

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

CRL.A.No. 140 of 2006 ()

**AGAINST THE JUDGMENT IN SC 451/2004 of ADDITIONAL DISTRICT & SESSIONS
COURT(ADHOC)-III, KOLLAM DATED 23-12-2005**

CP 168/2003 OF JUDICIAL FIRST CLASS MAGISTRATE - I, KARUNAGAPPALLY

APPELLANT(S)/ACCUSED::

**DEVARAJAN, S/O. PAPPU,
DEVARAJAMANDIRATHIL, PULIYOOR VANCHI, KIZHAKKUMURI
THODIYOOR VILLAGE, KARUNAGAPPALLY TALUK
KOLLAM DISTRICT.**

BY ADV. SRI.B.MOHANLAL

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA,
REPRESENTED BY THE EXCISE INSPECTOR
KARUNAGAPPALLY EXCISE RANGE, KOLLAM DISTRICT
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 140 of 2006

Dated this the 15th day of December, 2015

J U D G M E N T

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

2. The prosecution case as disclosed from the records is that on 15.07.2002, PW1 was functioning as the Assistant Excise Inspector. As usual, on that day also, he and officers under him had gone out for routine patrol duty. When they reached near the Varambuveettill Saw Mill, the accused was seen coming from the opposite direction carrying a plastic bag with him. Seeing the Excise vehicle, he tried to hide himself. He was intercepted and the bag was seized. When the contents were examined, it was found

to contain a bottle containing some sort of a liquid. They opened the bottle and by taste and smell, they identified it as arrack. He was arrested as per Ext.P1 arrest memo. He took a sample of 200ml in a bottle of 375ml capacity and sealed and labelled the same. The label contained the signatures of PW1, accused and the witnesses. The balance contraband article was also sealed and labelled as stated above. Ext.P3 is the mahazar prepared on the spot. He then, the seized article, the accused and the documents, went to the Range office at Karunagappally. PW5 was the Excise Range Inspector at the relevant time. He took over the accused and the documents produced by PW1 and on that basis, registered crime as per Ext.P4 occurrence report. The accused and the document were produced before the court. PW6 conducted further investigation in the case. He took statements of witnesses, obtained Ext.P8 Chemical Analysis Report, 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, Kollam under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional District & Sessions Court (Adhoc)-III, Kollam 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(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 6 examined and had Exts.P1 to P8 marked. MOs 1 and 2 were 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 court below, greatly impressed by the evidence of PWs 1 and 2, the two official witnesses taken along with Ext.P3 mahazar, came to the conclusion that the prosecution has succeeded in establishing the case against the accused. Accordingly, convicted and sentenced him as already mentioned.

9. Assailing the conviction, the learned counsel for the appellant contended that PW1 being an Assistant Excise Inspector was incompetent at the relevant time to detect the offence as he was not an authorised officer or a notified officer. Any act done by him regarding detection of offence or investigation, cannot be recognized in law. Any act done by such an incompetent officers is *non-est* in law, no valid proceedings can lie on the basis of such invalid acts. For the

above propositions, the learned counsel relied on the decisions reported in **Unni v. State of Kerala** (2009 (2) KHC 661). Attention was also drawn to the fact that no forwarding note is seen marked in the case and there is no guarantee that specimen sample seal has been shown in the forwarding note. This is also an essential requirement for a successful prosecution. For the above proposition, the learned counsel relied on the decision reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624) and **Krishnan v. State** (2015 (2) KLT SN 8).

10. The learned Public Prosecutor on the other hand contended that the evidence of PWs 1 and 2 taken along with the contents of Ext.P3 mahazar would clearly show that contraband was seized from the possession of the accused as alleged by the prosecution. Once that is established, other technicalities shall not stand in the way of finding the accused guilty. There are no grounds made out to interfere

with the conviction and sentence passed by the court below.

11. Even though the argument advanced by the learned Public Prosecutor may look attractive at the first blush, it is baseless and without any merits.

12. In the decision reported in **Unni v. State of Kerala** (2009 (2) KHC 661), it was held as follows:

“To prove the guilt of the accused for the possession of the contraband, that is, five litres of arrack in a jerry can, as alleged, the prosecution relied entirely on the evidence of two Police officers connected with the detection and seizure of the contraband, who were examined as PWs 1 and 2. PW 1, Asst. S.I. Of Police, who detected the crime and seized the contraband, had no authority to do so, is the attack raised by the learned counsel for the accused, relying on the notification of SRO No. 321/1996 and also the decision rendered by this Court in *Sabu v. State of Kerala*, 2007 (3) KHC 753: 2007 (4) KLT 169. If it was a case of accidental detection without prior information, then it could be stated that any police officer was expected to prevent the commission of any offence and taking the

offender into custody. But this was a case, even according to the prosecution, PW 1, the Asst. S.I. of Police received prior information of sale of illicit arrack in the residential building of the accused. He proceeded to that spot, pursuant to that information indicated that he went there to have a raid of the building, and, search the place. When a raid over the residential building for detection of Abkari offence is involved, necessarily and inevitably the mandate covered by S.31 of the Act applies with full force. There is nothing in evidence to show that PW1 complied with the formalities for conducting search over the residential building of the accused. Immediately on getting information, he rushed to the spot and reaching there, found the accused with a jerry can beside the courtyard of his building, seized the contraband into custody and arrested him, is the prosecution case. As per S.4 of the Abkari Act, the Government had authorised only certain Officers of the State to detect or investigate the offences contemplated under the Abkari Act. The Asst. S.I. of Police, as per the notification issued by the Government, is not authorised nor empowered to detect or investigate the abkari offences. Having regard to the fact that PW 1 went over to the

residential building of the accused pursuant to information that sale of illicit arrack was conducted there, prima facie, indicating that he went over to proceed with a search of that building, that too, without complying with the formalities, it follows that whatever acts performed by him pursuant to reaching the spot could not be taken as having been done with the sanction of law. No doubt, illegality or irregularity in a search will not by itself vitiate the evidence collected by the search and there is no bar in relying upon the evidence collected in such search to inculcate the accused. But in the given case, what has come out is that the prosecution at a later stage had developed a case that at the relevant time, PW 1, the Asst. S.I. of Police was in charge of the police station, and as such he was competent to detect a crime and seize the contraband. PW 1 has no such case when he was examined before the Court. So much so, the assertion of PW 4 that PW 1 at the relevant time was in charge of the S.I. of police since that officer was on leave cannot be given much value. So, there is much force in the submission of the learned counsel for the accused that PW 1 was not an authorised officer competent to detect and investigate an offence under the Abkari Act,

and as such the detection made by him was unauthorised. The accused in the given facts is entitled to the benefit of doubt since PW 1 was not empowered to detect and investigate the crime. So much so, it has to be concluded that the conviction and sentence imposed against the accused are liable to be set aside, and I do so. The accused is found not guilty and acquitted of the offence under S. 55 (a) of the Abkari Act. Fine amount, if any, remitted by the accused shall be refunded to him. Appeal is allowed.”

13. It is quite evident from the above decision that in the notification then in existence, admittedly, an Assistant Excise Inspector was not a competent officer to detect or investigate an offence under the Abkari Act. He became a competent officer only in the year 2009 and a notification was also issued in this regard. In the light of the above decision, it follows that the detection and all other acts done by PW1 are bad in law and has no legal sanction. This is sufficient to set aside the conviction.

14. It is also seen from the record that no forwarding note is seen marked and therefore the authenticity of the sample sent of chemical examination is also in doubt.

15. In the decision reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), it was held as follows:

“18. Yet another infirmity in the prosecution case is that there is no request forwarding note either produced or marked to indicate that a request was made to the Magistrate to send the sample bottle to the chemical examiner for analysis. P.W.6 who conducted the investigation, has no case that he had made any such request or had filed any forwarding note. Likewise, P.W.1 also has no case that he had made a request to the Magistrate to send the sample bottle to the chemical examiner. Ext.P4 certificate of chemical analysis dated 24.11.1997 is relied on by the prosecution to show that the sample bottle was duly despatched to the chemical examiner for analysis. In the absence of any forwarding note or requisition, it is not explained as to how the Magistrate forwarded a sample bottle to the chemical examiner as per his covering letter dated 19.8.1997 referred to in Ext.P4

certificate. Even the office copy of the covering letter has not been produced. The thondi section clerk who was the custodian of the properties before the Magistrate, was not examined to prove matters such as the date of receipt of the property before the Magistrate, the condition in which those properties were received in court including the fact whether a sample bottle was received and if so, whether the seals if any on such bottle were in tact, the date of despatch of the sample to the chemical examiner and the nature of the custody of the sample bottle until then. The prosecution can succeed in securing a conviction against the appellant only if it is shown that the sample which was subjected to chemical analysis as evidenced by Ext.P4 certificate was the very same sample which was drawn from the bulk quantity of contraband liquor allegedly held by the accused and which after change of hands, eventually reached the hands of the chemical examiner.”

16. 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.”

17. In the decision reported in **Majeedkutty v. Excise Inspector** (2015 (1) KLT 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.”

18. One only needs to read the above decisions to understand the significance and importance of providing the sample of the seal in the column provided for that purpose in the forwarding note. That probably is the only guarantee which the court can have regarding the authenticity of the sample sent for chemical analysis. This Court had occasion to hold that in the absence of forwarding note and in the

absence of sample seal, it cannot be said that the sample sent for the chemical analysis is the sample taken from contraband seized from the possession of the accused. There is no reason as to why the principle laid down in the above decisions should not be applied to the facts of the present case.

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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P.A. to Judge