

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

CRL.A.No. 242 of 2006

AGAINST THE JUDGMENT IN SC 1185/2000 of ADDL. SESSIONS COURT
FAST TRACK (ADHOC) NO.II, THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:

LAILA KUMARY, D/O.RESSINA,
MEKKUAMKARA VEEDU, PARIYARAM,
ARASUPARAMBU MURI,
NEDUMANGAD VILLAGE, THIRUVANANTHAPURAM.

BY ADV. SRI.G.SUDHEER KARAKONAM

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 242 of 2006

Dated this the 16th day of October, 2015.

JUDGMENT

The accused was found guilty of the offences punishable under Sections 8(1) and (2) of the Abkari Act and therefore she 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. Set off as per law was allowed.

2. The prosecution case is that on 13.8.1997 P.Ws. 1 and 2, along with other officers, had gone on patrol duty. At about 7.30 a.m. when they reached near Pariyaram Sreenarayana Gurumandiram, the accused was seen coming along the road with a can. Seeing the excise officers, she tried to escape. However, she was intercepted and the can was seized in the presence of independent witnesses. The can contained some liquor. By taste and smell, it was identified as

arrack. The article seized was sealed and labelled in the presence of witnesses and on the label signature of the accused, witnesses and P.W.1 were affixed. Ext.P1 mahazar was prepared and the arrest memo is Ext.P2. They returned to the office and registered crime as per Ext.P4 occurrence report. Ext.P5 property list was prepared and the articles seized were handed over to court. The accused was produced before court with a remand application. The court below ordered samples to be taken. According to P.W.1 he had filed a forwarding note also before the court.

3. P.W.4 is the Investigating Officer. He recorded statements of witnesses, obtained chemical analysis report, completed investigation and 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

under Section 209 Cr.P.C. The said court made over the case to Additional District and Sessions Court Fast Track (Adhoc) No.III, Thiruvananthapuram for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Sections 8(1) and (2) 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 4 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. 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 chose to adduce no evidence.

6. In all probability, the court below, greatly impressed by the evidence of P.Ws. 1 and 2 and also the fact that contemporaneous document also supports their version, went on to hold that the prosecution has succeeded in establishing the case. Conviction and sentence as already mentioned followed.

7. Assailing the conviction and sentence, learned counsel for the appellant submitted that this appeal will have to succeed on a very short ground.

8. It was contended that admittedly at the time of seizure, no sample had been taken. Properties were produced before court without taking sample and accordingly the learned Magistrate had ordered samples to be taken. But the matter ends there.

9. There is no evidence as to who had taken the sample and from where the sample was taken. In the absence of evidence in that regard, it could not be said that the sample

sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. This vital aspect has been lost sight of by the court below and that vitiates the conviction.

10. Learned Public Prosecutor on the other hand contended that the court below, inspite of the above infirmities found the accused guilty mainly on the evidence furnished by P.Ws. 1 and 2 and contemporaneous document, the seizure mahazar. It may not be proper to interfere with the conviction merely on the ground that there is no evidence as to who had taken the sample and the place from where the sample had been taken. According to the learned Public Prosecutor, no grounds are made out to interfere with the conviction and sentence.

11. One can only hope that the argument of the learned Public Prosecutor could be accepted. But it cannot be done.

12. One of the main basis for conviction is the chemical analysis report. The presence of ethyl alcohol in the contraband seized is detrimental to the accused to a great extent. Therefore, sampling has got a relevant role in these types of cases and courts have been insisting on strict evidence of sampling.

13. Usually at the time of detection, the detecting officer takes the sample and has it sealed and labelled containing the signature of the accused, himself and witnesses and forward it to court. That is followed by a forwarding note and requisition for sending it for chemical analysis. The court does so through one of the police officers.

14. There may be cases where the samples might not have been taken by the officers of the department and the thondi articles were produced before court. They then request the court to take samples and usually it is done by one of the

thondi clerks who makes a record of the same. In such cases, this Court had occasion to hold that the person who, under orders of the Magistrate, had taken sample has to be examined to prove the authenticity of sampling. If that is not done, and if there is want of evidence in that regard, it is fatal to the prosecution and conviction and sentence cannot stand. An identical question was considered in the decision 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.”

15. It is indeed true that P.W.1 had stated that court had ordered sample to be taken. P.W.1 had no case that any of the excise officers had taken sample pursuant to the direction issued by the Magistrate. There is absolute want of evidence to show as to who had taken the sample and from where. These vital aspects have been lost sight of by the court below. In the facts and circumstances of the case, a reasonable doubt is created in the mind of the court as to whether the sample is taken from the contraband seized from the possession of the accused or not. This doubt is sufficient

for discharging the burden cast on the accused.

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 her. Her bail bond shall stand cancelled and she is set at liberty.

P. BHAVADASAN,
JUDGE

sb.