

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA,
1937

CRL.A.No. 179 of 2006

AGAINST THE JUDGMENT IN SC 207/2005 of ADDL. SESSIONS COURT
(ADHOC)-I, KOTTAYAM.

APPELLANT(S)/ACCUSED NO.2.:

BHANU, W/O. REGHU, EDATHINAKAM,
(ILLATHANAMPARAMBIL), PACHANITHOTTAM KARA,
POONJAR THEKKEKKARA, MEENACHIL.

BY ADV. SRI.A.ANTONY

RESPONDENT(S)/COMPLAINANT.:

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
16-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 179 of 2006

Dated this the 16th day of December, 2015.

JUDGMENT

The appellant was prosecuted along with her husband for the offence punishable under Sections 55(a), (b), (g) and 58 of the Abkari Act. Appellant was the second accused. The first accused was fortunate to be left off and the second accused was less fortunate. She suffered conviction and she was sentenced to undergo simple imprisonment for five months each on each count with a fine of Rs.1,00,000/- for each of the offences with a default clause of three months each. Sentences were directed to run concurrently and set off as per law was allowed.

2. The incident which gave rise to this case occurred on 26.9.2000. P.W.1, who was functioning as the Circle Inspector of Excise, Pala Range and he along with P.W.2, who was the Excise Inspector at the relevant time and others,

on getting reliable information by P.W.1 about the activities that were being carried on by one Raghuvaran, i.e., distillation of illicit liquor and sale of the same, prepared a search warrant and went to the site. At that time, only the second accused was present in the house. The house was searched. A bottle having capacity of 450 ml containing about 350 ml of liquid was found. The bottle was opened and by smell it was revealed that it was caramel one of the ingredients used for making IMFL. A plastic container having a capacity of 1 litre containing some thick article was found. They were also able to recover plastic can having capacity of 20 litre and plastic tube also. The plastic can was opened and tested. It was found to have the smell of spirit. 50 feet away from the house, a plastic sack was found containing several bottles. Bottles had a capacity of 375 ml and it contained some sort of liquid. On examining the contents of the bottle, officers were convinced that illicit liquor was being manufactured. Several

other recoveries were also made. From the illicit liquor and caramel, samples were also taken. All the contraband articles seized were sealed and labels were affixed on the same. Thereafter P.W.1 returned to Erattupetta Excise Range Office along with the accused and articles seized and handed over the same to the office for further action.

3. Investigation was taken over by P.W.7. He recorded statements of witnesses. Further investigation was done by P.W.8. He completed investigation and laid charge before court.

4. 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, Kottayam. The said court made over the case to Additional Sessions Court (Adhoc)-I, Kottayam for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused, framed charge for the offences punishable under Sections 55(a), (b) and (g) and 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 7 examined and had Exts.P1 to P9 marked. M.Os.1 to 5 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. No evidence had been adduced on the defence side.

6. The court below considerably influenced by the evidence of P.Ws. 1 and 2 came to the conclusion that there is no reason to disbelieve their version. The court below found

that the first accused had no role to play in the incident and all the nefarious activities were attributed to the second accused and consequently the second accused was found guilty of the offences alleged against her and conviction and sentence as already mentioned followed.

7. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that the arrest memo and the arrest intimation were not produced. There is nothing to show that the accused was arrested as claimed by P.Ws. 1 and 2. It is also contended that there is no property list produced to show what are the properties seized and what are retained. It is then contended that the forwarding note which is the most crucial document is not seen produced and there is no proof about the sample seal affixed on the sample. For the proposition that forwarding note is a vital document and in the absence of which the prosecution should fail, learned counsel relied on the decisions reported in Krishnan v.

State (2015(2) K.L.T. SN 8) Joseph v State of Kerala (2009(4) KHC 537). It is therefore contended that conviction cannot stand.

8. Learned Public Prosecutor on the other hand tried to salvage the situation by pointing out that P.Ws. 1 and 2 gave a consistent and cogent version and there is nothing to doubt their version. The court below was therefore justified in accepting their evidence in holding that the accused was guilty. No interference is called for.

9. If one is to go simply by the evidence of P.Ws. 1 and 2, probably learned Public Prosecutor may be right. But there are other aspects to be looked into. P.Ws. 1 and 2 say about the detection of the offence in the presence of the second accused in the house. It is also to be noticed that P.W.1, who had gone on prior intimation, declined to prepare a search warrant.

10. P.W.1 also claims that the second accused was arrested from the spot. But there is no arrest memo produced nor any intimation was seen sent. Further, the prosecution has not produced the property list. It is not discernible as to what are the materials produced before the court.

11. Even assuming that independent witnesses have turned hostile, there is no harm in accepting the evidence of P.Ws 1 and 2. Their evidence has already been noticed. Their evidence is uniform and consistent and complement to each other.

12. However, one significant aspect is to be noticed. 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 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.”

14. A reading of the above decisions leaves one in no doubt about the significance and importance of the forwarding note and the availability of specimen sample seal. This Court held that that is an essential requirement of law and that is the only guarantee which the court can have to ascertain whether the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. In the absence of specimen seal, it is not possible for the court to assume that the sample sent for chemical analysis is the proper one. In the case on hand, there is nothing to show that the forwarding note as

contemplated has been produced before court. If that be so, the prosecution should fail on that sole ground.

15. In the light of the above fact, it is not necessary to consider whether the conviction entered into for the offence under Sections 55(a), (b) (g) and 58 of the Abkari Act are just and proper. This is only of academic interest.

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 her. Her bail bond shall stand cancelled and she is set at liberty.

P. BHAVADASAN,
JUDGE

sb.