

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

SATURDAY, THE 21ST DAY OF NOVEMBER 2015/30TH KARTHIKA, 1937

CRL.A.No. 1 of 2006 (A)

**AGAINST THE JUDGMENT IN SC 497/2001 of ADDITIONAL DISTRICT AND SESSIONS
COURT, FAST TRACK (ADHOC), MAVELIKKARA DATED 26-11-2005**

APPELLANT(S)/ACCUSED::

**ALEXANDER @ SHAJI
SHIBIN VILLA, ERAZHA THEKKUM MURI, PERINGALA VILLAGE
MAVELIKKARA.**

BY ADV. SRI.N.SURESH

RESPONDENT(S)/COMPLAINANT::

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

R1 BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1 of 2006

Dated this the 21st day of November, 2015

J U D G M E N T

The accused in this case was prosecuted for the offences punishable under Sections 8(1) and 55(a) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of one year. Set off as per law was allowed.

2. PW1, who was working as the Preventive Officer attached to Excise Range Office, Mavelikkara on 16.11.1998 was on patrol duty along with PW2 and others. When they reached the gravel road leading to Kottuvallil junction, they happened to see a person coming along the road carrying a blue polythene bag. Feeling suspicious, he was intercepted and the bag was seized. It was found to contain some kind of liquid. The bag contained plastic covers. Six of the

covers were opened and on examination by taste and smell, it was found to be arrack. There were 30 other covers in the bag. Three samples were taken in three bottles having capacity of 375 ml each and sample taken was of 160 ml each. They were sealed and labelled and numbered as A, B, C. The label contained the signatures of the accused and the witnesses. The other 30 covers were separately packed and they were sealed and labelled. The arrest memo prepared is Ext.P2 and the mahazar prepared is Ext.P1. The accused and the contraband articles were produced before the Excise Inspector. PW4, on the basis of Ext.P1 mahazar, registered crime as per Ext.P3 occurrence report. He had the accused and the contraband articles produced before court and property list produced by him is Ext.P4. Further investigation was done by PW5. He recorded statement of witnesses, obtained the Chemical Analysis Report namely, Ext.P6. He then completed investigation and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offences to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Alappuzha under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional District and Sessions Court, Fast Track (Ad hoc), Mavelikara for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Sections 8(1) and 55(a) of the Abkari Act.

5. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 5 examined and had Exts.P1 to P6 marked. M.O.s 1 series and 2 series were got identified and marked.

6. After the close of prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in

evidence against him and maintained that he is innocent.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined DW1 and had Ext.D1 marked.

8. On an appreciation of the evidence in the case, the court below found that the prosecution has succeeded in establishing the case against the accused and accordingly, found the accused guilty. Conviction and sentence as already mentioned followed.

9. In this appeal, one main ground taken is that the forwarding note which is a mandatory requirement to be produced before the court has not been done in this case and that should prove fatal. Before going into the said legal contention, it will be useful to refer to the evidence in the case. PW1 was the Preventive Officer at the relevant time and PW2 was also an officer of the same Station. They along with other officers had gone on routine patrol duty on 16.11.1998 also. When they entered the gravel road leading

to Kattuvallil junction, the accused was seen coming from the opposite side with a blue bag. Both of them say that seeing the Excise Officials, he got nervous and tried to escape. He was intercepted and the bag was seized. It was found to contain some packets of liquid. Both of them say that 6 covers were opened and by taste and smell, they identified the contents as arrack. They then speak about having taken three samples of 160ml each in bottles having capacity of 375 ml. PW1 says that he had sealed and labelled the samples and numbered the samples as A, B, C. He also speaks about having sealed and labelled the balance covers containing liquids. PW2 also gives a similar version regarding the incident. If one is to go by the evidence of PWs 1 and 2, of course, the detection can be said to have been established. So also the contemporaneous document namely, Ext.P1 gives a narration of what transpired at the place. It can be reasonably inferred that the contraband article was seized from the possession of the accused.

10. But that does not sufficient in law. The prosecution is bound to establish that the article seized is prohibited under law and for that purpose, they have to adduce evidence in that regard. None of the witnesses namely, PWs 1, 2,4 and 5 say about the filing of the forwarding note seeking a requisition to the court to sent the sample for chemical analysis.

11. The forwarding note has a significant role to play. Especially in cases where type of seal used for sealing the sample is not specifically mentioned in the mahazar. The forwarding note contains the specific column wherein, the officer who filed the forwarding note is bound to show the sample of the seal affixed on the sample to be sent for chemical examination.

12. In the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8), it was held as follows:

“Ext.P5 is a copy of the Forwarding Note submitted before the court for sending sample for subjecting it to chemical analysis. A specific

space is provided in the Forwarding Note for affixing the sample seal. No such sample seal was affixed on Ext.P5. Whether the sample seal was affixed on the original of Ext.P5 sent to the Chemical Examiner? Normally, if the sample seal is not appearing in the copy of the Forwarding Note, in this case it is Ext.P5, it has to be presumed that such sample seal was not affixed on the original Forwarding Note unless proved otherwise. A copy of the Forwarding Note is kept in the office of the court for serving certain purposes. The purposes are evident from the contents of the form of the Forwarding Note itself. They include the quantity and description of the sample drawn from the bulk of the contraband, the details of the case and the space for providing the sample impression of the seal affixed on the sample taken from the bulk of the contraband. Therefore, as already stated, the absence of sample seal in the space provided in the copy of the Forwarding Note is sufficient reason for presuming that the sample seal is not provided in the original Forwarding Note. Of course, this is only a rebuttable presumption. In the case on hand, such presumption has not been rebutted by the prosecution.”

13. From a reading of the above decision, one can easily understand the significance and importance of filing of the forwarding note and also the necessity to show the specimen seal in the forwarding note. Probably, that is the only guarantee which the court has to ensure that the sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused. In the light of the principle laid down in the above decision, it has to be held that conviction cannot stand.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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//True copy//

P.A. to Judge