IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA, 1937

CRL.A.No. 303 of 2006

AGAINST THE JUDGMENT IN SC 210/2002 of ADDL. SESSIONS COURT FAST TRACK-III, THIRUVANANTHAPURAM DATED 21-01-2006

APPELLANT/ACCUSED:

BALAN, S/O.JANARDHANAN,
MANAKKATTUVILA VEEEDU, KALPANA COLONY, KAMUKARA MURI,
MENAMKULAM, KAZHAKUTTOM, THIRUVANANTHAPURAM TALUK.

BY ADV. SRI.C.K.MOHANAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
EXCISE INSPECTOR, EXCISE RANGE,
KAZHAKKUTTOM (CRIME NO.63/97) THROUGH
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY SMT.S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.303 OF 2006

Dated this the 10th day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Sections 8(1) and 58 of Abkari Act. He was found guilty of the offence under Sections 8(1) and (2) of Abkari Act and was therefore convicted and sentenced to suffer simple imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for three months.

2. The incident which gave rise to the case occurred on 22.08.1997. On that day, PW4 was functioning as Circle Inspector of Thiruvananthapuram Excise Special Squad and PW2 was the Preventive Officer of the same Squad. According to PW4, while they were patrolling, when they reached near the electric transformer at Chittattumukku, they happened to see the accused coming along the road holding a white can. Seeing the Excise Officials, he became panicked and tried to withdraw. He was intercepted and the can was seized. The can had a capacity

of 5 litres in which there was liquid of 3 litres quantity. By taste and smell, it was identified as arrack. The accused was arrested as per Ext.P4 arrest memo and the mahazar prepared is Ext.P1. On the articles seized, label was affixed which contains the signature of PW4, accused and the witnesses. Thereafter the accused, articles seized and the records were handed over to the Excise Inspector at Kazhakuttam. PW3 was the then Excise Inspector of Kazhakuttam office. He admits having received the articles, accused and documents brought by PW4 to his office and he received the same. On that basis, as per Ext.P2 occurrence report, he registered Crime No.63/1997. He prepared Ext.P3 property list. As part of investigation, PW5 recorded statement of CWs 3, 4 and 5 and obtained Ext.P5 chemical analysis report. Further investigation was done by PW6. He recorded the statement of CWs 1 and 2, completed investigation and laid charge before court.

3. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was

committed to Sessions Court, Thiruvananthapuram. The said court made over the case to Additional Sessions Court Fast Track-III, Thiruvananthapuram for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Sections 8(1) and 58 of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

4. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P6 marked. M.O.1 was got identified and marked.

5. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

6. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He chose to examine DW1.

7. The court below, considerably influenced by the evidence of PWs 2 and 4 and also the contents of Ext.P1 mahazar, formed the opinion that the prosecution has succeeded in establishing

the case against the accused and found him guilty. The conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

8. Learned counsel appearing for the appellant contended that the court below has not addressed itself to the real question involved in the case and has been carried away by the evidence of PWs 2 and 4. It is true that certain articles were seized. There is no evidence as to who has done sampling in the case. Moreover, learned counsel contended that there is no forwarding note produced in the case which is a mandatory requirement to establish the prosecution case. Even PW3 the person who received the articles from PW4 does not say about any sample being taken or request being made to court to take sample for sending the same for chemical analysis. Learned counsel pointed out that in the absence of forwarding note, it could not be said that sample sent for chemical analysis is the sample taken from the contraband seized from the possession of accused. For the above proposition, learned counsel relied on the decision in ***Majeedkutty*** *vs.* ***Excise Inspector*** (2015 (1) KLT 624).

According to the learned counsel, the conviction and sentence cannot stand.

9. Learned Public Prosecutor, on the other hand, tried to sustain the conviction and sentence on the basis of evidence of PWs 2 and 4. It is pointed out that prompt production of accused goes a long way in establishing the prosecution case. At any rate, according to the learned Public Prosecutor, the court below has chosen to accept the evidence and held the accused guilty. There is no reason to take a different view.

10. Even all what the prosecution says is true, still the prosecution cannot succeed in this case for the reasons stated by the learned counsel for the appellant. Obviously, the evidence of PWs 2 and 4 do not indicate that sample was taken by PW4 at the time of detection. Going by the evidence, it would appear that the entire contraband articles seized along with the can was sealed and labeled by PW4 and handed over to PW3. PW3 also does not say that he had taken any sample and then produced the balance quantity before court. It was necessarily to be presumed that sample was taken by court, in which case, it was

necessary to examine the thondi Clerk. The necessity to examine the thondi Clerk was considered in the decision in ***Joseph*** *vs.* ***State of Kerala*** (2009 (4) KHC 537). Therefore, there is absolutely no evidence to show that there was proper sampling. It is not discernible from records as to who had taken sample and from where it was taken.

11. Apart from the above fact, as pointed out by the learned counsel for the appellant, there is non production of forwarding note. In the decision in ***Majeedkutty*** *vs.* ***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. <u>It is usual that seal of the court will be affixed while sending the sample to the Chemical Examiner for analysis</u>. 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."

12. In the light of the above decision, it is necessary to produce the forwarding note containing specimen of the sample seal. As has been observed by this Court, that is the only guarantee which the court can have to ensure that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of accused.

13. In the case on hand, there is no evidence of sampling. There is no forwarding note also. It is not discernible from evidence that who had filed requisition to the court for taking sample, assuming that sample was taken. From Ext.P5, it is quite evident that sample was done by somebody because the report shows that the laboratory received a bottle containing 375ml of liquid. As to who had taken sample is not available from the records. The two vital ingredients necessary to establish the case are totally absent in the case. In the absence of those factors, the court below was not justified in holding that

the accused is guilty of the offence. The conviction, obviously, cannot stand.

For the above reasons, 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 offence under Sections 8(1) and (2) of Abkari Act. He stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A to Judge.