

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 25TH DAY OF NOVEMBER 2015/4TH AGRAHAYANA,
1937

CRL.A.No. 132 of 2006 ()

AGAINST THE JUDGMENT IN SC 644/2004 of ADDL.SESIONS COURT
(ADHOC)-II, THODUPUZZHA.

APPELLANT(S)/ACCUSED NOS.2 & 3:

1. MANI, S/O. JOSEPH, KANAYAKAYIL HOUSE,
KALKOONTHAL VILLAGE, ERATTAYAR KARA.
2. ROSILY, W/O. MANI,
KANAYAKAYIL HOUSE, KALKOONTHAL VILLAGE,
ERATTAYAR KARA.

BY ADVS.SRI.C.M.TOMY
SRI.MATHEW SKARIA

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
25-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 132 of 2006

Dated this the 25th day of November 2015.

JUDGMENT

Three persons were sought to be prosecuted for the offence under Section 8(1) and (2) and 55(a) and (b) of the Abkari Act. Among them, the first accused absconded and the second and third accused stood trial. They were found guilty of all the offences and they were convicted and sentenced to undergo rigorous imprisonment for two years each and to pay fine of Rs.1,00,000/- each, in default, to undergo rigorous imprisonment for six months each.

2. The incident in this case occurred on 13.11.1999. On that day P.W.7, the then Circle Inspector of Kattappana Police Station, received information that illicit distillation was going on near Irattayar and he set out for an enquiry about the same. He reached a shed which is owned and possessed by accused Nos. 2 and 3. He found illicit

distillation being carried on there. Accused Nos. 2 and 3 and another person were present there. Accused Nos. 2 and 3 ran away. P.W.7 found several materials used for distillation in the place of occurrence. The first accused was found in the shed and he was arrested. P.W.7 identified the contents as arrack and wash. He claims to have taken sample of both the items. He took 180 ml arrack as sample and also took 375 ml wash as sample. Search list prepared for the said purpose is Ext.P1. He also seized all the articles used for illicit distillation. P.W.7 says that he had sealed and labelled the samples as well as the articles seized from the place of occurrence. He has done a good portion of the investigation, recorded statements of witnesses and prepared property list which is Ext.P6. He says that from the date of detection till the articles were produced before court, they were in his custody. Subsequent investigation was conducted by the successor in office of P.W.7. He obtained chemical analysis report, namely, Ext.P4 and laid charge before court.

3. The court, before which final report was laid, took cognizance of the offences and on finding that the offences were exclusively triable by a court of sessions, committed the case to Sessions Court, Thodupuza. That court made over the case to Additional Sessions Court (Adhoc)-II, Thodupuzha for trial and disposal. 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) and Sections 55(a) and (b) 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 7 examined and had Exts. P1 to P7(a) marked. M.Os. 1 to 7 were got identified and marked. After the close of the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. wherein they denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their

defence. They chose to adduce no evidence.

4. The court below was considerably influenced by the evidence of P.Ws. 5 and 7, the two officers who were in the team which detected the offence, and also the fact that the documents were promptly produced before court, and came to the conclusion that the offences have been established. Accordingly, the conviction and sentence followed.

5. Learned counsel appearing for the appellants pointed out that the conviction is totally unsustainable in law for more than one reason. First of all, learned counsel pointed out that the detection of the offence was on 13.11.1999, and the articles seized were seen to have been produced before court only on 30.12.1999, i.e., after more than one month of seizure. No reasonable explanation was offered for the delay, except P.W.7 asserting that the articles were in his custody. Learned counsel relied on the decision reported in *Ramankutty v. Excise Inspector, Chelannur Range* (2013(3) KHC 308).

6. It was then contended that there is no forwarding note marked by the prosecution and therefore there is no sample seal available for ascertaining whether the samples sent for analysis are the samples taken from the contraband articles seized from the possession of the accused. For the above proposition, learned counsel relied on the decisions reported in *Krishnan v. State of Kerala* (2015 (2) K.L.T. SN 8) and *Majeedkutty v. Excise Inspector* (2015 (1) K.L.T. 624). These are sufficient, according to the learned counsel to show that the prosecution should fail. These vital aspects have been omitted to be noticed by the court below and that has resulted in an unmerited conviction.

7. Learned Public Prosecutor on the other hand contended that the evidence of P.Ws. 5 and 7 are clear and cogent and convincing enough and there is no manner of doubt that the articles were seized from the possession of the accused. The mere fact that there was some delay in producing the articles before court does not have of much

significance when it is shown that the accused were produced before the court on the same day. So is the case of failure to produce the forwarding note. They are technical grounds and the oral testimony of P.Ws. 5 and 7 is supported by Ext.P1 search list. At any rate, the court below has chosen to accept the evidence furnished by the two witnesses and found it sufficient to hold the accused guilty. Accordingly, it is contended that no grounds are made out to warrant interference.

8. True, if one goes through the evidence of P.Ws. 5 and 7, it can be seen that some articles used for distillation were seized from the possession of the accused so also the contraband article. One cannot omit to note that the articles were seized from a particular house. The prosecution case is that accused Nos. 2 and 3 were actually engaged in illicit distillation.

9. It is by now well settled that the officer concerned has to produce the seized articles as expeditiously

as possible. This Court is not unaware of the decision in which the word 'forthwith' was considered and it was held that it does not mean immediately, it only means that if some delay is there, it should be properly explained. Here, the detection was on 13.11.1999. From the endorsement in the property list which is marked as Ext.P6, it is seen that the properties were received by the court only on 30.12.1999. Even though P.W.7 states that the articles were in his custody, it is difficult to believe that statement. Assuming that it is in safe custody, that does not enable the officer concerned to produce the same at his will and pleasure. One must remember that the property includes the samples also.

10. The forwarding note will contain a column for affixing specimen seal. In the case on hand, it is not even seen produced. The consequence of not producing the forwarding note is highlighted in the decisions reported in *Krishnan v. State of Kerala* (2015(2) K.L.T. SN 8) and *Majeedkutty v. Excise Inspector* (2015(1) K.L.T 624). In the

decision in Krishnan's case (*supra*), 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. In the decision in Majeedkutty's case (supra), 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.”

12. Equally well founded is the submission made with regard to delay. In the decision reported in *Ramankutty v. Excise Inspector, Chelannur Range* (2013(3) KHC 308) it was observed that unexplained delay in producing the contraband before the Court after seizure is fatal to the prosecution case. In the said decision it was also observed that non-compliance of the mandatory requirements to be followed at the time of arrest and non-disclosure of the custodian of the contraband during the delayed period make the delay decisive and fatal to the prosecution case. The decision relied on by the learned counsel for the appellant

applies to the facts of this case.

13. Merely because P.Ws. 5 and 7 gave a parrot like version, it does not follow that the prosecution has succeeded in establishing the case against the accused as there exists serious doubt regarding the prosecution case and hence the accused is entitled to benefit of doubt.

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 are acquitted of the charges levelled against them. Their bail bonds shall stand cancelled and they are set at liberty.

P. BHAVADASAN,
JUDGE

sb.