

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. 122 of 2006

AGAINST THE JUDGMENT IN SC 552/2001 of ADDL. DISTRICT & SESSIONS
COURT (ADHOC)-I, KOLLAM DATED 29.12.2005

APPELLANT/ACCUSED:

VIDHYADHARAN, SON OF KUNJUPILLAI,
PUTHENPURAYIL VEEDU, KALLELIBHAGAM VILLAGE,
KARUNAGAPALLY, KOLLAM.

BY ADVS.SRI.S.SUDHEESHKAR
SRI. K.SIJU

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
KARUNAGAPALLY EXCISE RANGE OFFICER
THROUGH 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.122 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 55(a) and 8 of Abkari Act. He was found guilty of the offence under Section 8(2) of Abkari Act and was therefore convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for one year. Set off as per law was allowed.

2. The incident in this case is said to have occurred on 17.02.1998. On the relevant date, PW1 was functioning as Preventive Officer of Karunagappally Excise Circle Office. He along with PW3 and other officers had gone for routine patrol duty on 17.02.1998 and when they reached before the brick klin of one Sreedharan Pillai, accused was seen coming along the road carrying a can having a capacity of 2½ liters. Seeing the Excise Officials, he tried to turn around and escape. Feeling suspicious,

he was intercepted and can was seized from his possession. It contained 1½ liters of liquid. On examination of the liquid by taste and smell, it was found that it was arrack. PW1 arrested the accused and seized the contraband article and prepared Ext.P1 mahazar. Ext.P2 is the arrest memo. He had the contraband article sealed and labeled in accordance with law. He entrusted the article and accused to PW4. PW4, the then Excise Inspector of Karunagappally Excise Range, on the basis of Ext.P1 mahazar, registered Crime No.19/98 against the accused as per Ext.P3 occurrence report. He had the accused and articles seized produced before court and the property list prepared is Ext.P4. He had obtained Ext.P5 chemical analysis report. Investigation was completed by PW5 who laid charge before court.

3. 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, committed the case to Sessions Court, Kollam. The said court made over the case to Additional District and Sessions Court (Adhoc)-I, Kollam for trial and disposal. The latter court, on receipt of records and on

appearance of the accused, framed charge for the offence under Sections 55(a) and 8 of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

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

5. 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 claimed that he is innocent.

6. 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 adduce no evidence.

7. Presumably impressed by the evidence of PWs 1 and 3 and also the fact that Ext.P1 mahazar, contemporaneous document, narrates what had transpired at the spot in detail and that the accused and contraband article were produced before court promptly persuaded the court below to hold against the accused. He was convicted and sentenced as already mentioned.

8. Learned counsel appearing for the appellant, assailing

the conviction and sentence, pointed out that there is absolutely no evidence in the case as to who had taken sample, from where it was taken and when it was taken. To add to the agony of the prosecution, according to the learned counsel, there is no forwarding note prepared in the case and there is no clue about the seal used by PW1. These vital aspects have been omitted to be taken note of by the court below and that has resulted in a wrong finding being entered into.

9. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 1 and 3 are sufficient in law to fasten liability on the accused. There is no suggestion to PWs 1 and 3 that they had any axe to grind against the accused and that they had not actually recovered the contraband article. In the absence of any evidence to show that PWs 1 and 3 had anything to hold against the accused, there is no need to doubt the seizure. The evidence is to the effect that sample was taken from court and sent from court. It could not be said that there is no sample. Accordingly, it is contended that conviction and sentence have only to stand.

10. Even assuming that PWs 1 and 3 are believed in full, all that the prosecution has been able to make out is that the contraband to the tune of 1.5 liters has been seized from the possession of the accused. One may also accept the fact that Ext.P1 mahazar, contemporaneous document, gives all the details. So also prompt production of accused and contraband before court further gives credit to the prosecution version of the incident. That is not sufficient. As rightly pointed out by the learned counsel for the appellant, there is no evidence at all to show when the sample was taken, who had taken sample and from where sample was taken.

11. Admittedly, evidence of PWs 1, 3 and 5 would clearly show that no sample was taken by the Excise Officials and sample was taken from court after the entire contraband was produced before court. If that be so, the person who had taken sample from the court ought to have been examined by the prosecution. There is no evidence in that regard.

12. Apart from the above fact, yet another fact is non production of specimen seal and also non production of

forwarding note in the case on hand. Consequence of non production of specimen seal and forwarding note was considered in the decisions in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624) and in **Krishnan vs. State** (2015 (2) KLT SN 8).

13. 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.”

14. 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.”

15. It is very clear from a reading of the above decisions that the availability of specimen seal assumes considerable significance for the simple reason that that is the only guarantee the court has to ensure that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. In the absence of specimen seal, it may not be possible for the court to come to such a conclusion. Applying the principles laid down in the decisions cited above, it necessarily follows that non marking of forwarding note and non availability of sample seal is fatal to the prosecution case.

In the result, 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 offence. 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

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P.A to Judge.