IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

MONDAY, THE 07TH DAY OF DECEMBER 2020 / 16TH AGRAHAYANA, 1942

CRL.A.No.1722 OF 2006

AGAINST THE JUDGMENT IN SC NO.363/2005 DATED 04-08-2006 ON THE FILE OF THE COURT OF THE ADDITIONAL SESSIONS JUDGE (ADHOC)-II, THODUPUZHA

APPELLANT/ACCUSED:

SOMAN, S/O. BHARGAVAN,
PARAPURACKAL VEETTIL, CHAKKIKKAVU KARA,, KUDAYATHOOR VILLAGE, THODUPUZHA.

BY ADV. SRI.C.C.ABRAHAM

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

OTHER PRESENT:

R1 BY SRI.K.B.UDAYAKUMAR, SR.PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07.12.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 7th day of December 2020

...

The appellant is the accused in S.C.No.363 of 2005 on the file of the court of the Additional Sessions Judge (Adhoc)-II, Thodupuzha.

2. The above case is charge sheeted by the Excise Inspector, Idukki Excise Range against the appellant alleging offences punishable under Section 8(1) & (2) of the Abkari Act.

3. The prosecution case is that, on 4.8.2003 at 5.15 p.m., the accused was found in possession of 3.300 litres of arrack in his house bearing No.V/130 of the Kudayathoor Grama Panchayat.

4. To substantiate the case, the prosecution examined PWs.1 to 5. Exhibits P1

to P9 are the documents marked on the side of the prosecution. MO1 and MO2 are the material objects.

5. After going through the evidence and documents, the trial court found that, the accused committed the offence punishable under Section 8(2) of the Abkari Act. The accused is 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 three months.

6. Aggrieved by the above conviction and sentence, this criminal appeal is filed.

7. Heard.

8. The point for consideration in this appeal is whether the accused committed the offence under Section 8(2) of the Abkari Act ?

9. A perusal of Ext.P5 forwarding note

will show that, it is silent about the person through whom the sample is sent to the Chemical Analyst. The space for mentioning the name of the person is kept blank. That is fatal to the prosecution. In such cases, the benefit of doubt will go in favour of the accused. 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."

10. Similarly as per Ext.P5 forwarding note the sample was dispatched on 5.8.2003. But the sample is seen received by the Chemical Analyst through the Excise Guard V.S.Nizar on 14.8.2003. The Excise Guard V.S.Nizar was not examined. Since the prosecution has no explanation about the custody of the contraband article from the date of dispatch of the same on 5.8.2003 till it reaches in the hands of the Analyst on 14.8.2003, I think, the accused is entitled the benefit of doubt.

11. In the light of the above findings, I think, the accused is entitled the benefit of doubt in this case.

Hence, this criminal appeal is allowed. The conviction and sentence imposed on the appellant as per the judgment dated 4-8-2006 in S.C.No.363 of 2005 on the file of the Additional Sessions Judge (Adhoc)-II,

Thodupuzha are set aside. The appellant is set at liberty. Bail bond, if any, executed by the appellant is cancelled.

Sd/-

P.V.KUNHIKRISHNAN

pkk **JUDGE**