

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA,
1937

CRL.A.No. 192 of 2006 ()

AGAINST THE JUDGMENT IN SC 857/2003 of ADDITIONAL SESSIONS
COURT FAST TRACK III, THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:

SAJI R., S/O. RAGHAVAN,
CHARUVILA PUTHEN VEEDU, SANTHIPURAM,
VANDITHADOM,
PACHALLOOR DESOM, THIRUVALLAM VILLAGE,
THIRUVANANTHAPURAM.

BY ADV. SRI.B.S.SIVAJI

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA
KOCHI-31.

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
26-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 192 of 2006

Dated this the 26th day of November, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Section 55(a) of the Abkari Act. He was found guilty and he was convicted and sentenced to undergo simple imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for three months.

2. The prosecution case is that on 11.12.1999, while P.W.4, who was the Excise Inspector of Thiruvananthapuram Range, was on routine patrol duty, on the way near Paruthikuzhy junction, they happened to see a person standing by the side of the road with a can. Feeling suspicious, he was detained and the can was examined. The can had a capacity of 2 ½ litres and contained 2 litres of liquid. The can was opened and by taste and smell it was revealed as arrack. The accused was arrested as per Ext.P3 arrest memo.

The articles seized were sealed and labelled and the label contained the signature of the witnesses and P.W.4. Ext.P1 is the mahazar prepared at the spot. P.W.4 then proceeded to the station and handed over the articles, accused and the documents in office. On the basis of the materials, crime was registered as per Ext.P4 FIR. On the same day, the accused and the articles were produced before court. Property list is marked as Ext.P5. They also prepared the forwarding note and sent it to court.

3. P.W.5 is the Investigating Officer. He recorded statements of witnesses, obtained chemical analysis report, Ext.P6 and after completing investigation laid charge before court.

4. The court, before which final report was laid, took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thiruvananthapuram.

The said court made over the case to Additional Sessions Court Fast Track-III, Thiruvananthapuram for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 55(a) 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 5 examined and had Exts.P1 to P6 marked. M.O.1 was 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. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined D.W.1.

6. Learned counsel appearing for the appellant contended that there is no evidence regarding sampling and

there is nothing to show as to who had taken the sample. 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. Learned counsel drew the attention of this Court to the fact that there is no forwarding note produced or marked in this case and therefore, there is no idea about the sample seal alleged to have been used by the officer concerned. The absence of forwarding note is fatal to the prosecution. For the above purpose, learned counsel relied on the decisions reported in Joseph v. State of Kerala (2009(4) KHC 537) and Krishnan v. State of Kerala (2015(2) K.L.T. SN 8). It is also contended that the conviction is bad in law.

7. Learned Public Prosecutor pointed out that evidence of P.Ws. 4 and 5 are sufficient in law to found the accused guilty. Technical aspects shall not stand in the way and the lower court was impressed with the evidence of

P.Ws.4 and 5.

8. Even though one would like to agree with the learned Public Prosecutor, the law does not permit the court to do so. The detecting officer is P.W.4 and along with P.W.4 there was P.W.1. P.Ws. 4 and 1 gave uniform version that the whole contraband seized were sealed and labelled and there is nothing in their evidence to show that any sample was taken at the place of occurrence. They did not speak of sample being taken elsewhere also. P.W.4 does say that he prepared the forwarding note. It is obvious therefore that the sample was taken from the court. In such case, it is well settled that the person who has taken the sample as per the orders of the Magistrate should be examined to prove that the sample sent for chemical examination is the sample taken from the contraband seized from the possession of the accused. (See the decision reported in *Nalinakshan v. State of Kerala* (2012 (4) KHC 464). There is no evidence in this regard. There is

absolutely no materials to show as to who had taken the sample and when the sample was taken and from where the sample was taken. The essential ingredients necessary to attract the above factors are conspicuously absent.

9. For lack of production of forwarding note also, the prosecution has to fail. The consequence and necessity to produce the forwarding note has been considered in the decisions reported in Joseph v. State of Kerala (2009(4) KHC 537), wherein 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.”

10. 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.”

11. In the case on hand, forwarding note is not seen marked at all and therefore there is no evidence regarding the sample seal.

12. Forwarding note with the sample seal is the only guarantee by which the court has to come to the conclusion that the sample sent for analysis is the sample taken from the contraband article seized from the possession of the accused. Hence there is no evidence in that regard. Hence, the appellant has to succeed.

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

sb.