be presumed that such sample seal was not affixed on the original Forwarding Note unless proved otherwise. A copy of the Forwarding Note is kept in the office of the court for serving certain purposes. The purposes are evident from the contents of the form of the Forwarding Note itself. They include the quantity and description of the sample drawn from the bulk of the contraband, the details of the case and the space for providing the sample impression of the seal affixed on the sample taken from the bulk of the contraband. Therefore, as already stated, the absence of sample seal in the space provided in the copy of the Forwarding Note is sufficient reason for presuming that the sample seal is not provided

in the original Forwarding Note. Of course, this is only a rebuttable presumption. In the case on hand, such presumption has not been rebutted by the prosecution."

10. In the decision reported in **Majeedkutty** v. **Excise Inspector** (2015 (1) KLT 624), it was held as follows:

"7. It is the prosecution case that the bulk of the contraband as well as the sample collected were sealed by PW3. PW3 also deposed that they were so sealed. The description in the List of Property does not show that the bulk was so sealed. Be that as it may, the sample is described in the List of Property as sealed. Whose seal was so affixed? No evidence is available regarding that aspect of the matter. It is noted in Ext.P3 Certificate of Chemical Analysis that the seal on the bottle was intact and found tallied with the sample seal provided. Whose sample seal was so provided? None of the excise officials examined in the case deposed that sample seal was so provided. No Forwarding Note is seen among the case records. PW4 deposed before the court that he had submitted a requisition before the court for subjecting the sample to Chemical Analysis. It is usual that seal of the court will be affixed while sending the sample to the Chemical Examiner for analysis. Therefore, the sample seal noted in Ext.P3 can be the seal of the court also. A comparison of the seal of the court affixed on the bottle containing sample with the specimen seal of the court will not give any assurance that the sample of the contraband allegedly seized from the appellant

has, in fact, reached the Chemical Examiner for analysis. Such an assurance is possible only when the sample seal of the seal affixed on the sample was provided to the Chemical Examiner for comparison. Such a link evidence is missing in this case. Therefore, there is no assurance that the Chemical Examiner examined really the sample taken from the bulk allegedly seized from the appellant in this case. Hence, the report in Ext.P3 that ethyl alcohol was detected in the sample will not connect the accused with the crime alleged.

8. This Court in Rajamma v. State of Kerala (2014 (1) KLT 506) has held as follows:

> *" .... The investigating officer has also deposed that he is not aware whether any specimen seal is produced before the court. So, absolutely there is no evidence to convince the court that the prosecution has proved that the sample seal or specimen impression of the seal, alleged to have been affixed in the sample by PW.1 has been provided to the chemical examiner for their verification and to ensure that the sample seal, so provided, is tallying with the seal affixed on the sample bottle. In spite of the above fact and in the absence of sample seal, however in Ext.P3, it is certified that the seal of the sample bottle is in tact and tallied with sample seal provided. Therefore, according to me, no evidentiary value can be given to Ext.P3 chemical analysis report. In the absence of any link evidence to show that the very same sample which drawn from the*

> *contraband article allegedly seized from the possession of the accused reached the hands of the chemical examiner, it is unsafe to convict the appellant who is a lady."*
>
> *A Division Bench of this Court in Ravi v. State of Kerala (2011 (3) KLT 353) has held that the prosecution 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 in a tamper-proof condition. Also held that no conviction can be entered against the accused in a prosecution 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."*

11. A reading of the above decisions lead to a conclusion that the production of the forwarding note along with the specimen of the sample seal is a mandatory requirement for a successful prosecution under the Act. This court has held that the specimen sample seal is the only guarantee regarding the authenticity of the sample sent for chemical analysis. If that be so, in the case on hand, there is no material to draw the authenticity of the sample apart from the fact that the sample taken by PW1 has been tampered by the court.

For the above reasons, it is held that the appellant is entitled to succeed in this appeal. 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 offences. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN, JUDGE

AV

/True Copy/

P.A to Judge