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.2214 OF 2006

AGAINST THE ORDER/JUDGMENT IN SC 160/2003 OF III ADDITIONAL DISTRICT COURT, KOLLAM

AGAINST THE ORDER/JUDGMENT IN CP 125/2002 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I, KARUNAGAPPALLY

APPELLANT/ACCUSED:

SAJEEVAN, S/O. RAJAN,
MANNOOR THEKKADATHU COLONY,,
ADINADU VADAKKU MURI,
KULASEKHARAPURAM VILLAGE.

BY ADVS.
SRI.SASTHAMANGALAM S. AJITHKUMAR
SMT.LAKSHMI RENJITH
SRI.DILEEP P.PILLAI
SRI.RENJITH B.MARAR
SRI.T.K.SUJITH

RESPONDENT/COMPLAINANT:

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

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

OTHER PRESENT:

SRI.ARUN POOMULLI FOR APPELLANT, 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. 160/2003 on the file of the III Additional Sessions Judge, Kollam. Above case is charge sheeted by the Excise Inspector, Karunagapally, against the appellant, alleging offence punishable under Section 55 (a) of Abkari Act.

2. The prosecution case is that, PW2 the Excise Inspector and his party found the accused carrying a 5 liter can which contain 4 ½ litres of arrack. A glass measuring 150ml. was also found on the side of the road. Hence it is alleged that the accused committed the offence.

3. To substantiate the case, prosecution examined PW1 to PW5. Exts. P1 to P7 are the documents marked on the side of the prosecution. MO1 and MO2 are the material objects.

4. After going through the evidence and documents, the trial found that the accused committed the offence punishable

under Section 55(a) 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, the accused is directed to undergo simple imprisonment for three months. Aggrieved by the conviction and sentence, this Criminal Appeal is filed.

5. Heard the learned counsel Adv.Sri. Arun Pomulli for the appellant and the learned Public Prosecutor.

6. The learned counsel for the appellant submitted that, the entire prosecution against the appellant is vitiated for the simple reason that an unauthorized person registered the case. According to the learned counsel, the Assistant Excise Inspector is not an authorised person to register a case as per the Abkari Act. The learned counsel also submitted that, the forwarding note is not marked in this case. On that ground also the accused is entitled the benefit of doubt in this case because the prosecution miserably failed to prove that the seized article reached in the hands of the analysts.

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

there is nothing to interfere with the conviction and sentence imposed in this case.

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

9. Admittedly, PW4, the Assistant Excise Inspector registered the occurrence report in this case. Assistant Excise Inspector is authorised to register the case as per the Abkari Act only with effect from 08-05-2009. Admittedly in this case the seizure was on 30-07-2001. Since an unauthorised person registered the case the entire prosecution is vitiated on that ground itself.

10. 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.

11. 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, 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."

12. 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).

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 nd production of the accused and properties before Court, done by the Assistant Excise Inspector, would be well within his powers."

13. In the light of the above authoritative judgments of this Court, the trial in this case is vitiated.

14. In addition to this the learned counsel also submitted that, the forwarding note is not marked in this case. The importance of forwarding note is considered by this Court in several decisions. Non production of forwarding note in Abkari Act cases is fatal to the prosecution. For that sole reason the accused is entitled to the benefit of doubt.

15. 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.

16. 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))."

17. 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 20-10-2006 in S.C. No.160/2003, on the file of the III Additional

Sessions Judge, Kollam, 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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