

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. 167 of 2006

AGAINST THE JUDGMENT IN SC 940/2000 of ADDL.S.C. FOR TRIAL OF
ABKARI ACT CASES, NEYYATTINKARA.

APPELLANT(S)/ACCUSED NO.2:

BIJU, S/O. THANKAYYAN,
PERUVILA, CHIRAKKARA PUTHEN VEEDU,
PARASUVAIKKAL DESOM,
PARASUVAIKKAL VILLAGE.

BY ADV. SRI.S.SAJU

RESPONDENT(S)/RESPONDENT:

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
06-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 167 of 2006

Dated this the 6th day of November, 2015.

JUDGMENT

Three persons were prosecuted for the offence punishable under Section 55(a) of the Abkari Act. Among them, first and the third accused were acquitted. To be more precise, the first accused was acquitted by the trial court itself, while the third accused was able to gain an acquittal from this Court. In this appeal, we are concerned with the second accused who was convicted and sentenced to undergo rigorous imprisonment for a period of two years and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for three months. Set off as per law was allowed.

2. The incident in this case is said to have occurred on 2.5.1988. P.W.3 was then a Police Constable attached to Parassala Police Station. He says that on that day by about 4

p.m. He along with other Constables and also the Sub Inspector of the Police Station set out for law and order patrol duty. When they reached Parassala junction, they received reliable information that illicit liquor sale was being carried on in the compound of one Vincent. When they reached the place of occurrence, they saw three persons with cans. One took to his heels and when the other two were tried to do the same, they were effectively intercepted. The second accused had a white can with him. That was seized and when the article contained in the can was verified, the Sub Inspector was convinced that it was arrack. The can in the possession of the other accused were also seized. Ext.P2 is the mahazar prepared by the Sub Inspector of Police at the place of occurrence. After returning to the police station, crime was registered and it appears that the articles and the accused were produced before court immediately thereafter.

3. The predecessor-in-interest of P.W.4 conducted investigation of the case. He had prepared the first information report, property list etc. He completed investigation and charge was laid before court.

4. The court which took cognizance of the offence found that the offence is exclusively triable by a court of sessions and accordingly committed the case to Sessions Court, Thiruvananthapuram under Section 209 Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Neyyattinkara , which on receipt of records and on appearance of the accused before it framed charge for the offence punishable under Section 55(a) of the Abkari Act. The accused present before court pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 5 examined and had Exts.P1 to P7 marked. M.Os. 1 and 2 were got identified and marked. After the close of the prosecution evidence, the accused was questioned

under Section 313 Cr.P.C. 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.

5. The court below, presumably influenced by the evidence of P.Ws.3 and 4 and also the prompt production of articles before court and also the evidence of thondi clerk, namely, P.W.5, came to the conclusion that the offence has been established and convicted accused Nos.2 and 3 before it. As already stated, this court in Crl.Appeal No. 759 of 2006 by judgment dated 14.11.2006 had acquitted the third accused.

6. Challenging the conviction of the second accused, learned counsel appearing for the appellant, contended that this appeal will have to succeed on a very short ground. There is no clear evidence as to the sampling of the

contraband sent for chemical analysis and also that no forwarding note is produced in this case. According to the learned counsel, the court cannot be convinced of the fact that the sample that reached the laboratory is the sample taken from the contraband seized from the possession of the accused. In support of his contention, the learned counsel relied on the decisions reported in Krishnan v. State (2015(2) K.L.T. SN 8) and Majeedkutty v. Excise Inspector (2015 (1) K.L.T. 624).

7. It is also contended that it is surprising to note that the detecting officer has not been examined and no cogent reason has been given. Only the person who accompanied the detecting officer has been examined. There is no proper investigation in the case and that also adds to the agony of the prosecution case. Further, it is pointed out that going by the endorsement on the property list, it would appear that the property when produced before court was directed to

be returned and kept in the police station on the very same day and there is no direction to take sample, even though learned counsel submits, P.W.5, the thondi clerk says so. But there is no evidence regarding the same. Accordingly, it is contended that the evidence is bad.

8. Learned Public Prosecutor took pains to substantiate the conviction. Learned Public Prosecutor contended that the evidence of P.W.3 taken along with the evidence of P.W.5 and Ext.P2 are sufficient to show that the incident has occurred as alleged. Further, it is contended that the prompt production of the accused persons along with the articles seized is sufficient to show the genuineness of the prosecution story. At any rate, according to the learned Public Prosecutor, the court below was impressed with these items of evidence and it could not be said that the court below has erred in any manner unless it is shown that the appreciation of evidence is perverse or of such a nature that interference may

not be justified.

9. As things now stand, the second accused who is the appellant before this Court, alone stands convicted and sentenced as of now. The other two have secured acquittal.

10. P.W.3, is the police constable who had accompanied the Sub Inspector while on patrol duty. During that patrol duty, they have detected the offence. It is significant to notice that the first accused was acquitted by the trial court itself.

11. As regards the detection and subsequent proceedings, we have only the evidence of P.W.3. The independent witnesses turned hostile. There is not of much investigation in the case also. P.W.5 speaks about the investigation said to have been done by his predecessor in office. There is no reason given for not examining the person who has conducted the investigation. Further, even though P.W.5 says that she had taken sample from the contraband

produced before court, Ext.P5 does not indicate that. Further, to crown it all, there is no forwarding letter produced by the prosecution to show the nature of the sample seal said to have been affixed on the sample. It will be appropriate to refer to the decisions cited by the learned counsel for the appellant.

12. 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.”

13. 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.”

14. A reading of the above decisions will clearly show that the production of the forwarding note along with the sample seal which is alleged to have been used by the officer concerned is a must so as to ensure that the court can draw a presumption that the seal affixed on the sample sent for chemical analysis and the sample seal in the forwarding note are one and the same. In other words, the court can say that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused only on getting sample of seal affixed. This important aspect is not available in the case on hand. Further,

the arrest memo is also not produced. Therefore, this Court is unable to uphold the conviction and sentence of the second accused.

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

P. BHAVADASAN,
JUDGE

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