IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 15TH DAY OF DECEMBER 2020 / 24TH AGRAHAYANA, 1942

CRL.A.No.2090 OF 2007

AGAINST THE JUDGMENT IN SC 279/2006 DATED 29-09-2007 OF ADDITIONAL SESSIONS COURT, FAST TRACK COURT-II, ALAPPUZHA

APPELLANT/ACCUSED IN S.C. NO.279/06:

SOMARAJAN,
S/O. NANU,
SOMARAJAN BHAVAN,
KOTTAKKATTUSSERI, THAMARAKULAM VILLAGE,
MAVELIKKARA TALUK,
MAVELIKKARA.

BY ADVS.
SRI.M.R.SARIN
SRI.KIRAN SANKAR

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY DIRECTOR GENERAL OF PROSECUTION,
HIGH COURT OF KERALA,
ERNAKULAM.

R1 BY SMT.REKHA C.NAIR, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15.12.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 15th day of December, 2020

The accused in S.C. No.279 of 2006 on the files of the Additional Sessions Court, Fast Track-II, Alappuzha, is the appellant. He was convicted by judgment dated 29.9.2007 and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/-, in default to undergo simple imprisonment for two months for the offence under Section 8(1) and (2) of the Abkari Act. Though accused was found guilty under Section 55(a) of the Act, no separate sentence was imposed.

2. The prosecution case is that on 24.7.2001 at 12.30 pm, the accused was found in possession of 10 litres of arrack in MO1 can, on the side of a road in Thamarakulam Panchayat in Mavelikkara.

3. Pursuant to compliance of all procedures including committal to Sessions Court, the prosecution examined PW1

to PW5 and marked Exts.P1 to P7 apart from MO1 black can. After going through the evidence adduced, the learned Sessions Judge found the accused guilty and imposed the sentence as mentioned above.

4. The main point that arises for consideration in this appeal is as to whether the prosecution has proved beyond reasonable doubt the guilt of the accused. Though the counsel for the accused have raised several contentions, I am confining my consideration to the sole point regarding absence of the forwarding note.

5. It is a settled proposition of law, as held in **Sadasivan @ Para v. State of Kerala and Another** (2020 KHC 478) and other cases that absence of forwarding note is fatal to the prosecution case. With the aforesaid principle in mind, when the appendix to the judgment was perused, it is seen that the forwarding note was not marked as an exhibit. On verification of the exhibits marked, it is seen that Ext.P4 is marked through PW4 and on a reading of the deposition of PW4, it can be understood that Ext.P4 is a report relating to the loss of arrack from the black can.

Through to a small crack in the said can after it was produced before the court. However, the records produced also show that along with Ext.P4 a forwarding note dated 1.9.2007 is attached. Unfortunately the said forwarding note was not marked in court and hence no reliance can be placed upon the said forwarding note.

6. Since the forwarding note is available in the files, the learned Public Prosecutor sought for a remand of the matter for the purpose of proving the existence of the forwarding note, as, according to her, the omission to mark the forwarding note is a mistake committed during trial and the same shall not cause any prejudice to the prosecution also.

7. Even though the aforesaid submission may seem impressive, I find that this is a case which was detected 19 years ago and the trial took place in 2007. At this distance of time it would be against the concept of fair trial under Article 21 of the Constitution of India to remand the matter back to the trial court for the purpose of marking the forwarding note present in the files. I decline the request to

remand the case.

8. As stated above, the absence of the forwarding note being fatal to the prosecution case, no further consideration is required for the purpose of setting aside the judgment challenged in appeal.

9. Accordingly, I set aside the conviction and sentence imposed upon the accused by judgment dated 29.9.2007 in S.C. No.279 of 2006 on the files of the Additional Sessions Judge, Fast Track Court-II, Alappuzha and acquit the accused. The fine amount, if any, already deposited, shall be refunded to the accused.

The appeal is allowed as above.

Sd/-

BECHU KURIAN THOMAS
JUDGE

vps

/True Copy/ PS to Judge