

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

CRL.A.No. 248 of 2006 ()

**AGAINST THE JUDGMENT IN SC 738/2004 of ADDITIONAL DISTRICT & SESSIONS
COURT (ADHOC) FAST TRACK II, PATHANAMTHITTA DATED 04-01-2006**

APPELLANT(S)/ACCUSED:

**SREEDHARAN, S/O.SANKARAN,
SANKARAVILASOM VEEDU, KUMARAMPEROOR VADAKKEKARA
CHITTAR-SEETHATHODU VILLAGE, RANNY TALUK
PATHANAMTHITTA.**

BY ADV. SRI.S.SANTOSH KUMAR (PERUNAD)

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 248 of 2006

Dated this the 06th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8 (1) & (2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo simple imprisonment for two years and to pay a fine of ₹ 1 lakh with a default clause of one year.

2. The incident in this case is said to have occurred on 20.04.2003. At the relevant time, PW6 was functioning as the Sub Inspector of Police, Chittar Police Station. At 4.00 p.m., when he came to the office, he received information that Elavunkal Sreedharan was keeping arrack in his house for illegal sale. He along with his team of officers went to the place of occurrence. After reaching the place, he informed Sreedharan that the house was going to be searched. Search memo was prepared. His house was searched. In the middle room of the house, below the cot at

the southern end, a black can was seen with liquid in it. That was seized and on examination of the contents, it was found to be arrack. Ext.P4 arrest memo was prepared and he was arrested. PW6 says that he took a sample of 180 ml in a bottle and the sample was sealed and labelled. The balance quantity was also sealed and labelled. He claims to have prepared Ext.P5 document. He thereafter returned with the articles, accused and the documents to the Police Station and registered crime as Crime No. 43/2003 as per Ext.P6 FIR. He prepared Ext.P8 property list and produced all the articles before court. He filed Ext.P7 remand report as far as the accused is concerned. He claims to have preferred forwarding note with the signature and seal which is marked as Ext.P9. The Chemical Examination Report is Ext.P10. He recorded statement of witnesses. Investigation was completed and charge was laid before court by CW8.

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, Pathanamthitta under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional District and Sessions Court, (Ad hoc) Fast Track-II, Pathanamthitta, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 8(1) & (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 P11 marked. MO1 was got identified and marked. Ext.D1 was marked from the side of the defence.

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.

7. Finding that he 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. Considerably influenced by the evidence of PWs 4 and 6 and also the fact that the contemporaneous document also shows the details of the search and seizure and the added circumstance that the accused, contraband articles and the records were produced on the very next day before court, the trial court came to the conclusion that the offence had been made out. Accordingly, conviction and sentence followed.

9. The learned counsel appearing for the appellant referring to the evidence of PWs 6, the Detecting Officer pointed out that it is a story of series of violations entitling the accused for an acquittal. The learned counsel emphasized on the fact that in the forwarding note in the space provided for the specimen seal, no entry was made

and that means no there was no specimen seal seen in the forwarding letter. Relying on the decisions reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624) and **Krishnan v. State** (2015 (2) KLT SN 8), it is contended that this is fatal to the prosecution. The learned counsel also pointed out that it is difficult to say from the evidence of PW6 that the house in respect of which the certificate is granted by the Panchayat Secretary is the same. But the learned counsel for the appellant pointed out that in the light of the serious flaw for want of specimen seal since the prosecution has to fail, it is not necessary to go into the other questions.

10. The learned Public Prosecutor pointed out that the oral evidence furnished by PWs 4 and 6 are clear and convincing, corroborated by the contemporaneous documents and also the prompt production of articles and accused before court leave one in no doubt that the offence

had been committed. An inadvertent omission on the part of the Investigating Officer or the other officer as the case may be, to provide the specimen seal in the forwarding note, cannot be taken advantage by the accused when the evidence is clear. At any rate, according to the learned Public Prosecutor, the court below has chosen to accept the evidence and found the accused guilty. Unless it is found that the finding is perverse, this Court may not interfere.

11. Time and again, this Court has emphasized the need for providing the specimen seal in the forwarding in the column shown for the same. This Court has specifically mentioned in several judgments that the need to carefully fill up the forwarding note so as to ensure the proper compliance of statutory provision. Recently, this Court had occasion to take note of that the purpose for which the examination is sought also should be specified.

12. This Court insists for the presence of the specimen seal in the forwarding note so as to ensure that the sample

that is forwarded to the chemical analysis laboratory is the sample taken from the contraband article seized from the possession of the accused. For that is the only guarantee which the court has.

13. It will be appropriate here to refer to the decision cited by the learned counsel for the appellant.

14. In the decision reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), it was held as follows:

“18. Yet another infirmity in the prosecution case is that there is no request forwarding note either produced or marked to indicate that a request was made to the Magistrate to send the sample bottle to the chemical examiner for analysis. P.W.6 who conducted the investigation, has no case that he had made any such request or had filed any forwarding note. Likewise, P.W.1 also has no case that he had made a request to the Magistrate to send the sample bottle to the chemical examiner. Ext.P4 certificate of chemical analysis dated 24.11.1997 is relied on by the prosecution to show that the sample bottle was duly despatched to the chemical examiner for

analysis. In the absence of any forwarding note or requisition, it is not explained as to how the Magistrate forwarded a sample bottle to the chemical examiner as per his covering letter dated 19.8.1997 referred to in Ext.P4 certificate. Even the office copy of the covering letter has not been produced. The thondi section clerk who was the custodian of the properties before the Magistrate, was not examined to prove matters such as the date of receipt of the property before the Magistrate, the condition in which those properties were received in court including the fact whether a sample bottle was received and if so, whether the seals if any on such bottle were in tact, the date of despatch of the sample to the chemical examiner and the nature of the custody of the sample bottle until then. The prosecution can succeed in securing a conviction against the appellant only if it is shown that the sample which was subjected to chemical analysis as evidenced by Ext.P4 certificate was the very same sample which was drawn from the bulk quantity of contraband liquor allegedly held by the accused and which after change of hands, eventually reached the hands of the chemical examiner.”

15. In the decision reported in **Krishnan v. 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 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.”

16. In the decision reported in **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624), it was 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.”

17. A reading of the above decisions show that it is not an empty formality to provide specimen seal in the space provided. PW6 has clearly stated that he had not shown the specimen seal in the relevant column. Apart from

the other flaws also which need not be considered in the light of this aspect which should prove fatal to the prosecution.

For the above reasons, 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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P.A. to Judge