IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

CRL.A.No. 549 of 2006

AGAINST THE JUDGMENT IN SC 48/2004 of ADDL. SESSIONS COURT FAST TRACK-II, ALAPPUZHA.

APPELLANT(S)/ACCUSED:

BABU, S/O.RAGHAVAN,
MANJU BHAVANAM, KOIPALLY KARAZHMA MURI,
PERINGALA VILLAGE, MAVELIKKARA TALUK.

BY ADVS. SRI.R.GOPAN
SRI.BASANT BALAJI

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA,
REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 549 of 2006

Dated this the 15th day of December, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(g) of the Abkari Act. He was found guilty of the offences alleged against him. He was therefore convicted and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/- with a default sentence of rigorous imprisonment for three months. Set off as per law was allowed.

2. The prosecution case as spoken to by P.W.1 is as follows:

P.W.1 was the Preventive Officer attached to Mavelikkara Excise Range. On 12.8.2002, he along with P.W.2 and others were on patrol duty. When they reached in front of the house of one Gopalan, they found the accused coming along the road carrying a 35 litre can. Feeling suspicious, he was intercepted and the can was seized. On examination, the contents turned out to be wash. Since it was illegal to possess wash, arrest memo Ext.P1 was prepared and the accused was arrested. P.W.1 would say that he took a sample of 500 ml in a bottle and that was sealed and labelled. The balance wash was destroyed at the place itself and the can was marked as M.O.1 which according to P.W.1 also contains the label having the signature of the accused and P.W.1. Ext.P3 is the mahazar, which is claimed to have been prepared at the place of occurrence. He would say that the accused, the article seized and the documents were produced before the Excise Inspector in the Range Office.

3. P.W.5 is the Excise Inspector at the relevant time. He would accept that the accused, contraband article and the documents drawn up by P.W.1 were handed over to him by P.W.1. On the basis of those records, he registered Crime No. 118 of 2002 under Section 55(g) of the Abkari Act as per

Ext.P4 occurrence report. He would then say that on that day itself, the accused and the articles were produced before court. He claims to have sent a requisition to the court to sent the samples for analysis.

4. P.W.6 is the Investigating Officer. He would say that he had recorded statements of witnesses and after having completed investigation, laid charge before court.

5. The court, before which final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Alappuzha. The said court made over the case to Additional Sessions Court Fast Track-II, Alappuzha for trial and disposal.

6. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Section 55(g) 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 6 examined and had Exts.P1 to P6 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., in which he denied all the incriminating circumstances put to him and maintained that he is innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined D.W.1.

7. Presumably impressed by the evidence of P.Ws. 1 and 2 and Ext.P3 mahazar and also the prompt production of the accused, articles and the documents before court, the court below was inclined to believe the prosecution case and found the accused guilty and conviction and sentence as already mentioned followed.

8. Shri.R. Gopan, learned counsel appearing for the appellant pointed out that the conviction cannot stand for more than one reason. The point raised by the learned

counsel is that P.W.1 had no authority to destroy the balance contraband article after taking sample and that act done by P.W.1 is without any power and would be viewed seriously. Section 53A of the Abkari Act which came into force on 3.9.2002 obviously applies to the facts of the case. It is pointed out that at any rate, the prosecution has not produced and marked the forwarding note which is said to have been prepared by P.W.5 and that is fatal to the prosecution case. Not only that the forwarding note has to be marked, it should also contain the specimen sample seal sent for comparison. In support of the contention that in the absence of sample seal and the forwarding note, prosecution cannot succeed, learned counsel relied on the decisions reported in Majeedkutty v. Excise Inspector (2015 (1) K.L.T. 624) and Krishnan v. State (2015(2) K.L.T. SN 8).

9. Learned Public Prosecutor on the other hand tried to salvage the situation by relying on the evidence of

P.Ws. 1 and 2 and Ext.P3 mahazar. These items of evidence, according to the learned Public Prosecutor, are sufficient to show that there has been a seizure as claimed by P.W.1. If that is proved, nothing needs to be established. Chemical analysis report is only a procedural aspect and that cannot create any right on the accused.

10. After having heard learned counsel for the appellant and learned Public Prosecutor, and having perused the records, it appears that the appeal will have to succeed. Of course, learned counsel for the appellant placed reliance on the decision reported in Narayana Velichappada v. SI of Police (2007(4) KHC 748) wherein it was held as follows:

> "………. non-production of the residue or any other material before the Court would show that the alleged seizure was not proved. Section 53A casts duty on the police officers or the excise officers to produce sufficient and primary evidence to show that the contraband has been seized as alleged by the prosecution before the Court either by producing the residue or the sample or

> even photographs of such materials alleged to have been seized before the Court or even a certificate from the Magistrate should have been produced before the Trial Court."

11. A reading of the said decision shows that it was with respect to a seizure which took place after Section 53A was amended and the court had occasion to mention that non-production of the residue or any other material would show that the alleged seizure was not proved. In the case on hand, the detection was before the amendment which came into force on 3.9.3002. The seizure in the present case is on 12.8.2002. The principle laid down in the decision can have no application to the present case.

12. However, the argument based on absence of forwarding note and absence of sample seal is a formidable one. This Court had occasion to consider this aspect in the decisions referred to above. In the decision reported in Majeedkutty v. Excise Inspector (2015 (1) K.L.T. 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."

13. In the decision reported in Krishnan v. State (2015(2) K.L.T. 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 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."

14. In the light of the principles laid down in the above decisions, it is unnecessary to discuss the significance and importance of the forwarding note and also that the forwarding note should contain the specimen seal. In the above decisions, the Court held that in the absence of specimen seal in the forwarding note, the authenticity of the sample which is sent for chemical analysis is in doubt.

15. In the case on hand, no forwarding note is seen produced and there is no question of verifying whether there is any sample seal or not. In the light of the principles laid down in the above decisions, necessarily the prosecution will have to fail on that count.

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.