IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 18TH DAY OF DECEMBER 2020 / 27TH AGRAHAYANA, 1942

CRL.A.No.298 OF 2006

AGAINST THE JUDGMENT IN SC 535/2002 OF ADDITIONAL DISTRIT AND SESSIONS COURT (ADHOC)-II, KOLLAM

AGAINST THE JUDGMENT IN CP 78/2001 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I, KARUNAGAPPALLY

APPELLANT/ACCUSED:

ASOKAN, SON OF SADANANDAN,
KOCHUPURACKAL VEEDU, KALLELIBHAGAM,
KARUNAGAPPALLY

BY ADVS.
SRI.A.N.RAJAN BABU
SMT.K.SUNITHA VINOD

RESPONDENTS/COMPLAINANT:

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

2 **EXCISE INSPECTOR**
EXCISE RANGE, KARUNAGAPPALLY.

SRI.K.B.UDAYAKUMAR, SR.PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18.12.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 18th day of December 2020

The above appeal is filed by the accused in S.C.No.535/2002 on the file of the Additional District and Sessions Judge (Adhoc II), Kollam. The above case was chargesheeted by the Excise Inspector, Karunagappally against the appellant alleging offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case is that on 23.9.1999 at 10 am, the accused was found in possession of about 8 litres of arrack in a 10 litre cannas and he was carrying the same through the road leading from Kottaveettil junction to Kallelibhagom S.N.V L.P School and thereby committed the offence under Section 55(a) of the Abkari Act.

3. To substantiate the case, the prosecution examined PW1 to PW5. Exts.P1 to P6 are also marked on the side of the prosecution. MO1 is the material object.

4. After going through the evidence and the documents, the trial court found that the accused committed the offence under Section 8(1) of the Abkari Act. The accused was sentenced to undergo rigorous imprisonment for one year and to pay a fine

of Rs.1,00,000/-. In default of payment of fine, the accused is directed to undergo rigorous imprisonment for another one year. Aggrieved by the conviction and sentence, this Criminal Appeal is filed.

5. Heard the learned counsel for the appellant and the learned Public Prosecutor.

6. The learned counsel for the appellant submitted that there is no forwarding note marked in this case. According to the counsel, it is the duty of the prosecution to prove that the seized article reached in the hands of the analyst. Unless the prosecution is able to prove that the seized articles reached in the hands of the analyst, the prosecution is not sustainable. According to the counsel, to prove an offence under Section 55(a) of the Abkair Act, the prosecution has to establish that the accused is in possession of the liquor as defined in the Abkari Act. Without an expert opinion, the court cannot presume that the liquid found in the possession of the accused is arrack and therefore without an expert opinion, the court cannot convict the appellant. In such situation, the links starting from the seizure till it reaches in the hands of the analyst is important. The counsel also submitted that the charge framed is under Section 55(a) of the Abkari Act. But the trial court convicted the accused under

Section 8(1) of the Abkari Act. According to the counsel, after the amendment of the Abkari Act, a person can be charged only under Section 8 of the Abkari Act for the possession of arrack. According to the counsel, charge framed under Section 55(a) of the Abkari Act is not sustainable. The accused defended the case based on a charge under Section 55(a) of the Abkari Act. Since the court convicted the appellant under Section 8 of the Abkari Act, there is prejudice to the accused. The counsel also submitted that there is only the interested testimony of the official witnesses in this case and there is no independent corroboration to the official witnesses and on that ground also the accused is entitled the benefit of doubt.

7. The Public Prosecutor submitted that there is oral and documentary evidence to prove the case and there is nothing to interfere with the conviction and sentence imposed on the appellant.

8. The point for consideration in this case is whether the accused committed the offence under Section 8(1) of the Abkari Act.

9. Admittedly, the forwarding note is not marked in this case. The importance of forwarding note in abkari cases are considered by this court in several judgments. It is the duty of

the prosecution to prove all the links starting from the seizure of the contraband till it reaches in the hands of the analyst. Simply because a contraband article is seized from the possession of an accused, there is no presumption that he is guilty under the provisions of the Abkari Act, unless the prosecution is able to show that the seized article is a liquor as defined in the Abkari Act. In such circumstances the analyst report is important in abkari cases. The forwarding note is one of the links to establish that the seized article reached in the hands of the analyst. As I stated earlier, admittedly, the forwarding note is not marked. That is fatal to the prosecution. For that reason itself the accused is entitled the benefit of doubt.

10. In abkari cases, forwarding note is important because the specimen seal used by the detecting officer will find a place in it. It is the fundamental duty of the prosecution to prove all the links starting from seizure of the contraband till it reaches in the hands of the analyst. Forwarding note is one of the links to prove the prosecution case in abkari cases.

11. This Court in several decisions considered the relevancy of the forwarding note. Some of the decisions are **Gireesh @ Manoj v. State of Kerala (2019(4) KLT 79), Vijayan @ Pattalam Vijayan and another v. State of Kerala**

(2018 (2) KHC 814) and **Prakasan and another v. State of Kerala (2016 KHC 96)**. The relevant portion of the judgment in **Gireesh**'s case (supra) extracted hereunder:

> "14. There is another lacuna in the prosecution case. The copy of the forwarding note prepared by PW5 for sending the samples for chemical analysis was not marked in evidence. The forwarding note is expected to contain the specimen impression of the seal used for sealing the bottles containing the samples. In the absence of the forwarding note marked in evidence, it cannot be found that the prosecution has proved beyond reasonable doubt that the very same samples taken at the spot of the occurrence had reached the chemical examiner for analysis in a tamper proof condition (See Prakasan v. State of Kerala (2016 KHC 96 : 2016 (1) KLD 311 : 2016 (1) KHC SN 40 : 2016 (1) KLT SN 96) and Gopalan v. State of Kerala (2016 KHC 541 : 2016 (2) KLD 469 : 2016 (3) KLT SN 16))."

12. In the light of the above authoritative judgments, it is clear that the non production of the forwarding note is fatal to the prosecution. That itself can be a ground for acquitting the accused.

13. Moreover the seizure of the contraband in this case was on 23.9.1999. A perusal of Ext.P3 property list will show that the property is produced before court on 23.9.1999 itself. But the sample was received by the analyst only on 11.10.1999. As per the endorsement in Ext.P4 analyst report, the analyst received the sample through one Excise Guard Jayanth Kumar. He is not examined in this case. There is nothing to show that

when exactly the sample is despatched from the court to the analyst and who is in possession of the sample till 11.10.1999. As I stated earlier, the person through whom the sample is forwarded to the analyst namely Jayanth Kumar, the Excise Guard is not examined. As I said earlier, this is also a link to be proved by the prosecution. If the links starting from the seizure till it reaches in the hands of the analyst is not proved, the prosecution is unsustainable. On these two grounds the appellant is entitled the benefit of doubt. Therefore, I am not considering the other points.

Hence this Criminal Appeal is allowed. The conviction and the sentence imposed on the appellant as per the judgment dated 6.1.2006 in S.C.No.535/2002 of the Additional District and Sessions Judge (Adhoc) II, Kollam is set aside. The appellant is set at liberty. The bail bond, if any, executed by the appellant is hereby cancelled.

Sd/-

P.V.KUNHIKRISHNAN

JUDGE

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