IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

THURSDAY, THE 03RD DAY OF DECEMBER 2020 / 12TH AGRAHAYANA, 1942

CRL.A.No.1492 OF 2006

AGAINST THE JUDGMENT IN SC 606/2005 DATED 30-06-2006 OF ADDITIONAL SESSIONS JUDGE, FAST TRACK COURT NO.II, PALAKKAD

APPELLANT/ACCUSED:

RAJAN
S/O.VELU, KUNNAMPULLY VEETTIL,
KUNNAMPULLY, KUZHALMANNAM.

BY ADV. SRI.P.M.RAFIQ

RESPONDENT/COMPLAINANT:

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

SRI.K.B.UDAYAKUMAR, SR.PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03.12.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 3rd day of December 2020

The above appeal is filed by the accused in S.C.No.606/2005 on the file of the Additional Sessions Judge, Fast Track Court No.II, Palakkad. The above case was chargesheeted by the Kuzhalmannam Excise Range against the appellant alleging offence punishable under Sections 8(1) and (2) of the Abkari Act.

2. The prosecution case is that on 21.12.2001 at about 5.45 pm, the accused was found moving with a plastic can having a capacity of 5 litres containing 4.2 litres of illicit arrack in violation of the provisions of the Abkari Act. Hence it is alleged that the accused committed the offence.

3. To substantiate the case, the prosecution examined PW1 to PW5. Exts.P1 to P7 were marked from the side of the prosecution. MO1 is the material object.

4. After going through the evidence and the documents, the trial court concluded that the accused committed the offence under Section 55(a) and 8(2) of the Abkari Act. The accused is sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.1,00,000/-. In default of payment of fine, he is directed to undergo simple imprisonment for four months.

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 the accused is entitled to the benefit of doubt for the simple reason that the forwarding note is silent about the person through whom the sample is forwarded. The counsel also submitted that Ext.P3 crime and occurrence report is registered by an Assistant Excise Inspector. He is not an authorized person as per the Abkari Act.

7. The Public Prosecutor submitted that there is oral and documentary evidence to prove the case. The Public Prosecutor submitted that this Court may not interfere with the conviction and sentence on technical grounds.

8. The point for consideration in this case is whether the appellant committed the offence under Section 55(a) r/w 8(2) of the Abkari Act.

9. I perused Ext.P5, forwarding note. The same is silent about the person through whom the sample is forwarded to the analyst. That is fatal to the prosecution.

10. Admittedly, in Ext.P5 forwarding note, the name

of the person who took the sample to the Chemical Examiner is not mentioned. If that be so, the benefit of doubt will go to the accused. In this case, the thondy clerk or the person who took the sample to the Analyst are not examined. This Court in **Kumaran v. State of Kerala [2016 (4) KLT 718]** held as follows:

> "There is yet another reason to grant benefit of doubt to the revision petitioner, which is stated hereunder. Ext.P9 is the copy of the forwarding note whereby the sample was forwarded to the chemical examiner. The copy of the forwarding note is silent with regard to the name of the person with whom the sample was sent for analysis. Ext.P4 Certificate of chemical analysis would show that the sample was received in the laboratory through the Excise Guard Sri. Dinesan on 2.8.2007. It is not discernible as to why the space meant for writing the name of the Excise Guard/Preventive Officer, with whom the sample was sent, remained vacant in Ext.P9 copy of the forwarding note. This would give an indication that even at the time when the learned Magistrate put the initial in the copy of the forwarding note, it was not decided as to with whom the sample had to be sent to the laboratory for analysis. It is also not discernible from Ext.P9 as to when the learned Magistrate put the initial in the forwarding note. The learned Magistrate ought to have written the date on which the initial was made, which is normally expected in a case like this. However, since the date was not written by the learned Magistrate when the initial was made, it is not clear from Ext.P9 as to how many days before the despatch of the sample, the learned Magistrate put the initial in Ext.P9. This becomes relevant, particularly when the space meant for writing the name of the Excise Guard/Preventive Officer with whom the sample was sent, remained vacant in Ext.P9 copy of the forwarding note. In such a situation, it was imperative for the prosecution to examine the thondy clerk of the court or the Excise Guard concerned to prove the tamper-proof despatch of the sample to the laboratory. However, neither the thondy clerk nor the Excise Guard through whom the sample was sent to the laboratory was examined in this case to prove the tamper-proof despatch of the sample to the laboratory

> and consequently, the tamper-proof despatch of the sample to the laboratory could not be established by the prosecution, which is fatal to the prosecution. For the said reason also, the revision petitioner is entitled to benefit of doubt. The courts below did not consider the above vital aspects while appreciating the evidence and consequently, the conviction and sentence passed by the courts below cannot be sustained."

11. Moreover, the analyst report says that the property is received through the Excise Guard Bijoy Micheal on 23.1.2002. The forwarding note is dated 21.12.2001. The prosecution has no explanation regarding the possession of the contraband for the period from 21.12.2001 till 23.1.2002. I think, the accused is entitled the benefit of doubt on this ground also.

12. Moreover, the Assistant Excise Inspector registered this case. The Assistant Excise Inspector is not authorised to conduct search and seizure as per the Abkari Act till 8.5.2009. Admittedly in this case the seizure was on 21.12.2001. In **Bhaskaran v. State of Kerala [2018 (4) KLT 894]** and in **Subrahmaniyan v. State of Kerala** [2010 (2) KLT 470] and in **Sasidharan v. State of Kerala [2012 (2) KLT 392]** this Court considered this point. The relevant portion of the judgment in **Bhaskaran**'s case (supra) is extracted hereunder :

> "12. Here in this case, PW1 was only an Assistant Excise Inspector. It was argued by the learned counsel for the appellant that the arrest of the accused, the seizure of the articles and sampling of the articles done by the Assistant Excise Inspector

were without jurisdiction. Since the illegality annexed to the main parts i.e., the arrest, seizure and sampling, that will go to the root of the matter and hence the cognizance taken and the trial conducted based on such a report are vitiated. Though as per SRO No.234/1967, Preventive Officers were invested with the powers to be exercised under Sections 31, 32, 35, 38, 39, 53 and 59, since the preventive officers are officers specifically named as per the aforesaid notification, the arrest of the accused and seizure of the articles and the production of the accused and property before the Magistrate by the Assistant Excise Inspector, who is not a named or notified officer, are without jurisdiction as has been held by this Court in Subrahmaniyan v. State of Kerala (2010(2)KLT 470).

13. It has also come out in evidence that the notification-SRO.361/2009 dated 08.05.2009, as per which the Assistant Excise Inspector of the Range were empowered to exercise all the powers and to perform all the duties of the Excise Inspectors subject to the control of the Excise Inspector. So, as per the latest notification of 2009, all officers of the Excise Department not below the rank of Assistant Excise Inspector were empowered to perform the acts and duties mentioned in Sections 40 to 53 (both inclusive) of the Act. They were also empowered to exercise the duties under Sections 31, 32, 34, 35, 38, 39 and 53 of the Act and to exercise all the powers conferred and to perform all the duties assigned on Abkari Officers under the sections aforesaid.

14. In this case, the offence was detected on 16.4.2002 i.e., before the notification S.R.O.361/2009 dated 08.5.2009. So, the above said notification will not rescue the prosecution in this case since the offence was detected on 16.4.2002. So, the only basis on the notification S.R.O.234/1967, the Assistant Excise Inspector was not mentioned as authorised person to detect the offence. Only the offences detected by the Assistant Excise Inspector after 8.5.2009 is to be well within his power. So only the sole ground that the Assistant Excise Inspector was not empowered under the Act as has held in the ruling in Subrahmaniyan's case (supra), the appellant herein is entitled to get acquittal as prayed or. Accordingly, this appeal is allowed."

13. Similarly in **Sasidharan**'s case (supra) also, the same point

is considered. The relevant portion is extracted hereunder:

> "17. But it is argued by the learned counsel for the appellant that as per Section 70 of the Act, all notification and orders conferring powers, imposing duties and making appointments under the act may respectively refer to the persons concerned specially by name or in virtue of their office or to classes of officials generally by the official titles. It is argued since as per the notification in S.R.O.No.234/1967 it was specifically mentioned that the acts and duties mentioned in Sections 40 to 53 of the Act are to be performed by the officer not below the rank of Excise Inspector and since PW2 was only an Assistant Excise Inspector, the arrest of the accused, seizure of the articles and sampling of the articles done by him were without jurisdiction. Since the illegality annexed to the main parts i.e., the arrest, seizure and sampling, that will got to the root of the matter and hence cognizance taken and the trial conducted based on such a report are vitiated. Though as per S.R.O.No.234/1967, Preventive Officers were invested with the powers to be exercised under Sections 31, 32, 35, 38, 39, 53 and 59, since the preventive officers are officers specifically named as per the aforesaid notification, the arrest of the accused and seizure of the articles and the production of the accused and property before the Magistrate by the Assistant Excise Inspector who's not a named or notified officer, are without jurisdiction as has been held by this Court in Subrahmaniyan v. State of Kerala 2010(2)KLT 470).
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> 18. Smt.Jasmine, the learned Public Prosecutor submits that the contention that even thereafter no notification was issued authorising and empowering the Assistant Excise Inspector to perform the duties under the Act cannot be countenanced in view of the subsequent notification S.R.O.No.361/2009 dated 8.5.2009 as per which the Assistant Excise Inspector of the Range were empowered to exercise all the powers and to perform all the duties of the Excise Inspectors subject to the control of the Excise Inspector. It was further made clear that all officers of the Excise Department not below the rank of Assistant Excise Inspector were empowered to perform the acts and duties mentioned in Sections 40 to 53 (both inclusive) of the Act. They were also empowered to exercise the

> duties under Sections 31, 32, 34, 35, 38, 39 and 53 of the Act and to exercise all the powers conferred and to perform all the duties assigned on Abkari Officers under the sections aforesaid. But that notification cannot come to the rescue of the prosecution in this case since this notification S.R.O.No.361/2009 came into force only with effect from 8.5.2009 whereas the offence in this case was detected on 19.6.2001. The incident in the case on hand took place long prior to the aforesaid notification. Hence, following the decision in Subrahmaniyan's case, it has to be held that PW2, the Assistant Excise Inspector was not empowered under the Act as it stood then, to perform the duties under the aforestated provisions. Therefore, only on this ground, this Criminal Appeal is allowed. But it is made clear that on and after 8.5.2009, the arrest of the accused, seizure of contraband, sampling, sealing and production of the accused and properties before Court, done by the Assistant Excise Inspector, would be well within his powers."

14. In the light of the above discussion, the appellant is entitled the benefit of doubt.

Hence this Criminal Appeal is allowed. The conviction and the sentence imposed on the appellant as per the judgment dated 30.6.2006 of the Additional Sessions Judge, Fast Track Court No.lI, Palakkad 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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