IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

CRL.A.No. 1086 of 2005 ( )

AGAINST THE JUDGMENT IN SC 793/2001 of ADDITIONAL DISTRICT COURT (ADHOC-I), TRIVANDRUM DATED 28-06-2005

APPELLANT/ACCUSED::

SUDEVAN, S/O. KOCHAPPI,
HOUSE NO.371, HARIJAN COLONY, MUNDAKKAL,
MURUKKUMPUZHA, THIRUVANANTHAPURAM,
(WRONGLY SHOWN AS MANAKKATTUVILAKAM THAZHE VEEDU
VEILOOR VILLAGE, MUNDAKKAL IN THE PROSECUTION
RECORDS AND JUDGMENT).

BY ADV. SRI.M.SREEKUMAR

RESPONDENT/COMPLAINANT::

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

BY PUBLIC PROSECUTORSRI.JIBU P.THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**K. RAMAKRISHNAN, J.**

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Crl.A.No.1086 of 2005

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Dated this the 28th day of September, 2015.

**JUDGMENT**

The accused in SC.No.793/2001 on the file of the Additional Sessions Court, Adhoc-I, Thiruvananthapuram is the appellant herein. The appellant was charge sheeted by the Excise Inspector, Kazhakuttom excise range in Crime No.1/1998 of the excise range under section 55(a) of the Abkari Act.

2. The case of the prosecution in nutshell was that on 6.1.1998 at about 6.50 p.m, the accused was found to be in possession of 105 litres of spirit without any documents in the kitchen of his house in violation of the provisions of the Abkari Act and thereby he had committed the offence punishable under section 55(a) of the Abkari Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-II, Attingal where it was taken on file as C.P.No.115/2000. After compliance of the formalities, the learned Magistrate committed the case to the Sessions Court, Thiruvananthapuran under section 209 of the Code of Criminal Procedure. After committal, the Sessions

Court took cognizance of the case as SC.No.793/2001 and it was originally made over to the Additional Sessions Court, Attingal for disposal. Thereafter the case was withdrawn by the Sessions Court, Thiruvananthapuram and it was made over to the Additional Sessions Court, Adhoc-I, Thiruvananthapuram for disposal.

4. When the accused appeared before the court below, after hearing both sides charge under section 55(a) of the Abkari Act was framed and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 5 were examined and Exts.P1 to P8 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned under section 313 of the Code and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that he had not committed any offence and no article was seized from his possession and he is not residing in that house and he has been falsely implicated in the case. Since the evidence in this case did not warrant an acquittal under section 232 of the Code,

the learned Additional Sessions Judge directed the accused to enter on his defence. But no evidence was adduced on his side except marking Exts.D1 to D3 through PW5, the investigating officer. After considering the evidence on record, the court below found the appellant guilty under section 55(a) of the Abkari Act and convicted him thereunder and sentenced him to undergo rigorous imprisonment for four years and also to pay a fine of Rs.One lakh, in default to undergo rigorous imprisonment for one year. Set off was allowed for the period of detention already undergone by him. Aggrieved by the same, the present appeal has been preferred by the appellant/accused before the court below.

5. Heard Sri. Sreekumar, counsel appearing for the appellant and Sri. Jibu P. Thomas, Public Prosecutor appearing for the State.

6. Counsel for the appellant submitted that detection was made by the Excise Inspector, who had no jurisdiction over the area. So the detection is bad. He had further argued that there was no evidence to show from where the sample was taken, who had taken the sample etc. So under the

circumstances, it cannot be said that the prosecution has proved the chemical analysis report relates to therepresentative sample alleged to have been taken from the contraband article said to have been seized from the possession of the accused. There is no document produced by the prosecution to prove that the building from where the article alleged to have been seized belongs to the appellant. Unless the link between the place from where the contraband article is seized with the accused is established, it cannot be said that he was in possession of the building from where the article was seized. So according to him, the court below was not justified in convicting the appellant for the offence alleged. He had relied on the decisions reported in ***Lalitha v. State of Kerala*** (2012 (1) KHC 554) and ***Nalinakshan v. State of Kerala*** (2012(4) KHC 464) in support of his case.

7. On the other hand, learned Public Prosecutor submitted that patrol duty was done by the Excise Inspector attached to Thiruvananthapuram Excise Circle Office which is having jurisdiction over this area as well. Further, the accused was arrested from the spot. So non proving of ownership of the

house is not fatal in such case. The article was produced before court on the very same day which is evident from the observation made by the court below in this regard. Further as per Ext.P7 permission was granted for disposal of the liquor. So non production of the material object before the court below is not fatal in this case. According to him, the court below had considered all these aspects and rightly convicted the accused. That finding does not call for any interference.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows:

PW3, the Detecting Officer, the Excise Inspector attached to Thiruvananthapuram Excise Circle Office was doing patrol duty along with PW2, the Preventive Officer and others and when they reached near the place of occurrence, they got information that spirit is being stocked in a house. Immediately he prepared Ext.P2 search memo and sent the same to court and thereafter went to that house, knocked the door and at that time, the accused was inside the house pouring some liquid from one cannas to another cannas. When he verified the same, he was satisfied that it was spirit. When he conducted search of the house, he found four cannases containing different quantity of spirit concealed under a slab and on verification he found that all the four cannases contained a total quantity of 105 litres of spirit which he was satisfied on examination. Thereafter he sealed the cannases and affixed the label containing name of the accused with his signature and prepared Ext.P3 search list in the presence of PW1 and another and seized the same as per Ext.P1 mahazer in the presence of witnesses. Thereafter he arrested the accused as per Ext.P4 arrest memo and gave Ext.P5 arrest intimation to his relative. Thereafter he came to Kazhakuttom police station and entrusted the accused, contraband article and the documents prepared to PW4, the Excise Inspector of that range, who registered Ext.P6 crime and occurrence report against the accused as crime No.1/1998 of Kazhakuttom excise range under section 55(a) of the Abkari Act. He prepared thondi list, remand report and produced the article before court along with the thondi list and produced the accused along with the remand report on the same day before court. Thereafter he obtained permission to destroy the article as per

Ext.P7. On the request made by him, the sample was sent for analysis and Ext.P8 chemical analysis report obtained. He completed the investigation and final report was field by PW5, his successor in office.

9. PW1 is the attestor to Ext.P1 mahazar and Ext.P2 search list. But he denied his signature and also denied having witnessed the seizure. So the evidence is only that of Pws 2 and 3 the Preventive Officer accompanied the Detective Officer PW3. PW3 deposed that he was attached to Thiruvananthapuram Circle Excise Range and working as Excise Inspector in that range having jurisdiction over the entire Thiruvananthapuram circle including Kazhakuttam. While he was doing patrol duty on 6.1.1998 along with PW2, he got information that spirit was kept in the house belonging to the accused. Immediately he rushed to the place and prepared Ext.P2 Search Memorandum and sent the same to court and thereafter he conducted search of the house in the presence of PW1 and others. At the time he entered the house, he found the accused engaged in pouring some liquid from one cannas to another cannas. On examination of the cannas, it was found

that it was spirit. When he made search, he found three similar cannases buried under a slab which he had taken out and on examination found that all the four cannases contained total quantity of 105 litres of spirit. He had sealed the same and seized the same as per Ext.P3 search list and Ext.P1 seizure mahazer. Thereafter he came to the Excise Range Office, Kazhakuttam and entrusted the same along with the accused with the documents prepared to PW4, the Excise Inspector, who registered the crime and conducted a portion of the investigation. PW2, the Preventive Officer also deposed in tune with the evidence given by PW3 regarding the search and seizure and arrest of the accused. Though they were cross examined at length, nothing was brought out to discredit on this aspect. So it can be safely concluded that the prosecution has proved that four cannases were seized with some liquid said to be spirit and the accused was arrested from the house from where the alleged spirit was found.

10. Merely because some cannases were seized is not sufficient to prove that the accused has committed the offence. The prosecution has to prove the link between the accused and

the contraband article. That can be proved only if it was proved by the prosecution that the chemical analysis report relates to representative sample said to have been taken from the huge quantity of spirit said to have been seized from the possession of the accused. In this case, neither PW3 nor PW2 had deposed that any spot sample was taken from the spirit said to have been seized from the building from where they found the accused. Further PW4 also did not state from where the sample was taken as well, There is no evidence adduced on the side of the prosecution to prove when the sample was taken, who had taken the sample, how it was taken etc. PW4 only stated that he prepared the thondi list and produced the article before court. There is nothing on record to show that sample was taken from court.

11. In the decision reported in ***Sasidharan v. State of Kerala*** (2007 (1) KLT 720) it has been observed that:

> *"Prosecution has a duty to prove that it was the sample taken from the contraband liquor seized from the possession of the accused which had reached the hands of the Chemical Examiner in a fool proof condition. Without the link evidence of actual sampling by the concerned clerk of the court by drawing*

*sample from the can and sending the same in a sealed packet to the Chemical Examiner with a specimen seal sent separately for tamper proof despatch, the Prosecution cannot be held to have brought home the offence against the appellant. The prosecution had a duty to prove that it was the sample taken from the contraband liquor seized from the accused which had reached the hands of the Chemical Examiner in a fool proof condition".*

*In the same decision it has been observed that"*

*"Committing Magistrate have to take care that contemporary proceedings evidencing the drawing of sample and sending the same to the Chemical Examiner in a tamper-proof condition are recorded in the proceedings before court. Sessions Judges trying such cases also should ensure that the concerned member of the staff, who had drawn the sample and despatched the same to the Chemical Examiner duly packed and sealed under the covering letter of the Magistrate is examined before court during trial. The Public Prosecutor in charge of the case also had a duty to file an additional witness-list for examining the thondy section clerk (property clerk) concerned so as to establish the nexus between the contraband substance and the accused"*

12. In this case no such thing was done and there is no evidence to show from where the sample was taken, when it was sent etc. The same principle was laid down in the decision

reported in ***Lalitha's and Nalinashan's cases*** (cited supra) . In the absence of such evidence adduced on the side of the prosecution, it cannot be said that Ext.P8 chemical analysis report relates to the representative sample said to have been taken from the huge quantity of contraband article alleged to have been seized from the possession of the accused. In the absence of such evidence, the finding arrived at by the court below that prosecution has proved beyond reasonable doubt that the accused was found to be in possession of spirit and thereby he had committed the offence punishable under section 55(a) of the Abkari Act is unsustainable in law and the same is liale to be set aside.

13. The other contention raised by the counsel for the appellant that PW3 has no jurisdiction over the area where the detention was made and as such the detention is illegal has no substance because Pws 3 and 2 had categorically stated that PW3 was working as Excise Inspector in the Excise Circle Office, Thiruvananthapuram. If that be the case, he will be having jurisdiction over Kazhakuttam as well and he is entitled to conduct search and seizure within the jurisdiction of Excise

Circle Inspector's area. It is true that Exts.D1 to D3 produced by the appellant will go to show that he is residing in a different house. But those documents were issued in the year 1997 whereas the detection was in the year 1998. Further he was arrested from the spot along with the contraband article while he was engaged in dealing with the alleged article. So under the circumstances, non proving of ownership of the house and connecting ownership of the house with the accused is not fatal in this case.

14. But in view of my finding that the prosecution has failed to prove the link between the contraband article and the accused by proving that chemical analysis report relates to the representative sample said to have been taken from the contraband article alleged to have been seized from the possession of the accused, he is entitled to get acquittal. So, the order of conviction passed by the court below against the appellant is liable to be set aside and the appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt. In view of my finding that he is entitled to get acquittal, the sentence imposed is not proper and the same

is also set aside.

In the result, the appellant succeeds and the appeal is allowed. The order of conviction and sentence passed by the court below against the appellant under section 55(a) of the Abkari Act are hereby set aside. Te appellant is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand cancelled. The court below is directed to refund the fine amount, if any remitted, to the appellant on making such application in this regard before that court.

Office is directed to send the records with copy of this judgment to the court below at the earliest.

**Sd/-**
**K. RAMAKRISHNAN, JUDGE.**

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P.S to Judge

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