

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 15TH DAY OF OCTOBER 2015/23RD ASWINA, 1937

CRL.A.No. 171 of 2006 ()

**AGAINST THE JUDGMENT IN SC 2014/2001 of ADDITIONAL SESSIONS COURT, FAST
TRACK (ADHOC)-II, TRIVANDRUM**

APPELLANT(S)/ACCUSED:

**NAZARUDHEEN, S/O.SHAMSUDHEEN,
AGED 40 YEARS, VARUVILA VEEDU, MANAMBOOR
VILLAGE, CHIRAYINKEEZH, THIRUVANANTHAPURAM
DISTRICT (CHIRAYINKIL).**

**BY ADVS.SRI.P.K.MUHAMMED
SRI.S.VIJI**

RESPONDENT(S)/COMPLAINANT:

- 1. STATE OF KERALA, REPRESENTED
BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,]
ERANKULAM.**
- 2. STATE, REPRESENTED BY EXCISE INSPECTOR,
EXCISE RANGE, VARKALA, THIRUVANANTHAPURAM
DISTRICT.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 171 of 2006

Dated this the 15th day of October, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) and (2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of ₹1 lakh with a default clause of six months.

2. The incident in this case is said to have occurred on 07.12.1999. PW4 was the preventive Officer of the Attingal Excise Circle Office at the relevant time. On that day at about 7.00 p.m., while on patrol duty, when he reached near the Kavalyur bridge, he happened to see the accused coming along the road carrying a plastic sack. He was intercepted and the plastic sack was seized and examined. It was found to contain 50 covers of liquid each containing about 150 ml. One of the covers was opened and by taste and smell, it was revealed that it was arrack. The

accused was carrying 50 such covers and the total quantity was 7½ litres of arrack. The accused was arrested and the sample was sealed and labelled in accordance with law. A mahazar was also prepared. On the sample as well as on the balance quantity, seal was affixed and the labels containing the signature of the accused, witnesses and PW4 were affixed. Ext.P4 is the arrest memo. PW4 says that he then returned to the Range Office and entrusted the articles, the accused and the records to PW5. PW6 says that during 1999, he was the Preventive Officer of Varkala Range. On 07.12.1999 at about 7.00 p.m., the accused, the seized articles and the records were produced before him and he received them. He prepared occurrence report which was marked as Ext.P6. He prepared Ext.P7 property list. PW2 says that he 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, Thiruvananthapuram under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track (Adhoc)-II, Thiruvananthapuram for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offence punishable under Section 8(1) and (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 7 examined and had Exts.P1 to P7 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 was 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. Based on the evidence of PWs 4 and 7 and the contemporaneous documents i.e. Ext.P1 mahazar, the court below came to the conclusion that the offence had been made out and found the accused guilty. Conviction and sentence followed.

9. Assailing the conviction and sentence, Sri. P.K. Mohammed, the learned counsel for the appellant pointed out that there is a grave flaw in the whole proceedings. It is seen from the records that the forwarding note for which sample is said to have been sent for chemical examination, is not seen produced. It is the vital document as far as the accused is concerned since the seal contained therein is the only guarantee which the accused have to ensure that the sample sent for chemical analysis is the sample taken at the spot or in the court as the case may be. The learned

counsel drew attention of this Court to the fact that none of the officers of the department say about having prepared the forwarding note or filed it before court. In the absence of such a document, the prosecution cannot succeed. For the above proposition, the learned counsel place reliance on the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8).

10. The learned Public Prosecutor contended that even assuming that the forwarding note is not prepared, that cannot have any impact on the case in the light of the evidence furnished by the other witnesses namely PWs 4 and 7. They get support from Ext.P1 mahazar prepared by PW4 at the time of detection. The prompt production of the accused, the articles and the documents before court also confirmed the veracity of the prosecution case. The court below has considered all these aspects and has come to the conclusion that the offence has been made out. This Court may not interfere on the sole ground that forwarding note

has not been produced.

11. The detection is done by PW4 and he was accompanied by PW7, who was the excise guard. Both of them give a uniform version about the incident. Both of them say that they were on patrol duty and when they reached near the Kavalayur Bridge, they saw the accused coming along with a sack. Feeling suspicious, he was intercepted and the sack was examined. It was found to contain certain packets of liquid. When one packet was opened, on smelling and tasting the liquid, it was revealed that it was arrack. He had 50 such packets with him each having about 150ml of the liquid. Thus, 7½ litres of contraband article was seized. Both of them speak about the preparation of Ext.P1 mahazar, the preparation of the arrest memo etc. PW6 speaks about the drawing up of occurrence report and the property list.

12. The court below chose to have accept the evidence of PWs 4 and 7 and also taking along with Ext.P1

mahazar, the lower court formed the opinion that the offence has been made out.

13. Much attention does not appear to have been given by the court below to the non production of the forwarding note. As rightly pointed out by the learned counsel for the appellant, the forwarding note has an important role to play in such proceedings. In the case on hand, none of the witnesses say that they had even drawn up the forwarding note and prepared a requisition to the court to send the articles for chemical analysis. Apart from the fact that no such documents is seen produced.

14. The forwarding note should contain a sample seal affixed on the article so that the court can be assured of the fact that on getting the chemical analysis report, if the seals are found to be in tact, the articles sent for analysis is the article seized from the accused at the relevant time. If that document is withheld, for the accused, there is no means to find out whether the sample sent is the sample taken at the

time of seizure.

15. The significance and importance of production of forwarding note was highlighted in the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8), wherein, 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.”

16. In the light of the above decision, the non production of forwarding note cannot be taken very lightly. This Court has held that it is one of the most important document the prosecution is bound to produce in order to sustain the prosecution. Apart from the fact that, in this case, the forwarding note is not seen produced and none of the officers speak about the preparation of requisition send to court for sending the sample for chemical analysis.

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