IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

CRL.A.No. 947 of 2007 ( )

AGAINST THE JUDGMENT IN SC 1389/2001 of ADDITIONAL SESSIONS COURT FOR THE TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 31-05-2007

APPELLANT(S)/ACCUSED 1 AND 2;:

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1. RAJU, S/O.PALAYYAN,
   VELLARIKUNNUTHOTTARIKATHU VEEDU, KOOTHALY
   VELLARADA DESOM, VELLARADA VILLAGE, NEYYATTINKARA.

2. NALLATHAMPI, S/O.ENOSE, MANNATHIPARA
   PUTHEN VEEDU, PANNIMALA, VELLARADA DESOM
   VELLARADA VILLAGE, NEYYATTINKARA.

BY ADV. SRI.THIRUMALA P.K.MANI

RESPONDENT(S)/STATE;:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.BHAVADASAN, J.

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Crl.A. No.947 of 2007

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Dated this the 06th day of November, 2015

J U D G M E N T

Two persons were prosecuted for the offence punishable under Section 58 of the Abkari Act and they were found guilty. Both of them were therefore convicted and sentenced to undergo rigorous imprisonment for four years each and to pay a fine of ₹1 lakh with a default clause of six months each.

2. The prosecution case in brief is that on 09.04.2000, while PW3 was working as the Sub Inspector of Police at Vellarada Police Station and was engaged in patrolling duty along with other officers, when they reached Mannathippara, they came to know that in the property belonging to one Nallathampi, liquor vending is being carried on. PW3 claims to have reached the place. Then, a person was seen having a black can with him and he was pouring liquid into a glass in his hand. Immediately next to him was

another person with another black can and found taking money from the third person. Seeing the Police, the two persons, who had cans with them, tried to escape, they were effectively intercepted and the cans were seized. One of the cans had a capacity of 10 litres. When the can was opened and the contents were examined, it was found to be arrack. The other can having a capacity of 5 litre contained 3 litres of liquid which was found to be arrack. PW3 made two samples; one from each of the can and secured the same. Sealing wax was poured on it and metal seal was affixed. PW3 says that the label containing his as well the accused signature were affixed on the samples. The same procedure was followed with respect to the balance contraband article. He prepared Ext.P3 mahazar. Thereafter, he claims to have returned to the Station along with his officers, the accused, the contraband articles and the documents and then he registered crime as per Ext.P4 FIR. The accused were produced before court as per Ext.P5 remand report. He prepared list of property which is marked as Ext.P6 which was accepted by court as T.114/2000. He preferred Ext.P7 forwarding note and PW3 found that as the sample seal could not be affixed on the forwarding note, he separately had it affixed and sent to the court for comparison. He completed investigation and laid charge 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 Sessions Court for the trial of Abkari Act Cases, Neyyattinkara, 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 58 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 4 examined and had Exts.P1 to P8 marked. MOs 1 to 3 were identified and marked.

6. After the close of prosecution evidence, the accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they are innocent. They said that they were selling cane when the police was seen going up to the hill and they found a few persons standing there. They had cans with them. When they saw the police, they ran away from the place leaving the can there. The Police asked about the identity of the persons who had ran away from the place with the accused persons which they were unable to give and therefore they say they were falsely implicated.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their

defence. They examined DWs 1 and 2.

8. On appreciation of the evidence in the case, most probably, considerably influenced by the evidence of PWs 2 and 3 and also the contemporaneous records and so also the prompt production of the accused and the articles before court, trial court came to the conclusion that offence has been clearly made out and accordingly, found them guilty. Conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant raised one substantial point for consideration. According to him, the sample seal which must find a place in the forwarding note is conspicuously absent and the claim made by the prosecution that it was separately supplied does not stand scrutiny. The learned counsel drew attention to Ext.P6 and pointed out that the property list does not make mention of the samples having been produced before court. The forwarding note namely, Ext.P2 also does not give details

regarding the samples taken by PW3. The learned counsel pointed out that it is significant to note that in Ext.P3 mahazar, metal seal is said to have been used. The learned counsel did concede that it is true that PW4, the Thondi Clerk was examined and the evidence of Thondi Clerk is to the effect that the sample seal was compared and it was satisfied that it was proper and then the articles sent for chemical examination. But then the learned counsel points out that a copy of the specimen seal had to be kept with the court to ensure that the seal could be verified. That has not been done. The cumulative effect of these aspects is that there is a reasonable doubt created regarding the sample sent for chemical examination. Relying on the decisions 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), it is contended that this is fatal to the prosecution.

10. The learned Public Prosecutor on the hand relying on the evidence of PW4 considerably contended that Thondi Clerk has been examined due to the possible lacuna in the documents to ensure that forwarding note was properly prepared and presented before court and the seal was compared. She speaks about the same in court and her evidence is very eloquent. There is no reason to doubt her version. Of course, the learned Public Prosecutor did concede that she said that the seal was not available in court now. But her evidence is clear to the effect that at the time of production, it was compared and then only it was sent for chemical examination. Therefore, it was contended that the contention based on the absence of specimen seal cannot hold water.

11. It will be useful first to ascertain the purpose of insisting for a specimen of a sample seal in the forwarding note. It is to ensure that the sample that is sent for chemical examination contains the same seal as that is

before court. In fact, the first of seals is affixed at the time of preparation of the mahazar. Usually and normally, it would be only appropriate that the officer concerned mentions about the nature of seal used in the mahazar itself so as to avoid any controversy. Even if that is not so, the form of forwarding note contains a column where the specimen seal has to be clearly shown. The reason, object and purpose have already been stated.

12. 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."

13. 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."

14. 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."

15. It could be seen from the above decisions that the relevance and significance of the necessity to provide the

specimen seal in the forwarding note cannot be overlooked. It forms a significant aspect in the case. The court goes to the extent of holding that in the absence of a specimen seal in the forwarding note, it may not be possible to confirm that the sample sent for chemical examination is the sample collected from the contraband article seized from the possession of the accused persons.

16. In the case on hand, there is yet another difficulty. The property list namely, Ext.P6 is totally silent about the sample. Of course, PW3 says that along with the forwarding note, he produced the samples. But then again, forwarding note which is marked as Ext.P2 does not contain details of the samples also. The indifferent manner in which Ext.P2 is drawn will surprise anybody. There are definite columns seeking specific queries and in the case on hand, nothing is mentioned except that the total quantity of contraband seized. Of course, one is not forgetting the fact that in Ext.P7, the Chemical Analysis Report, the property number

T.114/2000 is shown which is the number given by court when Ext.P6 was received. But then as to when the samples were produced and about the specimen seal, there is considerable ambiguity. One cannot definitely say from the evidence on record that the sample seal was produced before court for comparison. Normally, as the forwarding note contains a column for the same, even assuming it was separately produced, that should have been retained and marked in the case.

17. In the light of principles laid down in the decisions referred to above, it follows that it cannot be specifically concluded that the sample sent for chemical examination are the samples alleged to have been taken by PW3 at the relevant time. If that be so, the accused are entitled to the benefit of doubt.

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 are not guilty of the offence levelled against them. Their bail bond shall stand cancelled and they are set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge