IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

CRL.A.No. 1085 of 2006 ( )

AGAINST THE JUDGMENT IN SC 212/2004 of ADDITIONAL DISTRICT & SESSIONS COURT (FAST TRACK-I) TRIVANDRUM DATED 12-05-2006

IN CP 57/2003 of JUDICIAL FIRST CLASS MAGISTRATE -II, ATTINGAL

APPELLANT(S)/ACCUSED:

SUMENDRAN @ RAJAN, S/O.THANKARATNAM,
ALAKKUKUDI, NEAR MURUKKUMPUZHA RAILWAY STATION
MUNDAKKAL DESOM, THIRUVANANTHAPURAM TALUK.

BY ADVS.SRI.SASTHAMANGALAM S. AJITHKUMAR
SMT.DEEPTHY.S.NATH
SRI.PRABHU VIJAYAKUMAR
SMT.VEENA KRISHNAN

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.BHAVADASAN, J.

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Crl.A. No. 1085 of 2006

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Dated this the 03rd day of December, 2015

J U D G M E N T

The accused faced prosecution for the offence punishable under Section 55(a) of the Abkari Act and he was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for 1½ years and to pay a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of six months. Set off as per law was allowed.

2. According to the prosecution, on 08.09.1999, PW5, the Excise Inspector attached to the Excise Enforcement and Anti Narcotic Special Squad, Thiruvananthapuram along with his team of officers were on patrol duty. When they reached Murukkumpuzha Railway Station, they happened to see the accused coming along the road carrying a can of 2½ litres capacity with him. On seeing the excise officials, he became nervous and tried to hide himself. Feeling suspicious, he

was intercepted and the can was seized. On examination of the contents therein, by taste and smell, the officials were convinced that it was arrack. After preparing the arrest memo, the accused was arrested. PW5 sealed and labelled the contraband article seized from the possession of the accused. The label contained the signatures of the accused, witnesses and PW5. He prepared Ext.P1 mahazar on the spot and the arrest memo is Ext.P3. Thereafter PW5 took the accused, and records to the Kazhakuttom Range Office and handed them over to the officer there. PW2, who was in charge of the Excise Range Office at the relevant time received the accused, the documents and contraband produced by PW5 before him. He registered crime as per Ext.P2 occurrence report. On the same day itself, the accused was produced before court. He says that he sent a requisition to the court seeking to have the sample taken and forwarded for chemical analysis. Further investigation was conducted by PW4. He took statements of witnesses, obtained Chemical Analysis Report and laid the final report before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Thiruvananthapuram under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional District and Sessions Court, (Fast Track-I), Thiruvananthapuram, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 55(a) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 5 examined and had Exts.P1 to P6 marked. MO1 was got identified and marked.

6. After the close of 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. He stated that he was a fish vendor by profession and in the afternoon, he used to take liquor. On the day of incident, a person who served him liqour ran away on seeing the Excise Officials and he was implicated. He claimed that he had nothing to do with the contraband article seized by the Excise Officials.

7. 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.

8. The court below, convinced and influenced by the evidence of PWs 5 and 1 and taken along with Ext.P1 mahazar, found no reason to doubt the prosecution version of the incident and felt that the prosecution had established the case against the accused beyond reasonable doubt. He

was found guilty. Conviction and sentence as already mentioned followed.

9. The learned counsel appearing for the appellant assailing the conviction contended that conviction cannot stand for more than one reason. Admittedly, according to the learned counsel, no sample was taken by PW5 from the spot and going by the evidence of PW2, it is clear that the sample was requested to be taken from court. If that be so, according to the learned counsel, it was incumbent on the part of the prosecution to establish as to who had taken the sample and when and where the sample was taken. There is no evidence in this regard at all. The learned counsel pointed out that this Court had occasion to hold that in such cases, the Thondi Clerk, who was authorised by the Magistrate to take the sample ought to have been examined and in the absence of his evidence, it cannot be held that proper sampling had been done. Further learned counsel pointed out that as has been held in the decision 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), the forwarding note is not seen produced and there is no evidence of the seal said to have been affixed on the sample sent for chemical analysis. These two vital aspects have been omitted to be noticed by the court below and they vitiate the conviction.

10. The learned Public Prosecutor had to depend upon the evidence of PWs 5 and 1 to support the finding of the court below. But the learned Public Prosecutor had no answer for the two contentions raised by the learned counsel for the appellant.

11. If one is simply to go by the evidence of PWs 5 and 1, probably it could be said that the case against the accused is made out. They give uniform and consistent version regarding the detection of the offence and also the seizure of the contraband article from the accused. Even though they were cross examined at length, nothing could

be brought out to show that they had any oblique motive or they had falsely implicated the accused. Further, Ext.P1 mahazar contains the entire details and it is a contemporaneous document. To add to this is the fact that the accused was produced before the court on the very same day itself. These matters would have been sufficient, in the ordinary course of things, to support the finding of the court below.

12. But unfortunately for the prosecution, this Court has gone further that unless it is shown that the sample is properly taken and also that the forwarding note is produced, the conviction cannot be stand.

13. This Court was clear enough to point out that in case no sample is taken by the detecting officer and it is left to the mercy of the court to take the sample, it is absolutely necessary that the person who was authorised by the court to take the sample ought to be examined. So also, this Court had occasion to hold that in order to ensure that the

sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused, the specimen sample seal should be before court. That it needs to be so, is evidenced from the form of forwarding note which contains a column for providing the sample seal.

14. If the above tests are to be applied, necessarily the prosecution should fail.

15. 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."

16. 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."

17. 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."

18. Principles are therefore well settled. It is not a matter of presumption that the sample has been properly

taken to send for chemical analysis. It is a matter for proof and it is also necessary to show the authenticity of the sample by providing the specimen sample seal to court. Having failed to conform to the above two standards, it is extremely difficult to sustain the conviction.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge