IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

CRL.A.No. 1469 of 2006 ( )

AGAINST THE JUDGMENT IN SC 1725/2001 of ADDITIONAL SESSIONS COURT FAST TRACK (ADHOC)-IV, TRIVANDRUM DATED 28-06-2006

IN CP 110/2001 OF JUDICIAL FIRST CLASS MAGISTRATE -I, NEDUMANGAD

APPELLANT(S)/ACCUSED::

KUMAR, AGED 37 YEARS,
S/O. KUNJU KRISHNAN KANI, THADATHARIKATHU VEEDU
CHITTUVEETTU MURI, THOLIKODE VILLAGE
NEDUMANGAD TALUK.

BY ADVS.SRI.SASTHAMANGALAM S. AJITHKUMAR
SRI.PRABHU VIJAYAKUMAR
SRI.RENJITH B.MARAR

RESPONDENT(S):

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.BHAVADASAN, J.

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Crl.A. No. 1469 of 2006

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Dated this the 04th day of December, 2015

JUDGMENT

The accused was prosecuted for the offence punishable under Section 8(1) & (2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of six months.

2. On 11.06.1998, PW4, the Circle Inspector of Excise along with his colleague officers had gone on routine patrol duty. When they reached a radio kiosk at Cheruppani, they happened to see the accused coming along the road carrying a white can. Feeling suspicious, he was intercepted and the can was seized. The can had a capacity of 10 litres. It contained about 5 litres of some liquid. On examination of the liquid by taste and smell, it revealed that it was arrack. Arrest memo was prepared and the accused was arrested.

The can was sealed and labelled and it was seized in the presence of witnesses. The label contained the signatures of accused, witnesses and PW4. Ext.P1 is the mahazar prepared by PW4. PW5 took over investigation. He visited the place of occurrence and recorded statements of witnesses. Ext.P4 occurrence report, according to him, was prepared by another Excise Officer namely, Radhakrishnan. The said Radhakrishnan also prepared Ext.P5 property list. The forwarding note for sending the sample for chemical examination was also prepared by the said Radhakrishnan. Ext.P7 is the report so received. He completed the 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,

Fast Track (Adhoc)-IV, 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 8(1) & (2) 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 P7 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.

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, impressed by the evidence of PWs 3 and 4, the two Excise Officers and also the fact that the contemporaneous document namely, Ext.P1 supported their evidence in toto, held the accused guilty. Conviction and sentence as already mentioned followed.

9. Assailing the conviction, the learned counsel appearing for the appellant contended that there is absolutely no evidence regarding the sampling alleged to have been done in the case. It is not discernible from the records as to who had drawn the sample which had been sent for chemical analysis. In the absence of evidence in that regard, the accused could not have been held guilty. Added to this, according to the learned counsel is the fact that the forwarding note does not contain the sample of the specimen seal. Relying on 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), it is contended that these two

factors should prove fatal to the prosecution.

10. The learned Public Prosecutor on the other hand contended that the evidence of PWs 3 and 4 are sufficient enough to warrant a conclusion that the accused was in possession of contraband article. Even assuming that their testimony do not get support from the independent witnesses, Ext.P1 mahazar sufficiently corroborates their version. None of the grounds urged by the learned counsel for the appellant, according to the learned Public Prosecutor, is sufficient to set aside the conviction.

11. After having heard the learned counsel for the appellant and the learned Public Prosecutor and after having perused the records, it is felt that the appellant is entitled to succeed in this appeal. Even assuming the court accepts all what is stated by Pws 3 and 4 to be true and accepting that Ext.P1 sufficiently corroborates their evidence, still for two technical reasons, this appeal will have to succeed. Neither PW3 nor PW4 says about having drawn any sample from the

place of occurrence. The crime and occurrence report filed before court and so also the list of properties do not show that the any sample was taken either by PW3 or PW4 and was submitted before court. It follows therefore that sample was taken from the court. In such cases, it is well settled by now that the Thondi Clerk, who had drawn the sample as per the orders of Magistrate, will have to be examined. There is no such evidence in the case on hand. The result is that it is not possible to come to the conclusion that the sample analysed in the laboratory is the sample drawn from the contraband article seized from the possession of the accused. Added to the above is the fact that the forwarding note does not contain the specimen sample seal which also is fatal to the prosecution.

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. From a reading of the above decisions, it follows that in the absence of specimen seal, it will not be possible for the court to come to the conclusion that the sample analysed in the laboratory is the sample taken from the contraband article seized from the possession of the accused. The principles laid down in the above decisions apply with all force to the facts of the present case. The result is that this appeal will have to succeed and the appellant is entitled for an acquittal.

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