

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 17TH DAY OF NOVEMBER 2015/26TH KARTHIKA, 1937

CRL.A.No. 50 of 2006 (B)

**AGAINST THE JUDGMENT IN SC 633/2004 of ADDITIONAL DISTRICT & SESSIONS
COURT (ADHOC) FAST TRACK-I, PATHANAMTHITTA DATED 14-12-2005**

APPELLANT(S)/ACCUSED.:

**SOMAN, S/O.SREEDHARAN, AGED 50 YEARS,
KIZHAKKECHARUVIL VEEDU, ELAVUMTHITTA, MEZHUVELI
VILLAGE, KOZHENCHERRY TALUK, PATHANAMTHITTA.**

BY ADV. SRI.S.MUHAMMED HANEEFF

RESPONDENT(S)/COMPLAINANT.:

**STATE OF KERALA, REP. BY THE EXCISE
INSPECTOR, EXCISE RANGE OFFICE, PATHANAMTHITTA
(CRIME NO. 24/2001) REP. BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 50 of 2006

Dated this the 17th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) & 8(2) of the Abkari Act. He was found guilty. Accordingly, he was convicted and sentenced to suffer rigorous imprisonment for a period of two years and to pay a fine of ₹1 lakh with a default clause of two years. Set off as per law was allowed.

2. The incident in this case occurred on 14.11.2001. On the relevant date, PW5 was working as the Excise Range Inspector. On that day, while PW5, PW1 and other officers were on routine patrol duty, when they reached in front of Kizhakkecharuvil house, the accused was found coming along the road with a light yellow coloured can. Seeing the Excise Officers, he panicked which caused suspicion in the minds of the officers. They intercepted the accused and seized the can from him. It was found to contain some

liquid. By smell and taste of the liquid, PW5 confirmed it to be arrack. The can had a capacity of 5 litres and it was found to contain 3 litres of arrack. Informing the accused about the illegality committed by him, he was arrested after preparing the arrest memo. Thereafter, PW5 took a sample of 200ml from the contraband article in a bottle having a capacity of 375ml. PW5 then had the sample as well as the balance contraband article sealed and labelled as is required under law. The labels contained the signatures of the accused, PW1 and PW5 and the witnesses. The arrest of the accused was duly informed to his relatives. Thereafter, PW5 returned to the Station and as per Ext.P6 occurrence report, registered Crime No. 24/2001. He then prepared Ext.P7 property list, Ext.P8 forwarding note and had the accused produced before the learned Magistrate on the very same day itself along with Ext.P9 remand application. The accused and the articles were returned to the custody of PW5 directing him to produce them at 10.00 a.m., on the

next day. It was so done. Investigation in this case was done by PW3, who was the Excise Inspector at the relevant time. He recorded the statement of witnesses and prepared Ext.P3 scene mahazar. After obtaining the Chemical Analysis Report, he 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 offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Pathanamthitta 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, (Ad-hoc) Fast Track-I, Pathanamthitta, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 8(1) & 8(2) 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 P10 marked. MO1 was 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 chose to adduce no evidence.

8. The lower court found the evidence of PWs 1, 2 and 5 taken along with the mahazar prepared by PW5 to be convincing enough and also took the aid of the fact that the accused, the articles seized and the documents drawn up by PW5 were promptly produced before the Magistrate on the very same day of detection itself which lends considerable credence to the prosecution version of the incident and so

found the accused guilty. Conviction and sentence followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant contended that the court below has not critically analyzed the evidence. Had it done so, it would have seen inconsistencies in the evidence of PWs 1, 2 and 5 which goes to the root of the matter and it is extremely doubtful whether proper sampling was done at all. Highlighting this aspect, the learned counsel for the appellant pointed out that going by the version given by PW2, a bottle which was lying at the place of incident was picked up and sample was taken in that bottle. PW5 has another version. Whatever that be, the learned counsel points out that as long as PW2 is not declared hostile to the prosecution, his version has to stand. In fact, the evidence of PW5 would show that bottles are kept in the office for the purpose of taking the samples and one of such bottle was used. Again, a reading of the evidence of PWs 1, 2 and 5 throw considerable doubt regarding the place of occurrence

and also the place of arrest. It is also pointed out by the learned counsel that going by the evidence of PW2 the independent witness on which considerable reliance is placed by the prosecution, it is clear that he has not seen the actual seizure of the contraband article from the possession of the accused. But his evidence would show that by the time he reached there, the can had already been placed on the ground and he has no case that he had ever seen the accused holding the can. The learned counsel then pointed out that there are serious omissions between the statements given by the witnesses in box and the statements given to the Investigating Officer which amounts to contradiction and therefore these witnesses cannot be trusted or believed. Their evidence will have to be viewed in suspicion. Further, the learned counsel contended that Ext.P8, the forwarding note said to have been filed by PW5 does not contain the specimen seal as is required under law. Therefore, according to the learned counsel, there is no

guarantee that the original sample was also sealed and if that be so, the mere fact that even assuming it to be true that contraband article has been seized, does not help the prosecution. For the above proposition, the learned counsel relied on the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8), **Rajamma v. State of Kerala** (2014 (1) KLT 506) and **Ravi v. State of Kerala** (2011 (3) KLT 353). As long as it is not established, the sample relies by the Chemical Analyst is a sample taken from the contraband article seized from the possession of the accused, the prosecution cannot succeed. It is significant to notice, according to the learned counsel, that in the mahazar prepared by PW5, he does not make mention of the nature of the seal used by him. Had he mentioned the nature of the seal therein, there would have been some substance in the prosecution case. In the absence of any evidence except for the statement given by PW5 at the time of evidence, there is no material to show the nature of the seal

said to have been affixed by PW5. These vital aspects have been overlooked by the lower court and that has resulted in a wrong conviction being entered into.

10. The learned Public Prosecutor on the other hand very vehemently contended that none of the points raised by the learned counsel for the appellant can be sustained. According to the learned Public Prosecutor, the evidence of PWs 1, 2 and 5 taken along with the contemporaneous document namely, the mahazar etc., are sufficient to show the seizure of contraband article from the possession of the accused. In his evidence, PW5 has stated that seal affixed by him as alphabet 'D'. It is also contended by the learned Public Prosecutor that the seal affixed on the balance contraband article seized was found intact and it is spoken to by PWs 1 and 5. In the light of these overwhelming items of evidence, the mere absence of specimen seal in the forwarding note does not assume any significance and none of the decisions relied on by the learned counsel for the

appellant applied to the facts of the case. The learned Public Prosecutor therefore contended that this is a case where there is no flaw in the prosecution case and conviction and sentence are only to be upheld.

11. At the outset itself, it has to be said that the evidence of detection centers around the testimony of PWs 1, 2 and 5. among them, PW5 led the team of officers on patrol duty in which PW1 was also a member. PWs 1 and 5 have a case that they apprehended the accused on the Panchayath road. There is some controversy in this regard in the evidence of PWs 1, 2 and 5. The exact location of apprehension seems to be doubtful. According to PW2, it was in front of the house of the accused while PWs 1 and 5 would say, it was a little far away. However, this slight inconsistency need not be blown out of proportion to doubt the prosecution version.

12. PWs 1 and 5, the Excise Officers have a consistent case. They say that, while they were on patrol duty, they

happened to see the accused coming along the Panchayath road holding a can and he panicked as he saw them. They speak about the interception of the accused, seizure of the can, examination of the contents, taking of samples, labelling etc.. There is no serious contradiction between the evidence of PWs 1 and 5 in this regard. Even though they were cross examined at length, except for some minor contradictions, there is nothing to show that they are speaking falsehood. The contradictions pointed is only with regard to the place of occurrence etc. which is not very material in this case,.

13. It is difficult to say that PW2, the independent witness has actually seen the seizure. The prosecution examined PW2 to show that he was a witness to the actual seizure of the contraband article from the possession of the accused. But, a reading of his evidence would show that by the time he reached the place, the can had already been seized from the possession of the accused and he has no

case that he had ever seen the accused holding the can. However, he then deposes about PW5 having identified the article as arrack and sampling etc.. Though his evidence could not be relied on for the purpose of coming to a conclusion that the accused was holding a can, the rest of his evidence regarding sampling etc., fortify the prosecution case.

14. It is true that the evidence of PWs 1 and 5 will have to be carefully scrutinized. But there is no rule of law that unless their evidence is corroborated by independent evidence, prosecution case cannot be accepted. After all, corroboration is a rule of prudence and not a rule of law. If the evidence of official witnesses are found to be convincing, cogent and acceptable and contains the ring of truth, there is no justification in rejecting the evidence on the ground that there is no corroboration from the side of independent quarters.

15. However, it has been held in several decisions of this Court that mere claim of seizure of contraband article is not sufficient. It will have to be proved by the prosecution that the article seized is in the illegal possession of a person concerned or it falls within one of the penal provisions of the Abkari Act. It is here that the question of sample assumes importance.

16. There seems to be some inconsistencies regarding the sampling from the evidence of PWs 2 and 5. PW2 is definite that the sample was taken in a bottle which was picked up from the place of occurrence, while PW5 though does not say that he had brought the bottle from the Police Station, he would say that the Station keeps clean bottles for the purpose of taking samples. However, both of them are uniform and consistent in their evidence that the sample taken was sealed and labelled and so also the balance contraband article. Both PWs 1 and 5 say that the label contained the signatures of the accused, witnesses and

PW5.

17. Ext.P8 is the forwarding note. That contains a column where the officer, who files the same, is obliged to show the specimen of the seal used. The purpose and object of that column has been of considerable debate by this Court in various decisions. This Court had occasion to hold that, that is not an empty formality. 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.”

18. In the decisions reported in **Rajamma v. State of Kerala** (2014 (1) KLT 506) and **Ravi v. State of Kerala** (2011 (3) KLT 353), the same issue has been considered in detail.

19. In all these decisions, the necessity to provide a sample seal was highlighted. Of course, in the decision reported in **Krishnan's** case (supra), this Court went on to

hold that in the absence of a specimen seal in the forwarding note, it is to be presumed that the original sample also did not contain the seal though it is a rebuttable presumption. Whatever that be, these decisions highlight the necessity and significance of providing a sample seal. It would have been some solace for the prosecution had mahazar Ext.P1 prepared by PW5 at the place of occurrence had mentioned the nature of seal used by him or in fact, had shown a specimen of the seal used by him. That is also not available in the case on hand. Of course, this Court is not forgetful of the fact that in Ext.P10 Chemical Analysis Report, the Chemical Analyst reported that the seal found on the sample tallied with the sample seal forwarded to the Chemical Analyst. However, as long as the specimen of the sample seal is not forwarded to the court, it is not possible for the court to come to a conclusion that the sample which reached the laboratory is the sample taken from the contraband article seized from the possession of the

accused.

20. The learned counsel appearing for the appellant is justified in his submission that this vital aspect has been omitted by the lower court though it is of much significance and importance and it provides a clear link or chain of events in order to hold the accused guilty.

21. Relying on the decisions placed before this Court, it has to be held that the absence of specimen seal in Ext.P8 and also any mention of the same in the mahazar must prove fatal to the prosecution.

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