

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

CRL.A.No. 83 of 2006

AGAINST THE JUDGMENT IN SC 937/2001 of ADDITIONAL SESSIONS
COURT (ABKARI), KOTTARAKKARA.

APPELLANT(S)/ACCUSED:

SAMUEL @ CHUTTI SAMUEL,
S/O.DANIEL, KUTTICHARUVILA VEEDU, KOCHALUMMODU,
MYLOMMURI, MYLOM VILLAGE, KOTTARAKKARA TALUK,
KOTTARAKKARA.

BY ADVS.SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.R.SURAJ KUMAR

RESPONDENT(S)/STATE:

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

BY ADV. PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
06-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 83 of 2006

Dated this the 6th day of November, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 8(1) and (2) of the Abkari Act. He was found guilty. He was convicted and sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for six months. Set off as per law was allowed.

2. On 23.10.2000 while P.W.2 and his associate officers were on patrol duty in fact as an aftermath of the tragedy caused by illicit liquor vending, when they reached Mylom – Palavila junction they received reliable information that the accused was vending illicit liquor. P.W.2 and other officers reached the place at 5.10 p.m. , the accused was seen holding a can and a glass. The can had a capacity of 10 litres of arrack. Seeing the police officers, he tried to escape. He

was effectively intercepted and questioned. When the can was opened and the contents were examined by taste and smell, it was revealed that it was arrack. P.W.2 took two samples of 150 ml in bottles having capacity of 180 ml and sealed and labelled the same. He also had the can sealed and labelled. The labels on each of these had the signature of P.W.2. He prepared Ext.P1 mahazar. Ext.P2 is the arrest memo prepared while arresting the accused. P.W.2 thereafter along with the accused, documents, and the contraband article seized returned to the station and registered crime No.215 of 2000 as per Ext.P3 FIR. The accused and the contraband articles were produced before court. C.W.6 had conducted investigation and he is no more. P.W.2 while examination in court pointed out that Ext.P5 is the chemical analysis report received by them.

3. Investigation was conducted by C.W.6. He after taking statements of witnesses and verifying records laid charge before court.

4. The court, before which final report was laid, took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Kollam. The said court made over the case to Additional Sessions Court (Abkari), Kottarakkara for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Sections 8(1) and (2) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 4 examined and had Exts.P1 to P5 marked. M.Os. 1 to 3 were got identified and marked. After the close of the 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. Finding that the accused could not be acquitted

under Section 232 Cr.P.C., he was asked to enter on his defence. He examined D.W.1.

6. Presumably convinced by the testimony of P.Ws.1 and 2 and also the prompt production of the accused and the articles before court and also by the receipt of the chemical analysis report, the court below formed the opinion that the prosecution has succeeded in establishing the case beyond reasonable doubt and convicted and sentenced the accused as already mentioned.

7. Assailing the conviction, learned counsel appearing for the appellant pointed out that the appeal will have to be allowed on a very short ground. Learned counsel also pointed out that no forwarding note has been produced and more over in this case, there is nothing to show the sample seal used by the officer concerned so as to ensure that the sample that had reached the laboratory is the sample taken from the contraband seized from the possession of the accused. This vital link, according to the learned counsel is

missing in the case on hand and that vitiates the prosecution case.

8. Learned Public Prosecutor on the other hand tried to sustain the conviction and sentence by pointing out that the court below has appreciated the evidence of P.Ws. 1 and 2 and found that Ext.P1 is the testimony of what had transpired at the place and it is the contemporaneous document. Further prompt production of the articles and the accused before court further guarantees that the incident had occurred as alleged by the prosecution. The non-availability of specimen seal, according to the learned Public Prosecutor is only a technical aspect and it need not override the overwhelming evidence available in the case so as to find the accused guilty.

9. How one would wish that one could agree with the learned Public Prosecutor. The evidence regarding detection, sampling etc are available in the testimony of P.Ws.1 and 2. They speak about having received the

information and gone to the place, intercepted the accused and seized the can and also sampling. Their version about the incident is uniform, cogent and convincing. The prompt production of the accused and the articles before court also lend credence to the prosecution case.

10. However, the prosecution for reasons best known to it, thought it unnecessary to produce the forwarding note which should normally contain the seal used for sealing the sample which has been sent for chemical analysis. One would have been satisfied had Ext.P1 mahazar atleast mentioned about the sample seal. That is also not available in the case on hand.

11. In the decision reported in Krishnan v. State (2015(2) K.L.T. 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.”

12. In the decision reported in *Majeedkutty v. Excise Inspector* (2015 (1) K.L.T. 624), it was 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.”

13. The importance or the necessity to have a sample seal in the forwarding note is highlighted in the above decisions. One, as already noticed, could have been satisfied that had there been a sample of the seal affixed in Ext.P1 mahazar. In the absence of either of these, as noticed in the above decisions, it is not possible to come to the conclusion that the sample which reached the laboratory is the sample taken from the contraband article seized from the possession of the accused. If that be so, as held in the above decisions,

the accused is entitled to acquittal.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.