IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

CRL.A.No. 432 of 2006

AGAINST THE JUDGMENT IN SC 1059/2004 of ADDITIONAL DISTRICT & SESSIONS COURT(ADHOC) III, KOLLAM DATED 17-01-2006

APPELLANT/ACCUSED:

SRI.FELIX, S/O.JOHN, VINOD BHAVAN,
KALEEKKAL THEKKATHIL, MUNDAKKAL EAST, KOLLAM TALUK.

BY ADVS.SRI.C.UNNIKRISHNAN (KOLLAM)
SRI.S.HARIKRISHNAN

RESPONDENT/COMPLAINANT:
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1. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

2. THE EXCISE INSPECTOR,
KOLLAM EXCISE RANGE.

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.432 OF 2006

Dated this the 19th day of November, 2015.

J U D G M E N T

The accused in this case was prosecuted for the offence punishable under Section 8(2) of Abkari Act. He was found guilty 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. Set off as per law was allowed.

2. Incident that gave rise to the case occurred on 20.05.2000. PW1, at the relevant time, was functioning as Preventive Officer attached to Excise Range Office, Kollam. He and PW2 along with other officers, at about 11.30 a.m, set out for patrol duty. When they reached the main gate of the H & C compound, they happened to see the accused coming along with a bottle having a capacity of 1 liter. Feeling suspicious, he was intercepted and the bottle was seized. The bottle was seen to contain 750 ml of liquid. By taste and smell, the contents were

identified as arrack. PW1 took sample of 200ml in a bottle having capacity of 375ml and sealed and labeled the same. The labels contained the signature of accused, witnesses and PW1. He then handed over the accused, records and articles to the Excise Office. Ext.P3 is the mahazar prepared by him. Ext.P1 is the arrest memo and Ext.P2 is the arrest notice prepared by PW1. He says that the seal affixed by him is 'CSN'.

3. PW5 was the Assistant Excise Inspector of Kollam Range as on the date of incident. He would say that on that day, he had charge of the Inspector also. PW1 brought the accused, records and articles before him. He registered crime under Ext.P4 occurrence report. He had the accused produced before court with a remand application, Ext.P4. He would say that he sent the forwarding note for sending the sample for chemical examination. He had prepared the list of articles to be produced before court and did produce them before court.

4. Investigation of the case was done by PW6. He took the statement of witnesses, obtained Ext.P8 report from the chemical analysis laboratory and filed final report showing the commission

of offence under Section 8(1) of Abkari Act.

5. 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, Kollam. The said court made over the case to Additional District & Sessions Court (Adhoc) III, Kollam for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence under Section 8(2) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

6. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P9 marked. M.O.1 was got identified and marked.

7. After the close of the prosecution evidence, 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. He claimed that he has been falsely implicated.

8. 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 adduce no evidence.

9. The trial court found the evidence of PWs 1 and 2 to be convincing enough even though the independent witnesses have turned hostile to the prosecution. The lower court also drew support from Ext.P3 mahazar said to have been prepared by PW1 at the spot containing what had transpired at the place of incident. Further, the court below was greatly impressed by the fact that the articles seized, accused and documents were promptly produced before court. These items of evidence, according to the court below, was sufficient to warrant a conclusion that the prosecution has succeeded in establishing the case against the accused. Conviction and sentence followed.

10. Assailing the conviction and sentence, learned counsel appearing for the appellant raised two main points for consideration. Learned counsel pointed out that PW5, who is said to have registered crime, prepared the property list, produced the accused before court and also drawn up forwarding note, was only an Assistant Excise Inspector at the relevant time and he was not a competent officer as per the notification and any act

done by him is non est in law. The second contention is that the forwarding note namely, Ext.P7 does not contain the sample seal and that is fatal to the prosecution. For the said proposition, learned counsel relied on the decision in ***Krishnan*** *vs.* ***State*** (2015 (2) KLT SN 8). Therefore, learned counsel contended that these vital aspects have been omitted to be noticed by the court below and they go to the root of the prosecution case and the conviction and sentence are bad in law.

11. Learned Public Prosecutor, on the other hand, tried to support the findings of the court below on the basis of the evidence furnished by PWs 1 and 2 and also the narration of things in Ext.P3. At any rate, according to the learned Public Prosecutor, the court below has chosen to accept the evidence and find the accused guilty. Unless it is shown that the findings of the court below are perverse, interference is not called for.

12. It may be true to say that evidence of PWs 1 and 2 could be taken aid of to find that the contraband was seized from the possession of the accused. Both of them say that while they were on patrol duty and when they reached the main gate of the

H & C compound, they saw the accused coming along with a bottle having a capacity of 1 liter. Feeling suspicious, he was intercepted and the bottle was seized and the contents were identified as arrack. Both of them say about sample having been taken by PW1. They also say about sealing and labeling of the sample and the contraband article. Both of them say that they returned to the station and handed over the accused, articles and records to the officer then present there.

13. PW5 was the officer who was present at the station. He was only an Assistant Excise Inspector. He would claim that he had the charge of Excise Inspector at the relevant time. An 'Abkari Officer' and 'Abkari Inspector' who are empowered to exercise the powers under the Abkari Act have been defined under Section 3(2) and 3(6) of the Act. An 'authorised officer' is defined under Section 4(d) of Act. The notification issued in 1967 which was in force at the relevant time specifies the powers exercisable under Sections 40 to 53 of Abkari Act. The provisions stipulate that an officer of the rank of Excise Inspector or above can alone act as Abkari Officer. That means that powers of an

Abkari Officer shall not be exercised by an Assistant Excise Inspector.

14. In the case on hand, drawing up of occurrence report, production of accused before the Magistrate concerned, drawing up of property list and sending requisition to court were all done by PW5 who was an incompetent officer. In this respect, decision in ***Subrahmaniyan*** *vs.* ***State of Kerala*** (2010 (2) KLT 470) can be relied on. It was held in the said decision as follows:

> "13. On a reading of S. 50, it is crystal clear that the court can take cognizance only upon a valid report filed by "competent officer after investigation of the case as provided under S. 50 of the Act". S.40 deals with procedure on arrest and seizure. S.41 deals with disposal of persons arrested. Going by various provisions of the Act, it can be seen that wide powers are given to "Abkari Officers" and "Abkari Inspectors". Besides that, S.50 is more particular that, only "report of Abkari Officer" gives jurisdiction to a competent Magistrate and only on such report, the Magistrate can take cognizance. In the present case, PW1 who was working as an Assistant Excise Inspector was not given powers under the above provisions to effect seizure and investigation. He was also not competent due to absence of conferment of

> powers under S.50, to file "Report" or complaint. A trial conducted based upon a report of an incompetent officer will render as "*non est.*".....".

It is therefore clear that PW5 was incompetent to exercise the powers under Sections 40 to 53 of Abkari Act.

15. Apart from the above aspect, it is by now well settled that copy of forwarding note should contain specimen seal so as to enable the court to make comparison. The importance, significance and necessity to provide sample seal is considered in the decision in ***Krishnan*** *vs.* ***State*** (2015 (2) KLT SN 8). In the said decision, 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 evidence 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."

16. In the light of the above decision, it is necessary for the prosecution to affix the sample seal in the space provided in the copy of forwarding note and any failure to do so invites chances of an acquittal. Unless that is provided, it is not possible to ascertain whether the sample sent for chemical analysis is the sample collected from the contraband seized from the possession of the accused. If that be the position, in the case on hand, for

want of specimen seal, necessarily, the prosecution has to fail.

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. 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.