

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 11TH DAY OF NOVEMBER 2015/20TH KARTHIKA, 1937

CRL.A.No. 38 of 2006 (A)

AGAINST THE JUDGMENT IN SC 337/2003 of ADDL.SESIONS COURT FAST
TRACK - II, ALAPPUZHA DATED 15-11-2005

APPELLANT/ACCUSED:

CHANDRAN, S/O. NARAYANAN,
THENNADUYIL KIZHAKKETHIL, ORIPREM MURI,
CHENNITHALA VILLAGE, MAVELIKARA.

BY ADV. SRI.JOHN BRITTO

RESPONDENT/COMPLAINANT:

STATE OF KERALA REPRESENTED BY
THE EXCISE INSPECTOR, MAVELIKARA RANGE
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

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

P.BHAVADASAN, J.

Crl. Appeal No.38 OF 2006

Dated this the 11th day of November, 2015.

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 8(1) and (2) and 55(a) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for three months. Set off as per law was allowed.

2. PW1, at the relevant time, was functioning as Preventive Officer of the Excise Range Office, Mavelikkara. At about 4 p.m on that day, he set out for routine patrol duty along with other officers. By about 5 p.m, when they reached Mavelikkara-Mannar road and in front of St. George Orthodox Church, they found a person going along the Panchayath road nearby holding a bottle. Seeing the Excise Officials, he panicked and turned back and that created suspicion in the minds of the Excise Officials who intercepted him and seized the bottle from him. By taste and

smell, they identified that the liquid contained in the bottle was arrack. The bottle contained about 750ml of arrack. The accused was arrested. PW1 then took a sample of 200ml of arrack in a bottle having a capacity of 375 ml. He would say that the sample as well as the balance contraband article were sealed and labeled in accordance with law. The label contained the signatures of accused, witnesses and PW1. PW1 says about the preparation of Ext.P1 seizure mahazar and also says that arrest memo, Ext.P2 was prepared before arresting the accused.

3. PW4 who was the Excise Range Inspector at the relevant time, on receipt of records and accused, prepared Ext.P3 occurrence report. He had the accused, documents and contraband articles produced before court and Ext.P4 is the property list. He sent a requisition to the court to send the sample for chemical analysis and obtained Ext.P5 report. He recorded the statement of witnesses, completed the investigation and laid charge before court.

4. The court before which final report was laid took cognizance of the offence and finding that the offence is

exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Alappuzha under Section 209 Cr.P.C after following necessary procedures. The said court made over the case to Additional Sessions Court Fast Track-II, Alappuzha for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offences punishable under Sections 8(1), 8(2) and 55(a) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P5 marked. M.O.1 was got identified and marked.

6. After the close of the prosecution evidence, 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 the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He chose to examine DWs 1 and 2.

8. The court below greatly impressed by the evidence of

PWs 1 and 3 and the fact that there is a contemporaneous document Ext.P1 which came into existence soon after the incident and also the fact that there was prompt production of accused and articles before court, came to the conclusion that offence alleged against the accused has been established. He was accordingly convicted and sentenced as already mentioned.

9. Learned counsel appearing for the appellant raised only one point for consideration. It is pointed out that there is no forwarding note marked in the case and there is no evidence of any sample of the seal said to have been affixed by PW1 available before court. If that be so, according to the learned counsel, as per the principles laid down in the decisions in **Majeedkutty** vs. **Excise Inspector** (2015 (1) KLT 624) and in **Krishnan** vs. **State** (2015 (2) KLT SN 8), the prosecution has to fail.

10. Learned Public Prosecutor, on the other hand, contended that in the light of the evidence furnished by PWs 1 and 3, even if the seal of the officer is not produced, evidence regarding seizure is overwhelming and there is no reason to

suspect those items of evidence. Further, learned Public Prosecutor pointed out that there was a narration of what had transpired at the place by way of Ext.P1 and the fact that the accused and contraband articles were promptly produced before court gives credit to the prosecution case. At any rate, it is pointed out that the court below has chosen to accept those items of evidence and found the accused guilty. There is no reason as to why this Court should take a different view.

11. If one is left with the question of seizure rather sampling, probably, the stand of the learned Public Prosecutor could be accepted. But, unfortunately, the court has insisted that in one of the columns available in the forwarding note for providing sample seal, sample seal should be seen to have been affixed. In the decision in ***Majeedkutty vs. Excise Inspector*** (2015 (1) KLT 624), it has been held as follows:

“7. It is the prosecution case that the bulk of the contraband as well as the sample collected were sealed by PW3. PW3 also deposed that they were so sealed. The description in the List of Property does not show that the bulk was so sealed. Be that as it may, the sample is described in the List of Property as sealed. Whose seal

was so affixed? No evidence is available regarding that aspect of the matter. It is noted in Ext.P3 Certificate of Chemical Analysis that the seal on the bottle was intact and found tallied with the sample seal provided. Whose sample seal was so provided? None of the excise officials examined in the case deposed that sample seal was so provided. No Forwarding Note is seen among the case records. PW4 deposed before the court that he had submitted a requisition before the court for subjecting the sample to Chemical Analysis. It is usual that seal of the court will be affixed while sending the sample to the Chemical Examiner for analysis. Therefore, the sample seal noted in Ext.P3 can be the seal of the court also. A comparison of the seal of the court affixed on the bottle containing sample with the specimen seal of the court will not give any assurance that the sample of the contraband allegedly seized from the appellant has, in fact, reached the Chemical Examiner for analysis. Such an assurance is possible only when the sample seal of the seal affixed on the sample was provided to the Chemical Examiner for comparison. Such a link evidence is missing in this case. Therefore, there is no assurance that the Chemical Examiner examined really the sample taken from the bulk allegedly seized from the appellant in this case. Hence, the report in Ext.P3 that ethyl alcohol was detected in the sample will not connect the accused

with the crime alleged.

8. This Court in Rajamma v. State of Kerala (2014 (1) KLT 506) has held as follows:

“ The investigating officer has also deposed that he is not aware whether any specimen seal is produced before the court. So, absolutely there is no evidence to convince the court that the prosecution has proved that the sample seal or specimen impression of the seal, alleged to have been affixed in the sample by PW.1 has been provided to the chemical examiner for their verification and to ensure that the sample seal, so provided, is tallying with the seal affixed on the sample bottle. In spite of the above fact and in the absence of sample seal, however in Ext.P3, it is certified that the seal of the sample bottle is in tact and tallied with sample seal provided. Therefore, according to me, no evidentiary value can be given to Ext.P3 chemical analysis report. In the absence of any link evidence to show that the very same sample which drawn from the contraband article allegedly seized from the possession of the accused reached the hands of the chemical examiner, it is unsafe to convict the appellant who is a lady.”

A Division Bench of this Court in Ravi v. State of Kerala (2011 (3) KLT 353) has held that the prosecution can succeed only if it is shown that the contraband liquor

which was allegedly seized from the accused ultimately reached the hands of the Chemical Examiner in a tamper-proof condition. Also held that no conviction can be entered against the accused in a prosecution unless it is proved that the sample which was analysed in the Chemical Examiner's Laboratory was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused.”

12. In the decision in **Krishnan** vs. **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 evidence 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. A reading of the above decisions show the importance, significance and necessity for providing sample seal. Even though sample seal is not furnished, if there is an indication to that effect in the mahazar, that is sufficient. But, in the case on hand, that too is absent. Therefore, the court had no opportunity to ascertain whether the sample that reached the chemical analysis laboratory is the sample taken from the contraband article seized from the possession of the accused.

14. After having gone through the above decisions, it seems that the principles laid down therein apply to the facts of this case. There is no reason as to why the same benefit should not be given to the accused.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the offences. He stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A to Judge.