

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 17TH DAY OF DECEMBER 2015/26TH AGRAHAYANA, 1937

CRL.A.No. 276 of 2006

AGAINST THE JUDGMENT IN SC 66/2004 of ADDL.SESIONS COURT FAST
TRACK-III, THIRUVANANTHAPURAM DATED 03-01-2006

APPELLANT/ACCUUSED:

VIJAYAKUMARI, D/O.KRISHNAMMA,
SOU MYA NIVAS, TC 69/2333(4), POONTHURA WARD,
MUTTATHARA VILLAGE, THIRUVANANTHAPURAM.

BY ADV. SRI.D.AJITHKUMAR

RESPONDENTS/COMPLAINANT:

1. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
2. THE EXCISE INSPECTOR,
EXCISE RANGE, THIRUVANANTHAPURAM.

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
17-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.276 OF 2006

Dated this the 17th day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Sections 8(1) and (2) of Abkari Act. She was found guilty and was therefore convicted and sentenced to suffer simple imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of imprisonment for three months.

2. The incident which gave rise to the case occurred on 14.11.1999. On that day, PWs 1 and 2, Preventive Officers of the Excise Range Office, Thiruvananthapuram along with others were on routine patrol duty. When they reached in front of Poonthura Swami Memorial Library, they happened to see the accused coming along the road carrying a can. As soon as she saw the Excise Officials, she tried to retreat. She was immediately intercepted and the can was seized. When the contents of the can was examined, it was turned out to be arrack. The can contained about 1½ litres of arrack. Arrest memo was

prepared and the accused was arrested. The can was sealed and a label containing the signature of PW1, accused and witnesses was affixed on the same. Ext.P1 is the mahazar prepared by PW1. PWs 1 and 2 who had detected the offence and arrested the accused, brought her to the Excise Range Office where PW4 was available. He received the accused and the articles brought along with him which was seized at the time of detection. After being convinced about the details given by PW1, Crime No.120/99 was registered as per Ext.P4 occurrence report.

3. Finally, PW5 took over investigation. He recorded the statement of witnesses, 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, Thiruvananthapuram. The said court made over the case to Additional Sessions Court Fast Track-III, Thiruvananthapuram for trial and disposal. The latter court, on receipt of records and on appearance of 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 P6 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. She denied all the incriminating circumstances brought in evidence against her and maintained that she is innocent.

7. 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.

8. Obviously impressed by the evidence furnished by PWs 1 and 2 and also the contents of Ext.P1 mahazar prepared by PW1 which is a contemporaneous document, the court below was inclined to take the view that the offence has been established. The conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

9. Learned counsel appearing for the appellant contended

that this appeal will have to be disposed of on a very short ground. Learned counsel pointed out that no forwarding note is seen produced before court and that means there is no specimen of sample seal made available to the court. Non production of forwarding note and non marking of sample seal is fatal to the prosecution. For the said proposition, learned counsel relied on the decisions in **Majeedkutty** vs. **Excise Inspector** (2015 (1) KLT 624) and in **Krishnan** vs. **State** (2015 (2) KLT SN 8).

10. Learned Public Prosecutor, on the other hand, relied on the evidence of PWs 1 and 2 and pointed out that there is no infirmity in the evidence of PWs 1 and 2 and their evidence can be safely accepted and acted upon. If that be so, court below was justified in finding that the offence is made out and no interference is called for in the said finding.

11. It is true that the evidence regarding the incident remains confined to the testimony of PWs 1 and 2, Preventive Officers. Both of them gave uniform and consistent version regarding the incident and their versions complement each other. Even though they are cross examined at length, nothing was

brought out in their evidence to show that they had any axe to grind against the accused or that they had any reason to falsely implicate the accused. There is nothing to show that their evidence is not trustworthy.

12. But that is not the end of the matter. This Court in the decisions in **Majeedkutty** vs. **Excise Inspector** (2015 (1) KLT 624) and in **Krishnan** vs. **State** (2015 (2) KLT SN 8) held that production of forwarding note along with specimen of sample seal will have to be provided to the court. In the case on hand, that has not been done. This Court in the above decisions has observed that in the absence of forwarding note containing specimen of sample seal, it is not possible for the court to ensure the authenticity of the sample taken. By getting the forwarding note prepared and produced before court, that should necessarily contain the seal used by the officer concerned and then the court is in a position to compare the seal on the sample sent for chemical analysis. Whatever that be, in the case on hand, no forwarding note is prepared and there is nothing to show that the specimen of sample seal was also provided. In the absence of all

these materials, this Court is unable to uphold the findings of the court below.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Sections 8(1) and (2) of Abkari Act are set aside and it is held that the accused is not guilty of the offence. She stands acquitted of the charges levelled against her. Her bail bond shall stand cancelled and she is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.