

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 26TH DAY OF OCTOBER 2015/4TH KARTHIKA, 1937

CRL.A.No. 188 of 2006 ()

**AGAINST THE JUDGMENT IN SC 741/2003 of ADDITIONAL SESSIONS COURT FAST
TRACK-I, ALAPPUZHA DATED 30-12-2005**

IN CP 141/2002 OF JUDICIAL FIRST CLASS MAGISTRATE , KAYAMKULAM

APPELLANT(S)/ACCUSED:

**MURALEEDHARAN, S/O.VELUMBAN,
AGED 52 YEARS, MELATHARA KIZHAKKATHIL, KADUVINAL MURI
VALLIKUNNAM VILLAGE, MAVELIKARA TALUK.**

**BY ADVS.SRI.M.SUNILKUMAR
SMT.ROHINI V.MENON**

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 26-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 188 of 2006

Dated this the 26th 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 and he was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of six months. Set off as per law was allowed.

2. The incident in this case occurred on 22.03.2001. On that day PW4 and PW2 along with others had gone on patrol duty. When they reached in front of the house of one Raju, they happened to see the accused coming along the road carrying a jar. As soon as he saw the excise officials, he became panicky and tried to hide behind the well nearby. He was followed and apprehended and the jar he left was recovered. The contents of the jar was examined and it was found to contain arrack. The accused was arrested after

preparing the arrest memo and the sample of 200 ml was taken in a bottle of 375 ml capacity. The sample and the rest of the quantity were sealed and labelled. The label contained the signatures of PW4, the accused and the witnesses. PW4 prepared Ext.P1 mahazar on the spot and he returned to the Station with the accused, articles recovered and the documents. As per Ext.P2 occurrence report, he registered crime against the accused. The accused was produced before the court along with the seized articles and also the sample taken along with the requisition proceedings to send it for chemical examination. The property list so produced is marked as Ext.P3. PW4 conducted the investigation in the case, he recorded statement of witnesses. After getting the chemical analysis report namely Ext.P4, 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, Alappuzha 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-I, Alappuzha, 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 4 examined and had Exts.P1 to P4 marked. M.O.1 was 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. He further added that on the date of incident, he was

carrying on agricultural operations in his property which was adjacent to the property of one Raju. The Excise officials entered the courtyard of Raju and called the accused to that place. When he reached the courtyard of Raju, he was thrown into the jeep and taken to the excise office and he was falsely implicated in the case.

7. Finding that the accused 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 2 and 4 and also by the contemporaneous document, namely, Ext.P1 and also the fact that the accused and the articles were produced without any delay, came to the conclusion that the offence has been established beyond reasonable doubt and found the accused guilty. Conviction and sentence followed.

9. Assailing the conviction, the learned counsel appearing for the appellant contended that this appeal will

have to succeed on a very short ground. The learned counsel referred to Ext.P1 mahazar and contended that there is no description of the seal which is said to have been affixed by PW4 either on the sample which is alleged to have been taken by him or on MO1 can and the balance articles seized by the officers. It is also significant to notice according to the learned counsel that no copy of the forwarding note is produced before the court even though PW4 in his evidence says that he had made a requisition to the court to send the articles for chemical examination. The learned counsel pointed out that in the absence of a copy of the forwarding note being marked by the prosecution, there is no guarantee that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused and if that be so, the accused is entitled to the benefit of doubt. For the above proposition, the learned counsel relied on the decisions 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 PW4 has spoken to in box that he had produced the requisition to send the sample for chemical examination and that is not seen challenged in the cross examination. Further, it is pointed out that there is no reason to disbelieve PWs 2 and 4 and their evidence is supported by the narration in the contemporaneous document, namely, Ext.P1 which guarantees that the incident has taken place as alleged by the prosecution. According to the learned Public Prosecutor, there is no procedure prescribed under the Abkari Act for sampling, sealing etc., and any infirmity in sealing or sampling cannot be taken as a ground to escape from law. The learned Public Prosecutor also pointed out that the court below has chosen to analyze the evidence in considerable detail and has found the evidence of PWs 2 and 4 taken along with

Ext.P1 to be convincing enough, and further, the production of the accused and the articles seized along with the documents soon after the incident before court also lends credence to the prosecution case. These aspects cannot be overlooked on the ground that the forwarding note has not been marked and the accused is entitled to an acquittal.

11. Though there may be considerable force in the submission made by the learned Public Prosecutor, this Court had occasion to consider the consequence of not producing the forwarding note and marking it in the case. It is no doubt true that PW4 has stated that he had forwarded the requisition for sending the sample for chemical analysis. But such a requisition is not seen among the records. It is not seen marked in the case also. This Court had occasion, in the decision cited by the learned counsel for the appellant, to consider the significance and importance of the forwarding note and its relevance. This Court had also occasion to consider the question of absence of details

regarding the seal affixed in the mahazar prepared by the detecting officer. This Court, in the above decisions, was of the opinion that the description of the seal and the prompt production of the copy of the forwarding note had a purpose to serve and in the absence of any evidence in that regard, it cannot be said that any offence is made out.

12. 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.”

13. 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.”

14. It is worthwhile to note that in the decision reported in **Krishnan's** case (supra) even though the forwarding note was produced and marked in the case, the court found that the sample seal was not affixed in the forwarding note produced before court and that is fatal to the prosecution. If that be so, the very non-production of the same becomes more fatal.

15. It must be remembered that the only guarantee the court can have regarding the sample is with reference to the nature of the seal affixed in the mahazar as well as in the forwarding note produced before court. In the absence of description in the mahazar and the absence of any forwarding note produced and marked in the case, it will not be possible for the court to come to the definite conclusion

that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused.

16. The principle laid down in the above decisions applies with all force to the facts of the case and there is no reason as to why the accused should not get the same benefit.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the prosecution has not succeeded in establishing the case against the accused. 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