IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

CRL.A.No.1225 of 2006

AGAINST THE JUDGMENT IN SC 985/2001 of ADDL.SESSIONS COURT FAST TRACK (ADHOC No.IV), THIRUVANANTHAPURAM DATED 23-06-2006

APPELLANT/ACCUSED:

CHANDRAN @ KOCHU CHANDRAN,
S/O. SUKUMARAN, LAKSHAM VEEDU COLONY No.75
KULASEKHARAM, KULASEKHARAM WARD, VATTIYOORKAVU VILLAGE
TRIVANDRUM.

BY ADV. SRI.T.A.UNNIKRISHNAN

RESPONDENT/COMPLAINANT:

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

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

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Crl. Appeal No.1225 OF 2006

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Dated this the 21st 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 (2) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for three months. Set off as per law was allowed.

2. The prosecution case is that on 13.03.1998 while PW3 was functioning as Excise Inspector of Thiruvananthapuram Excise Range Office, he, as usual, along with his colleague officers had set out for patrol duty. As they were going along, they happened to see the accused coming along the road with a black can in his hand. He was intercepted and the can was seized and the contents were examined. It turned out to be arrack. Ext.P3 arrest memo was prepared and the accused was arrested and intimation of arrest was given to his brother in law.

PW3 would say that he prepared Ext.P1 mahazar on the spot and thereafter he returned to the station along with the accused, seized articles and documents prepared by him and registered crime as per Ext.P5 occurrence report. On the next day along with list of property Ext.P6, accused was produced before court. He would also claim that he had prepared forwarding note for sending the sample for chemical analysis.

3. PW5 is the investigating officer. He would say that Ext.P7 is the chemical analysis report received by him. He recorded the statement of witnesses, completed the investigation and laid charge before court.

4. 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 (Adhoc) No.IV, 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 (2) of

Abkari Act, to which, the accused pleaded not guilty and claimed to be tried.

5. The prosecution, therefore, had PWs 1 to 5 examined and Exts.P1 to P7 marked. M.O.1 was got identified and marked.

6. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances put to him and maintained that he is innocent.

7. 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.

8. Mainly based on the evidence of PWs 3 and 4 and also Ext.P1 mahazar which, according to the court below, is a contemporaneous document corroborating the evidence of PWs 3 and 4 and relying on Ext.P7 chemical analysis report, court below found the accused guilty. Conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

9. Learned counsel appearing for the appellant contended

that even though sample is seen to have been sent for chemical analysis, evidence does not describe who had taken sample and from where and when it was taken. Going through Ext.P1 mahazar and on a reading of the evidence of PWs 3 and 4, it is clear that they had not taken sample from the contraband seized at the time of seizure. Ext.P6 property list would show that bottles were sent to court to take sample. It means that the sample must have taken from court. If that be so, according to the learned counsel, the thondi Clerk who had taken sample ought to have been examined. That has not been done. Further, learned counsel pointed out that it is by now well settled that forwarding note should contain the specimen seal of the officer concerned. In the case on hand, forwarding note is not seen marked. Relying on the decisions in ***Majeedkutty*** *vs.* ***Excise Inspector*** (2015 (1) KLT 624) and in ***Krishnan*** *vs.* ***State*** (2015 (2) KLT SN 8), it is contended that the non production of forwarding note and non availability of specimen of sample seal in the forwarding note are fatal to prosecution. According to the learned counsel, on all the above grounds, the conviction cannot stand.

10. Learned Public Prosecutor, on the other hand, tried to justify the findings of the court below mainly based on the evidence of PWs 3 and 4. It is pointed out that if the evidence of PWs 3 and 4 are found to be cogent and convincing enough, then there is no reason to disbelieve them. It is true that contraband was seized from the possession of accused and there is no justification or reason not to rely on the evidence of PWs 3 and 4 which is above board. It is therefore contended that no grounds are made out to interfere with the conviction and sentence.

11. It is true that the evidence of detection stands confined to the testimony of PWs 3 and 4. As rightly pointed out by the learned counsel for the appellant, it is clear from a reading of the depositions of PWs 3 and 4 and also from Exts.P1 and P6, mahazar and property list prepared by PW3, that no sample was taken by PW3 from the spot. It would appear that sample was requested to be taken from court and sent it for chemical analysis. Sample bottle was provided as per Ext.P6. Nowhere from the records it is seen that Excise Officials had taken sample.

If that be so, the only conclusion possible is that sample was taken from court by a thondi Clerk. It is by now well settled that in such case examination of thondi Clerk is mandatory and non examination of thondi Clerk is fatal to the prosecution. If that be so, in the case on hand, thondi Clerk has not been examined and the learned counsel for the appellant is justified in his submission that there is no evidence as to who had taken sample, when it was taken and under whose orders it had been taken.

12. In the decisions in ***Majeedkutty*** *vs.* ***Excise Inspector*** (2015 (1) KLT 624) and in ***Krishnan*** *vs.* ***State*** (2015 (2) KLT SN 8), the necessity to produce forwarding note and also to make available the specimen of sample seal have been emphasised. It has been held in the above decisions that unless sample seal is provided, it is not possible for the court to come to the conclusion that sample sent for analysis is the sample collected from the contraband seized from the possession of accused. In the case on hand, there is neither forwarding note produced nor sample seal provided in the forwarding note.

13. In the light of the above decisions, this Court is unable

to uphold the conviction and sentence.

In the result, 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.