IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

FRIDAY, THE 11TH DAY OF DECEMBER 2020 / 20TH AGRAHAYANA, 1942

CRL.A.No.1102 OF 2007

AGAINST THE ORDER/JUDGMENT IN SC 923/2001 DATED 05-06-2007 OF SPECIAL COURT FOR ABKARI ACT CASES, KOTTARAKKARA

APPELLANT/S/ACCUSED:

SOMAN
S/O AYYAPPAN, AYAAKOTTU PUTHENVEEDU,
KUDAVATTOOR MURI,, VELIYAM VILLAGE.

BY ADV. SRI.PREMCHAND R.NAIR

RESPONDENT/S/COMPLAINANT:

STATE OF KERALA
SUB INSPECTOR OF POLICE, POOYAPALLY POLICE STATION,
THROUGH PUBLIC PROSECUTOR,, HIGH COURT OF KERALA,
ERNAKULAM.

SMT. M. K. PUSHPALATHA,SR.PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11.12.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

The appellant was convicted and sentenced by the court below under Section 55(a) of the Abkari Act.

2. The prosecution allegation is that on 06.07.2000 at about 5.00 p.m., the appellant was found in possession of 3 liters of arrack in contravention of the provisions of the Abkari Act.

3. Heard.

4. The learned Counsel for the appellant has argued that since no forwarding note was marked and proved in this case, the appellant is entitled to be acquitted.

5. It appears that no forwarding note was

marked and proved in this case.

6. In Sasidharan v. State of Kerala [2007 (1) KLT 720], the Court observed thus:

> "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".

7. In Ravi v. State of Kerala [2011 (3) KLT 353], the Division Bench of this Court held that the prosecution in a case under the Abkari Act could 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 by change of hands in a tamper-proof condition.

8. Since no forwarding note was marked and proved in this case, the prosecution could not establish the tamper-proof despatch of the sample to the laboratory. Therefore, there is no satisfactory link evidence to show that it was the same sample which was drawn from the contraband seized from the appellant which eventually reached the hands of the Chemical examiner by change of hands in a tamper-proof condition. Consequently, there is no link evidence to connect the appellant with the sample analysed in the laboratory. In the said circumstances, the appellant is entitled to be acquitted.

9. There is yet another reason to acquit the appellant. The incident in this case was on 06.07.2000. However, the contraband and the sample were produced before the court only on 17.07.2000 as per Ext.P4 property list. PW5 produced the contraband and the sample before the court. PW5 stated that he produced the contraband and the sample before the court only on 17.07.2000. He stated that he was engaged in other official duties and hence there was delay in producing the contraband and the sample before the court. However, it was not stated specifically with regard to the duties which prevented him from producing the contraband and the sample before the court. Even otherwise, the mere fact that he was having other official duties will not be

a sufficient reason justifying the delay of 11 days in producing the contraband and the sample before the court. Therefore, there was no explanation for the delay in producing the contraband and the sample before the court. Since, there was unexplained delay from 06.07.2000 to 17.07.2000 in producing the contraband and the sample before the court, there cannot be any guarantee that the sample produced before the court and analysed in the laboratory was the sample drawn from the contraband seized from the appellant. In the said circumstances also, the appellant is entitled to be acquitted.

10. It appears that PW5 was only an Assistant Sub Inspector of Police during the relevant period. As per S.R.O. No.321/96, all Police Officers of

and above the rank of Sub Inspector of Police in charge of law and order and working in the General Executive Branch of the Police Department were empowered to exercise all powers and perform all duties of the Abkari officers. The Assistant Sub Inspector of Police was not included as an Abkari Officer as per S.R.O. No.321/96. The learned Public Prosecutor has submitted that thereafter also, no notification was issued making the Assistant Sub Inspector of Police as an Abkari Officer under the Abkari Act.

11. The Division Bench of this Court in Subash v. State of Kerala [2008 (2) KLT 1047] held that the Assistant Sub Inspector of Police is not an Abkari Officer as defined under the Abkari Act. In the above

said case, the Division Bench directed the final report to be returned for re-presentation after curing the defects, if the trial was not commenced. In this case, PW5 detected the offence, seized the contraband and arrested the appellant. He also registered the crime. Since PW5 was only an Assistant Sub Inspector of Police, he was not an Abkari Officer. Therefore, the seizure of the contraband, the arrest of the appellant and the registration of the crime by PW5 were without authorisation and jurisdiction and in the said circumstances, the conviction and sentence passed by the court below on the basis of the said seizure, arrest and the registration of the crime, cannot be sustained. Consequently, the appellant is entitled to be acquitted on that ground as well.

In the result, this Criminal Appeal stands allowed, setting aside the conviction and sentence passed by the court below and the appellant stands acquitted. The bail bond of the appellant stands discharged.

Sd/-

B.SUDHEENDRA KUMAR

JUDGE

RK/11.12.2020