

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. 215 of 2006

AGAINST THE JUDGMENT IN SC 147/2005 of ADDL. DISTRICT & SESSIONS
COURT (ADHOC) FAST TRACK-III, PATHANAMTHITTA DATED 23-12-2005

APPELLANT/ACCUSED:

JAYACHANDRAN, S/O.CHELLAPPAN NAIR,
VAYALICHETHU VEEDU, KUNNATHOOR KARA,
PERINGANATTU VILLAGE, ADOOR THALUK,
PATHANAMTHITTA DISTRICT.

BY ADV. SRI.C.K.SAJEEV

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.215 OF 2006

Dated this the 13th day of November, 2015.

J U D G M E N T

The accused faced trial for the offence punishable under Sections 8(1) and (2) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer simple imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for three months. Set off as per law was allowed.

2. The prosecution case is that on 12.11.2001, the Preventive Officer namely, PW1 attached to Adoor Excise Office along with PW3 and other officers had gone for routine patrol duty. When they reached in front of the house of one Ramakrishna Kurup, they happened to see the accused coming along the road with a green bottle. Seeing the Excise Officials when he tried to escape from the place, he was intercepted and bottle was seized. The bottle having a capacity of 1½ liters was seen to contain a liquid. The contents of the liquid was examined

by taste and smell and it was revealed that it was arrack. Arrest memo, Ext.P1 was prepared and the accused was arrested. PW1 then collected 300ml of arrack each in two bottles having a capacity of 375 ml each and that was taken as sample. The sample was sealed and labeled. On the label, signatures of accused, witnesses and PW1 were affixed. The balance contraband article was also sealed and labeled likewise. PW1 prepared Ext.P3 mahazar. They returned to the station and PW1 prepared Ext.P4 occurrence report. He also prepared property list which is Ext.P5. The accused, documents prepared and also the contraband articles seized were produced before court. He then claims to have prepared the forwarding note, Ext.P7 for sending the sample for chemical analysis.

3. Investigation of the case was done by PW5. He went to the place of occurrence, and obtained Ext.P10 chemical analysis report. He completed the investigation and laid charge before court.

4. 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, Pathanamthitta which made over the case to Additional District & Sessions Court (Adhoc) Fast Track-III, Pathanamthitta for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence under Sections 8(1) and (2) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P10 marked. M.O.1 was got identified and marked.

6. 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.

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, presumably impressed by the evidence of PWs 1 and 3 and also the fact that the contemporaneous

document Ext.P3 contains all the essential details which are spoken to by PWs 1 and 3 and further prompt production of accused, articles and documents before court, came to the conclusion that the prosecution has succeeded in establishing the case against the accused. The conviction and sentence as already mentioned followed.

9. Learned counsel appearing for the appellant, assailing the conviction and sentence, pointed out that this appeal will have to be succeeded on a very short ground. It is well settled, according to the learned counsel, that the forwarding note sent to the court should necessarily contain the specimen seal used to seal the sample and if that does not contain the seal, it could be provided separately or independently. Even assuming that is not done, even if specimen seal is available in the mahazar, that would have been sufficient. In the case on hand, there is no specimen seal shown either in the mahazar or in Ext.P7 requisition note nor is provided independently. Relying on the decision in **Krishnan** vs. **State** (2015 (2) KLT SN 8), it is contended that absence of specimen seal should prove fatal to

the prosecution.

10. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 1 and 3 are sufficient in law to come to the conclusion that the article was seized from the possession of the accused. The contemporaneous document, Ext.P3 corroborates the version given by PWs 1 and 3. If the lower court was impressed by these items of evidence and had come to the conclusion that the offence had been made out, there is no justification as to why this Court should take a different view. In short, the contention is that the conviction and sentence does not call for any interference.

11. It is no doubt true that the evidence of PWs 1 and 3 is above board and is clear to the effect that contraband was seized from the possession of the accused. If any corroboration of their evidence is required, that is furnished by Ext.P3 mahazar which contains all the details which are spoken to by PWs 1 and 3. Being a contemporaneous document, it is difficult to believe that Ext.P3 could have been concocted. Further, prompt production of accused and articles and also the documents before court fortifies

the case of the prosecution. Therefore, the court below was justified in coming to the conclusion that the contraband has been seized. But, this Court has held that that may not be sufficient. Chemical analysis report is an essential factor which goes towards the complicity of the accused and that has necessarily to be taken into consideration while evaluating the liability of the accused. It is here that the forwarding note assumes importance.

12. Forwarding note contains several columns, one of which provides for specifying the specimen seal. Obviously, that column has a purpose to serve. It shows that specimen of seal used has to be indicated in the forwarding note so that the court can be assured of the fact that the seal found on the sample that is sent for chemical analysis is the seal alleged to have been affixed by the officer while taking the sample. In the absence of any seal, this facility is not available to the court. It would be sufficient if it is independently provided. It is not necessary that it should be in the same column as provided in Ext.P7. But, unfortunately for the prosecution, no independent seal is also

provided.

13. One could have also pardon the absence of seal in Ext.P7, had there been any specimen seal in Ext.P3 when the sampling was done by the detecting officer, that would have been sufficient. But that too is not available in the case on hand. In the decision in **Krishnan** vs. **State** (2015 (2) KLT SN 8), it has been 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."

14. A reading of the above decision leaves one in no doubt that it is absolutely necessary that specimen of the seal used by the officer concerned for sealing the sample must be available to the court for comparison. Its absence is fatal to the prosecution. This Court in the above decision has taken a view that in the absence of specimen seal in the forwarding note, the court cannot be sure of the fact that sample that was sent for chemical analysis was the sample taken from the contraband seized from the possession of the accused. If that be so, a doubt is created in the mind of court regarding the sample and that should certainly go in favour of the accused. This case stands on the same footing and there is no reason as to why the principles laid down in the above decision should not be applied to the present

case. In the above circumstances, it is difficult to sustain the conviction and sentence.

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 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.