

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 15TH DAY OF OCTOBER 2015/23RD ASWINA, 1937

CRL.A.No. 225 of 2006 ()

**AGAINST THE JUDGMENT IN SC 748/2003 of ADDITIONAL SESSIONS COURT, FAST
TRACK - I, ALAPPUZHA DATED 28-01-2006**

IN CP 83/2003 OF JUDICIAL FIRST CLASS MAGISTRATE, KAYAMKULAM

APPELLANT(S)/ACCUSED.:

**GOPINATHAN, S/O.THAMPI,
PANTHAPLAVIL VADAKKATHIL VEEDU,
THEKKE MANKUZHAY MURI, BHARANIKKAVU VILLAGE
MAVELIKKARA TALUK.**

**BY ADVS.SRI.S.SANAL KUMAR
SMT.BHAVANA VELAYUDHAN**

RESPONDENT(S)/COMPLAINANT.:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.BHAVADASAN, J.

Crl.A. No. 225 of 2006

Dated this the 15th 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. He was found guilty. Therefore, he was convicted and sentence to undergo rigorous imprisonment for three years 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 is said to have occurred on 12.01.2002. At the relevant time, PW2 was functioning as the Preventive Officer attached to Mavelikkara Excise Range. He, on that day while on patrol duty along with other officers, when they reached Munnamkutti Junction, near a temple at Muttam, they found the accused coming along the road holding a 5 litre can. Feeling suspicious, they stopped the vehicle and seized the can from the accused. It was found to contain some liquid. By smell and taste, they recognized it as arrack. The accused was arrested. From

the can, in a bottle having a capacity of 375ml, 200ml of arrack was taken as sample. The sample bottle, the balance contraband article and the can were sealed and labelled containing the signature of the accused, PW2 and the witnesses. Ext.P3 mahazar was prepared on the spot. They returned to the station and handed over the articles, the accused and the records to the Range Office Inspector on the very same day itself. PW1 was the Excise Inspector of Mavelikkara Excise Range at the relevant time. On 13.01.2002, at about 8.00 am, when he came to the office, the Preventive Officer attached to the said office produced the accused, the records and the articles before him and he registered crime No.6/2002 as per Ext.P1 crime and occurrence report. He prepared the requisition for sending the sample for chemical examination. Ext.P2 is the property list. He had the articles etc., produced before court on the next day itself. Investigation was completed and charge was laid 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 6 examined and had Exts.P1 to P4 marked. MO1 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 stated that he had not committed any act which constitute an offence.

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 influenced by the evidence of PWs 2 and 3 taken along with the contemporaneous documents, namely Ext.P3, and greatly impressed with the prosecution case found that the accused was guilty. Conviction and sentence followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant contended that this appeal will have to be succeeded on a very short ground. It is by now well settled that the forwarding note by which the sample is forwarded for chemical analysis report, the copy of the same should be filed before court containing the sample seal. In the case on hand, it is neither produced nor

marked and none of the witnesses say that it was available in court. The learned counsel emphasize that, that assumes significance in the light of the fact that a forwarding note is supposed to contain a sample seal which is an essential ingredient to establish prosecution case. In the absence of a forwarding note with the sample seal, it is not possible for the court to come to the conclusion that merely based on the narration in chemical analysis report that the sample was found intact and tallied with the seal forwarded. For the above proposition, the learned counsel relied on the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8).

10. The learned Public Prosecutor on the other hand contended that PW1 says about the requisition being forwarded to the court, the endorsement received etc., even though a forwarding note is in the file, it is not seen marked. The non marking of the forwarding note, according to the learned Public Prosecutor, causes no prejudice to the accused. The court below has considered all these aspects

into considerable details and has found the accused guilty. There are no grounds to interfere with the finding of the court below.

11. The detection is spoken to by PWs 2 and 3. PW 2 is the detecting officer and PW3 is the officer who had accompanied PW2. They give uniform and consistent version regarding the incident and also about drawing up of sample etc.. Both of them say that the accused was arrested on the spot and say about the sampling and also sealing and labelling of the articles as is required in law. Even though they were cross examined at length, nothing could be brought out from their evidence to show that they had any axe to grind against the accused or they had to falsely implicate the accused.

12. The mere fact that the independent witnesses turned hostile, that does not dilute the veracity of the evidence furnished by PWs 2 and 3. They had no reason to falsely implicate the accused.

13. However, the infirmity pointed out by the learned counsel for the appellant is a formidable one. The sample is taken either by the officer at the spot or is taken through court and it is sealed and labelled, the prosecution is required to produce and mark the forwarding note containing the sample seal forwarded for the chemical analysis report so as to ensure that the articles sent for chemical analysis is from the articles seized during the detection. In the absence of a forwarding note, it could not possible to arrive at a conclusion that the article sent for chemical analysis is from the article seized from the possession of the accused. This is a very vital document as far as the accused is concerned. The production of forwarding note with the sample seal thereon, is a guarantee that sample article send for analysis is the same prepared by the Detecting Officer. The non-production of the forwarding note therefore assumes considerable significance.

14. One need not labour much on this aspect in the light of the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8), wherein, 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.”

15. The above decision applies with all force to the case on hand and there is no reason as to why the principle laid down in the said decision shall not be followed in the case on hand also.

16. For the above reasons, this Court is unable to accept the findings of the court below and to uphold the conviction and sentence.

Hence, this appeal is allowed. The conviction and sentence passed by the court below are set aside and 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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