IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

WEDNESDAY, THE 16TH DAY OF DECEMBER 2020 / 25TH AGRAHAYANA, 1942

CRL.A.No.2090 OF 2006

AGAINST THE JUDGMENT IN SC 299/2004 DATED 25-09-2006 ON THE FILE OF THE ADDITIONAL SESSIONS JUDGE, FAST TRACK COURT-I, ALAPPUZHA

APPELLANT/ACCUSED:

AJITH KUMAR, S/O. THANKAPPAN,
KOTTISSERIPPADANNAYIL,
MUTHUKULAMTHEKKU MURI,
MUTHUKULAM VILLAGE.

BY ADVS.
SRI.BASANT BALAJI
SRI.R.GOPAN

RESPONDENT/COMPLAINANT:

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

OTHER PRESENT:

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

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16.12.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 16th day of December 2020

Appellant is the accused in S.C.No. 299/2004 on the file of the Additional Sessions Judge, Fast Track Court-I, Alappuzha. Above case is charge sheeted by the Sub Inspector of Police Kanakakunnu Police Station,against the accused alleging offences punishable under Section 8(1) & (2) and Sections 55(a) & (g) of the Abkari Act.

2. The prosecution case is that, on 12-07-2002 at about 11.30 p.m. the accused was found in possession of 3.6 litres of illicit arrack.

3. To substantiate the case, prosecution examined PW1 to PW5. Exts.P1 to P4 are the documents marked on the side of the prosecution. MO1 to MO7 are the material objects.

4. After going through the evidence and the documents, the trial court found that the accused committed the offence punishable under Section 8(1) & (2) and Section 55(g) of the Abkari Act. He was sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- each. In default

of payment of fine, the accused is directed to undergo simple imprisonment for six 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 the benefit of doubt for two reasons. The learned counsel submitted that, no forwarding note is marked and no arrest memo is produced to prove the arrest. On these grounds the accused is entitled the benefit of doubt.

7. The learned Public Prosecutor submitted that, there is adequate oral and documentary evidence to prove this case.

8. The point for consideration in this case is whether the accused committed the offence alleged against him.

9. Admittedly, the forwarding note is not marked in this case. The importance of forwarding note is considered by this Court in several decisions. If forwarding note is not marked that itself is a sufficient reason to acquit the accused in abkari cases.

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) is 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. Moreover, the arrest memo is not produced in this case. The importance of arrest memo in abkari case is considered by this Court earlier. If the arrest memo is not produced, the prosecution cannot prove the arrest of the accused from the place.

13. Admittedly, the arrest memo is not produced in this case. This Court in ***Sathyan v. State of Kerala [2015 (1) KLT 586*** and in ***Ramankutty v. Excise Inspector, Chalannur Range [2013 (3) KHC 308]*** mentioned about the importance of arrest memo in Abkari cases. To prove the arrest, this Court observed that, the arrest memo is necessary. The relevant paragraph in ***Ramankutty v. Excise Inspector, Chalannur Range [2013 (3) KHC 308]*** is extracted hereunder.

> "7. It is pertinent to note that the 'arrest memo', a crucial document which is required to be prepared contemporaneously at the time of arrest to show the genuineness of arrest, is seen not produced before the Trial Court. Prosecution has no case that though the arrest memo had been prepared at the time of the arrest and seizure, it could not be produced before the Trial Court. So it can be safely concluded that it was not prepared at the time of alleged arrest. It is the violation of one of the mandatory requirements of arrest to be followed in all cases of arrest, which is made mandatory by the Supreme Court in D.K. Basu v. State of West

Bengal. The specific case of the prosecution is that the Revision Petitioner, while coming through a public road carrying a plastic can containing 2 litres of arrack in his hand, was arrested from a road and seized the said contraband by the Preventive Officer and party. Therefore, I am of the opinion that the arrest with the contraband in his hand is the basis of the prosecution case on which the entire case has been built up. If the arrest is not proved beyond reasonable doubt, the entire case set up by the prosecution will fall to ground. It is also pertinent to note that there is no evidence to show that one friend or relative or other person known to him was informed of the arrest of the Revision Petitioner, immediately after the arrest in compliance with another mandatory requirement of arrest in the Supreme Court decision in D.K.Basu's case. It is apposite to have a look at the said directions of the Supreme Court which read as follows:

> "That the Police Officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
>
> A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the

arrestee."

The prosecution has no case that they have complied the said directions. I am of the opinion that the non-compliance of the mandatory requirements to be complied at the time of arrest speaks volumes doubting the genuineness of the arrest and it is fatal to prosecution case, as the seizure of the contraband has no existence at all without proving the factum of arrest, beyond reasonable doubt."

14. In the light of the above discussion, I think the appellant in this case is entitled the benefit of doubt.

Therefore, this Criminal Appeal is allowed. The conviction and sentence imposed on the accused as per the judgment dated 25-09-2006 in S.C. No.299/2004 on the file of the Additional Sessions Judge, Fast Track Court-I, Alappuzha, is set aside. The appellant is set at liberty. The bail bond, if any, executed by the appellant, is cancelled.

Sd/-

P.V.KUNHIKRISHNAN

JUDGE

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