

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

CRL.A.No. 174 of 2006

AGAINST THE JUDGMENT IN SC 343/2005 of ADDITIONAL SESSIONS
COURT (ADHOC) FAST TRACK NO.I, THRISSUR.

APPELLANT(S)/ACCUSED:

BINOJ, S/O.ALUVAKKARA NARAYANAN,
KAVALLUR DESOM, AMBALLUR VILLAGE,
MUKUNDAPURAM TALUK.

BY ADVS. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
28-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 174 of 2006

Dated this the 28th day of October, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 58 of the Abkari Act. He was found guilty and therefore convicted and sentenced him to undergo rigorous imprisonment for three years and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for three months.

2. The incident in this case is alleged to have taken place on occurred on 12.6.2003. On that day P.W.3 who was the Preventive Officer attached to Irinjalakuda Excise Range along with P.W.4 and other officers had gone on routine patrol duty. When they reached near the house of one Kochappan by about 5.15 p.m., they happened to see the accused coming along the road with a can. He was intercepted and the can

was seized from his possession and examined the contents. The can had a capacity of 5 litres and the can contained liquid. The liquid was identified as arrack. The accused was arrested and P.W.3 took a sample of 200 ml contraband article seized in a bottle of 375 ml capacity. The sample was sealed and label was affixed containing the signature of the accused, independent witnesses and P.W.3. The rest of the contraband article was also sealed and labelled as was done in the case of sample. He prepared Ext.P1 mahazar. He returned to the Excise Office along with the accused, contraband article and the documents. P.W.3 handed over the accused and the articles seized to P.W.5, who was functioning as Excise Inspector at 8 a.m. on the next day. On the basis of Ext.P1, P.W.5 registered Crime No. 33 of 2003 under Section 8(1) and (2) of the Abkari Act. Ext.P4 is the occurrence report. The accused, the seized the article and the documents were produced before the court on the same day itself. He

prepared the forwarding note and sent it to court. He obtained the chemical analysis report Ext.P5 and the scene mahazar prepared by him is Ext.P6. He recorded statements of witnesses, completed investigation and laid charge before court.

3. The court, before which final report was laid took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thrissur under Section 209 Cr.P.C. after following the requisite procedures. The said court made over the case to IIIrd Additional Sessions Court (Adhoc) Fast Track No.1, Thrissur for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 58 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 6 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. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He added that while he was in his house, he was taken by force to the Excise Office and was falsely implicated in a case. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined D.W.1 and had Exts. D1 and D2 marked.

5. It appears that the lower court was greatly impressed by the evidence of P.Ws.3 and 4 and the narration of events in Ext.P1 mahazar and also the fact that the accused, documents and the articles were promptly produced before court thus making the prosecution case creditworthy and beyond doubt. Accordingly conviction and sentence followed.

6. Learned counsel appearing for the appellant assailed the conviction on a very short ground. According to the learned counsel, the forwarding note is not seen produced in the case and that is fatal to the prosecution. It is also highlighted that the description of the sample seal does not find a place in Ext.P1 mahazar also. Relying on the decision reported in Ravi v. State of Kerala (2011(3) K.L.T. 353), Majeedkutty v. State of Kerala (2015(1) K.L.T. 624) and Krishnan v. State of Kerala (2015(1) K.L.T. SN 8) learned counsel contended that the non-production of the forwarding note and also the absence of description of the specimen seal in the mahazar is fatal to the prosecution case and this aspect has been omitted to be noticed by the court below. In the light of the principle laid down in the above decisions, the conviction cannot stand.

7. Learned Public Prosecutor tried to sustain the conviction by pointing out that the contention now taken is a

technical one and cannot be accepted ignoring the convincing evidence furnished by P.Ws. 3 and 4 and the narration in Ext.P1 mahazar. In Ext.P1 mahazar P.W.3 has specifically stated that he has affixed his personal seal and that is sufficient in law to meet the requirements of law. The court below has thought it fit to accept the evidence of P.Ws. 3 and 4 and taken along with the other circumstances, namely, Ext.P1 contemporaneous document and also the prompt production of accused, the seized articles and the documents before court put the case beyond reasonable doubt and it is sufficient to warrant a conclusion that the accused is guilty.

8. True, the evidence of P.Ws.3 and 4 are uniform and consistent regarding the detection, seizure and preparation of documents. Even though they were cross-examined, nothing could be brought out to show that they were not speaking truth and there is inconsistency in their evidence to make the prosecution case doubtful. Further

Ext.P1 mahazar said to have been prepared by P.W.3 contained a detailed narration of events leading to the seizure of the contraband article, sampling etc. There is nothing to show that P.Ws. 3 and 4 had any oblique motive or axe to grind against the accused so as to falsely implicate him.

9. But it is surprising to note that even though P.W.3 says that the accused was arrested from the spot, he does not speak about the preparation of arrest memo nor is it seen produced in the case.

10. Learned counsel for the appellant is well founded in his contention that non-marking of the forwarding note and absence of details regarding sample seal looks fatal to the prosecution case. Even in cases where the forwarding note which does not contain the seal in the space provided for the same, this Court had occasion to hold that the prosecution fails on that ground. In fact, this Court had observed that the description of the seal should normally found a place either in

the mahazar or in the forwarding note so as to ensure that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused or in other words the authenticity of the sample depends upon the sample seal shown in the document.

11. In the decision reported in *Ravi v. State of Kerala* (2011(3) K.L.T. 353), it was held as follows:

“13. It is difficult for us to believe that PW4 had produced the properties on 25.08.1997 and the Thondy Section Clerk refused to receive the properties on the ground that he was too busy. Even assuming that such a thing happened, we would have expected the prosecution to examine the Thondy Section Clerk to substantiate the above explanation. For reasons best known to the prosecution the Thondy Section Clerk was not examined. If so, it cannot be assumed that the property was in the safe custody of PW4 until their production before Court after 16 days. There is the possibility that the properties would have been tampered with. The prosecution, in a case of this nature 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 by change of hands in a tamper-proof condition. (Vide State of Rajasthan v. Daulath Ram (AIR 1980 SC 1314) and Valsala v. State of Kerala (1993 (2) KLT 550 (SC). No conviction can be entered against the accused in a prosecution as the present one 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 (See Sathi v. State of Kerala (2007 (1) KLT SN 57 (C.No.82) and Sasidharan v. State of Kerala (2007 (1) KLT 720). There is no satisfactory link evidence to show that it was the same bottles seized from the appellant which eventually found their way into the hands of the Chemical Examiner and that there was no meddling or tampering with the bottles while they were in the custody of P.W.4. Hence the result of Ext.P7 Chemical Analysis cannot be applied against the appellant.”

12. 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.”

13. 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.”

14. As already observed, in the case on hand there is no description of the seal in Ext.P1 mahazar except that it is

seen stated therein that P.W.3 had affixed his personal seal. For reasons best known to the prosecution, they felt it unnecessary to have the forwarding note marked. Therefore, it is not possible to come to the conclusion that the sample sent for chemical examination is the sample taken from the contraband article seized from the possession of the accused. The necessity to have evidence regarding identity sample seal is highlighted in the decisions referred to above. There is no reason as to why the principles laid down in those decisions shall not be applied to the facts of this case. In the absence of arrest memo, in the absence of forwarding note and also in the absence of seal affixed, it cannot be said that the sample that reached the Laboratory is the sample taken from the contraband seized from the possession of the accused.

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 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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