

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

CRL.A.No. 214 of 2006

-----  
AGAINST THE JUDGMENT IN SC 534/2000 of ADDL. SESSIONS COURT  
FOR THE TRIAL OF ABKARI ACT CASES, NEYYATTINKARA.

APPELLANT(S)/ACCUSED:

-----

KRISHNAMMA, AGED 67,  
D/O.KAMALAKSHY, ATTARIKATHU VEEDU,  
KARIMBUMANNADI,  
KOVILLOOR DESOM, VELLARADA VILLAGE.

BY ADV. SRI.R.T.PRADEEP

RESPONDENT(S)/COMPLAINANT:

-----

THE STATE OF KERALA, REP.  
BY THE DIRECTOR GENERAL OF PROSECUTION,  
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
09-10-2015, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

P. BHAVADASAN, J.

-----  
Crl.Appeal. No. 214 of 2006  
-----

Dated this the 9<sup>th</sup> day of October, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Section 55(a) and (i) of the Abkari Act. He was found guilty and therefore convicted and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/–, in default, to undergo rigorous imprisonment for three months.

2. The prosecution case in brief is that on 16.2.1998, P.W.4 and his team of officers got reliable information that a lady by name Krishnamma was vending in illicit liquor. P.W.4 after procuring the assistance of a woman police constable, went to the place of occurrence. They reached the place at 8 a.m. They found a lady holding a black can near the rubber plantation of Easwer. She was intercepted and on questioning her she admitted that she was carrying

arrack. Therefore she was arrested by the woman police constable and on examination of the contents, it was found to be arrack. P.W.4 claims to have taken samples from the can and thereafter sample as well as the can were sealed and labelled as per law containing the signatures of the accused, witnesses and P.W.4. They returned to the station and by Ext.P2 FIR registered Crime No.42 of 1998. The seizure mahazar prepared at the place of occurrence is Ext.P1. P.W.4 conducted further investigation and he produced the articles and the accused before the court. Ext.P3 is the property list. He claims that he had forwarded samples to the court along with the forwarding note. Ext.P4 is the report obtained from the Laboratory. He completed investigation and laid charge before court.

3. The court, before which final report was laid, took cognizance of the offence. Finding that the case is one 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 for the trial of Abkari Act Cases, Neyyattinkara for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused, framed charge for the offences already made mention of. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 4 examined and had Exts.P1 to P4 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. She denied all the incriminating circumstances brought out in evidence against her and maintained that she is innocent and that she has been falsely implicated. Finding that the accused could not be acquitted under Section 232 Cr.P.C., she was asked to enter on her defence. She examined D.W.1 and Exts. D1 to D3 marked.

5. Presumably greatly impressed by the evidence of P.Ws. 3 and 4 and so also Ext.P1 seizure mahazar, the court below went on to hold that the prosecution has succeeded in establishing the case against the accused and therefore conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

6. Learned counsel appearing for the appellant contended that the court below has omitted to note certain facts which tells upon the veracity of the case. Drawing attention to the evidence of P.Ws. 3 and 4 and Ext.P1, learned counsel pointed out that it is clear from their testimony and Ext.P1 that the same was taken from the spot itself and it was sealed and labelled. It is brought to the notice of the court that the thondi list prepared and produced before court is Ext.P3. Learned counsel pointed out that the sample which is alleged to have been taken is not seen produced before the court at all. However, learned counsel brought to the

attention of this Court the endorsement below the thondi list wherein it was stated that after taking the sample, the rest of the contents were returned to the police station for safe custody. This, according to the learned counsel, belies the version given by P.W.4 that sample was taken at the spot. In fact there is no convincing evidence to show as to who had taken the sample and from where it was taken. Unless it is proved that proper sampling had been done, the prosecution cannot succeed.

7. It is also contended that the detection of the offence was on 16.2.1998 while the chemical analysis report shows that they have received the sample on 19.2.1999, i.e.. almost a lapse of one year. There is no explanation for this undue and long delay. Relying on the decision reported in *Ramankutty v. Excise Inspector, Chelannur Range* (2013(2) KHC 308) it is contended that even a day's delay is fatal to the prosecution case.

8. Learned counsel also drew the attention of this Court that no forwarding note has been marked in the case and that should prove fatal to the prosecution case.

9. Learned Public Prosecutor very vehemently tried to support the finding of the court below, but with little success.

10. Learned counsel for the appellant is justified in his submission that considerable amount of confusion is caused due to the sample taken. If we go by the evidence of P.Ws. 3 and 4 it is seen stated that sample was taken at the spot itself and it was sealed and labelled then and there. That it was so done is evident from the narration in Ext.P1 mahazar also. P.W.4 conducted the investigation and laid charge before court. He is definite that he had handed over samples to the court on the very same day.

11. It is here that Ext.P3 assumes importance. The thondi list submitted to the court showing the articles forwarded to the court shows only the can. The sample which is alleged to have been taken by P.W.4 as spoken to by P.Ws. 3 and 4 did not find a place in Ext.P3 at all.

12. It will be appropriate in this context to refer to the decision reported in Manikantan Pillai v. State of Kerala (2013(4) K.L.T. 139) wherein it was held as follows:

“The matter involved in this case was handled by P.W.1 in a reckless manner. He ought to have drawn samples in the presence of the appellant at the time of seizure or atleast on reaching the Excise Office. Here in this case, there is no evidence to show as to who had drawn the sample that was allegedly subjected to chemical analysis, for which Ext.P4 was obtained. There is no evidence to show as to when and where the sample was drawn. There is no evidence to show that the forwarding note was filed by P.W.3. Apart from all these, the copy of the property list has not been produced to show as to when the contraband was produced before court. No conviction can be entered against the accused

in a prosecution unless it is proved that the sample which was analysed was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused. In this case, there is absolutely nothing to show that the sample allegedly subjected to chemical analysis, for which Ext.P4 was prepared, is one drawn from the contraband allegedly seized from the appellant.”

13. Equally formidable is the contention that in the absence of a forwarding note, it was not possible for the court to ascertain whether the seal found on the sample is the one which was affixed by the officer concerned. Forwarding has not been marked in this case at all.

14. With reference to the absence of forwarding note and sample seal, this Court had occasion to observe in the decision reported in Krishnan v. State (2015(2) K.L.T. SN 8) 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. Going by Ext.P3, the sample must have been taken from the court. It is not obviously the case put forward by the prosecution at the time of evidence. Thus, as rightly pointed out, considerable confusion has been created regarding the sample that is alleged to have been taken at the time of detection. It is extremely doubtful in the light of the materials referred to above that sample was taken at the spot. The person who had taken the sample had to be examined.

16. There is nothing to show that the alleged sample taken from the place of occurrence is the sample which had been forwarded to the Laboratory. In the absence of such evidence, it will be imprudent on the part of the court to enter a finding of guilt on the accused. This Court is unable to sustain the order of conviction.

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.