

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

CRL.A.No. 203 of 2006

AGAINST THE JUDGMENT IN SC 681/2000 of ADDL.SESIONS COURT FOR
TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 04.01.2006

APPELLANT/ACCUSED:

BIJU, S/O.SUKUMARAN,
VADAKKARUKU PUTHEN VEEDU, VENGANINNA, KAZHIVOO DESOM,
KANJIRAMKULAM VILLAGE, NEYYATTINKARA TALUK.

BY ADV. SRI.G.SUDHEER

RESPONDENT/COMPLAINANT:

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

BY SMT.S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
13-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.203 OF 2006

Dated this the 13th day of November, 2015.

J U D G M E N T

The accused in this case was prosecuted for the offence punishable under Section 55(a) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for three months. Set off as per law was allowed.

2. The incident in this case occurred on 01.10.1998. On that day, PWs 2, 3 and other Excise Officials under the leadership of PW3 were on routine patrol duty. When they reached in front of a Church at Venkulam, they found the accused going along the road with a can of 10 liters capacity. Feeling suspicious, he was intercepted and the can was seized. On examination of the contents, it was revealed that it was arrack. PW3 seized the article and sealed and labeled the same. On the label, he and the witnesses affixed their signatures. Accused was arrested on the

spot. He returned to the office and prepared Ext.P2 crime and occurrence report. He produced the documents, accused and article before court on the very same day itself. Ext.P1 is the mahazar prepared at the spot and Ext.P3 is the arrest memo. He recorded the statement of witnesses. His successor in office completed the investigation and laid charge before court.

3. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Thiruvananthapuram under Section 209 Cr.P.C after following necessary procedures. That court made over the case to Additional Sessions Court for trial of Abkari Act cases, Neyyattinkara for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence under Section 55(a) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

4. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P7 marked. Ext.C1 was marked as court exhibit.

5. After the close of the prosecution evidence, 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.

6. 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 examine DWs 1 and 2.

7. The court below, impressed by the evidence of PWs 2 and 3 and the fact that Ext.P1 contemporaneous document contains all the details and also the fact that the accused and thondi articles were produced before court on the very same day, found that the prosecution has succeeded in establishing the case against the accused. Conviction and sentence followed.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant pointed out that there is delay of four days in producing the article before court and that remained unexplained. There is no evidence to show that from 01.10.1998 till 05.10.1998, the date on which the articles were produced before court, who had the custody of the articles. Learned

counsel then went on to point out that there is no forwarding note marked in the case on hand and therefore the court may not be in the know of the nature of the seal used to seal the sample.

9. Learned counsel appearing for the appellant highlighted the fact that sample was taken from court and if that be so, sealing would have also been done by the court. But, there is no mention about the same. Learned counsel went on to point out that there seems to be no evidence as to who had affixed seal on the sample. In the absence of evidence to show that particular seal was used and its specimen is given in the forwarding note, it could not be said that the sample which reached the laboratory is the sample collected from the contraband article seized from the possession of the accused. On this sole ground, according to the learned counsel, the appellant is liable to be acquitted.

10. Learned Public Prosecutor, on the other hand, relying on the evidence of PWs 2 and 3, contended that they have given a uniform and consistent version regarding the incident and detection of offence is beyond challenge. It is true, according to the learned Public Prosecutor, that sample was taken from court.

The evidence of PW4, the thondi clerk, is to the effect that she had taken sample as ordered by the Magistrate. According to the learned Public Prosecutor, there is no reason to doubt her version. The cumulative effect of production of documents and accused before court and also drawing of contemporaneous document in detail are indications that the incident has taken place as alleged by the prosecution. At any rate, learned Public Prosecutor contended that the court below has chosen to accept the evidence on record and has found the accused guilty and unless there are compelling reasons, this Court may not take a different view.

11. If one is to go by the evidence of PWs 2 and 3, it is uniform, consistent and cogent. It is clear that 10 liters of arrack was seized from the possession of the accused on 01.10.1998. Ext.P1 is the mahazar prepared by PW3 and that gives a detailed narration of what had transpired at the place of incident. It is true that a reading of the evidence of PWs 2 and 3 and also Ext.P1 mahazar show that no sample was taken from the spot. The entire contraband found in the possession of the accused was

sealed and labled and the label contained the signature of PW3 and the witnesses. The evidence of PW4, who was thondi clerk at the relevant time, would indicate that sample was taken from court as per the orders of the Magistrate. What is significant is that there is no evidence to show the type of seal used to seal the sample which has been collected by PW4. The forwarding note is also not seen marked. So one is not in a position to ascertain the nature of specimen seal used assuming there was one. PW4 also does not say who had affixed seal on the sample and what type of seal was used.

12. This Court had occasion to consider the absence of forwarding note and omission to show the specimen seal in the decisions in **Majeedkutty** vs. **Excise Inspector** (2015 (1) KLT 624) and in **Krishnan** vs. **State** (2015 (2) KLT SN 8).

13. In the decision in **Majeedkutty** vs. **Excise Inspector** (2015 (1) KLT 624), it has been 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."

14. In the decision in **Krishnan** vs. **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 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.”

15. A reading of the above decisions will clearly show that production of forwarding note containing the specimen seal is must for proper prosecution of the case. Possibly, it could be said that even though forwarding note does not contain the specimen seal, it could be provided independently. Even assuming that it was not possible, if it is available in the mahazar, that would be sufficient. Even going by the evidence of PWs 2 and 3, it is very clear that no sample was taken at the time of detection and that sample was taken from court. The evidence of PW4 does not indicate what type of seal was used.

16. The result is that, following the principles laid down in the decisions cited above, it is not possible to ascertain that the sample which reached the laboratory is the sample taken from the contraband article seized from the possession of the accused. If that be so, benefit of doubt should certainly go to the accused.

In the result, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the offence. He stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.