

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

CRL.A.No. 131 of 2006 ()

AGAINST THE JUDGMENT IN SC 648/2000 of ADDL. SESSIONS COURT
FAST TRACK-IV, THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:

APPU, S/O. PADMANABHAN,
THOTTANKARAVILA VEEDU, KODUMON,
CHITTATTINKARA DESOM,
CHIRAYINKEEZHU TALUK.

BY ADV. SRI.J.JAYAKUMAR

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
04-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 131 of 2006

Dated this the 4th day of December, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 8(1) and (2) of the Abkari Act. He was found guilty. Accordingly, he was convicted and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/–, in default, to undergo rigorous imprisonment for three months.

2. The prosecution story is that on the date of occurrence, P.W.4 along with P.W.3 and other officers were on patrol duty and when they reached near the house of one Girija on the Municipality road, they happened to see the accused coming along the way holding a can. Seeing the excise party, he tried to escape. He was intercepted and in the presence of the witnesses who were available then, the can was seized. The can had a capacity of 2 ½ litres and it was full

of liquid. By tasting and smelling the same, it was identified as arrack. The mahazar was prepared at the spot. Thereafter, P.W.4 and others returned to the excise office with the accused, articles and documents and registered Crime No. 1 of 1999 as per Ext.P6 occurrence report. He also produced the accursed, articles and the documents before court. Ext.P1 is the mahazar prepared by him. He also made a requisition for sending the articles for chemical examination. Property list prepared by him is Ext. P8.

3. Most of the investigation was conducted by P.W.5, who recorded statements of witnesses and he obtained Ext.P9 chemical analysis report. Final charge was laid by P.W.4.

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, Thiruvananthapuram

under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court Fast Track No.IV, Thiruvananthapuram 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 5 examined and had Exts.P1 to P9 marked. M.O.1 was got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C., wherein 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 chose to adduce no evidence.

6. Accepting the evidence of P.Ws. 3 and 4 and also placing reliance on the Ext.P1 mahazar said to have been prepared at the spot and also the fact that the accused and the articles were promptly produced before court, the lower court came to the conclusion that there is no room for suspicion and that the prosecution has established its case. Conviction and sentence therefore followed.

7. Assailing the conviction, learned counsel for the appellant contended that certain crucial aspects have been omitted to be noticed by the court below which have a material bearing on the issue. It is significant to notice, according to the learned counsel, that neither P.W.3 nor P.W.4 say about having taken samples at the place of occurrence. Ext.P1 mahazar also does not say so. So, it is clear that no sample was taken by the excise officials. Then the question arises as to who has taken the sample and from where it was taken. Further it is pointed out that in the forwarding note alleged to

have been prepared by P.W.4, there is no case that sample seal was affixed. The property list Ext.P8 clearly shows that the entire articles seized were produced before court. If one is to assume that sample was taken from the court, learned counsel pointed out that, it is mandatory that the clerk who was authorised to take sample ought to have been examined by the prosecution. These latches on the part of the prosecution is fatal and vitiates the conviction.

8. Learned Public Prosecutor on the other hand contended that whatever may be the latches pointed out by the learned counsel for the appellant, the court below has chosen to accept the evidence of P.Ws. 3 and 4 and the contemporaneous document and that is sufficient to show that the offence has been made out and it cannot be said that the finding is perverse. It is a possible finding and therefore, it has to stand.

9. Even assuming that P.W.3 is fully believed and it is accepted that they detected the offence, the question pointed out by the learned counsel for the appellant remained to be answered. It may be assumed for argument sake that the contraband article infact was seized from the possession of the accused. Even going by the evidence of P.Ws. 3 and 4 and Ext.P1 mahazar, it is very evident that no sample was taken by the excise officers. Ext.P7 is the forwarding note and there is no request therein before the court to take sample, nor does it contained the sample seal also.

10. 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.”

11. It is by now well settled that in a case where sample is taken from the court, it is incumbent on the part of the prosecution to examine the person who had taken the sample to show that proper sampling was done. In the case

on hand, there is no evidence as to who had taken the sample and from where and when it was taken. That creates reasonable doubt in the mind of the court as to whether the sample which reached the laboratory is the sample taken from the contraband article seized from the possession of the accused. There is difference between 'may be' and 'must be'. Law insists for 'must be'. To crown it all, sample seal is also not available.

12. Therefore, reliance could not be placed on Ext.P9 to come to the conclusion that the accused was carrying the contraband article.

13. Merely because P.Ws. 3 and 4 say about detection, that may not be sufficient in law to warrant conviction in the light of the infirmities, latches and lacuna pointed out above.

For the above reasons, this Court is unable to uphold the conviction of the accused by the lower court.

Hence 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.