

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA,
1937

CRL.A.No. 294 of 2006

AGAINST THE JUDGMENT IN SC 524/2004 of ADDITIONAL DISTRICT &
SESSIONS COURT (ADHOC)-I, PATHANAMTHITTA.

APPELLANT(S)/ACCUSESD:

CHANDRAN PILLAI,
S/O. PARAMESWARAN PILLAI, VETTITHARAYIL VEETIL,
HARIPPAD THAMALLAKARA MURI, KUMARAMPEROOR VILLAGE,
KARTHIKAPPALLY TALUK.

BY ADV. SRI.P.HARIDAS

RESPONDENT(S)/COMPLAINANT:

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

2. THE EXCISE INSPECTOR,
KONNI.

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
18-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 294 of 2006

Dated this the 18th day of December, 2015.

JUDGMENT

The accused faced prosecution for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty of the offence. Hence he was convicted and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for two years. Set off a per law was allowed.

2. The prosecution gives the story thus:

The incident which gave rise to this case is said to have occurred on 19.2.2002. On that day, P.W.1 was functioning as the Excise Inspector of the Pathanamthitta Excise Enforcement and Anti Narcotic Special Squad. He along with P.W.5 and a few other officers had set out on patrol duty as usual. While they reached near the house of one Samuel situate at Kulanadakkuzhi at about 4.30 p.m., they happened

to see a person coming along the way carrying a plastic bag with him. As soon as he saw the excise officers, he became nervous and tried to conceal himself. Feeling suspicious about his conduct, he was intercepted and the bag was seized. It contained three bottles of 750 ml capacity containing light reddish coloured liquid. Each of the bottle was opened and the contents was examined by taste and smell. It was revealed that the contraband article is coloured arrack. From each one of the bottle, sample of 200 ml was taken in bottles of 375 ml capacity and balance contraband liquor was also sealed and labelled. The labels contained the signature of P.W.1, witnesses and the accused. Ext.P1 mahazar was prepared at the spot and the accused was arrested then and there as per Ext. P2 arrest memo. Intimation of arrest was given to the wife of the accused as per Ext.P3 which she acknowledged. Thereafter P.W.1 along with his team of officers and the accused, contraband article and the samples and the records

returned to the office and entrusted the same to the Excise Range Inspector on the same day itself. P.W.3 was the then Excise Range Inspector. On the date of the incident, according to him, the accused, the contraband article and the records were produced by P.W.1 before him, and he would say that at the time when he received those articles, M.Os. 1 and 2 were sealed and labelled. As per Ext.P5 occurrence report, he registered Crime No. 49 of 2002. The accused and the articles were produced before court accompanied by a remand application. P.W.3 says that in the remand application there was a request to send samples for chemical analysis. Ext. P7 is the property list. The chemical analysis report after analysing the sample obtained is Ext.P8. He conducted investigation in the case. Further investigation was done by P.W.4. He recorded statements of witnesses, completed investigation and laid charge before court.

3. The court, before which final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Pathanamthitta. The said court made over the case to Additional District and Sessions Court (Adhoc) -I, Pathanamthitta for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Section 55(a) of the Abkari Act. To the charge read out to him, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 5 examined and had Exts.P1 to P8 marked. M.Os.1 and 2 were identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is

innocent. 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.

5. The court below considerably influenced by the evidence of P.Ws. 1 and 5, who gave a uniform and consistent version of the incident coupled with Ext.P1 mahazar, contemporaneous document drawn up by P.W.1 containing all the details and also prompt production of the accused before the court concerned, came to the conclusion that the offence has been established beyond reasonable doubt. Conviction and sentence followed.

6. Assailing the conviction and sentence, learned counsel for the appellant contended that this appeal may have to succeed on a very short ground. Referring to the evidence of P.Ws. 1 and 5 it is contended that there is nothing to show that a forwarding note as contemplated by law containing the specimen sample seal has been prepared. At

any rate, it is not marked in the case. In the absence of forwarding note with a sample seal thereon, prosecution cannot succeed. It is an essential ingredient in the sense that that is the only way of ascertaining the authenticity of the sample sent for chemical analysis. For the above proposition, learned counsel relied on the decisions reported in Krishnan v. State (2015(2) K.L.T. SN 8) and Joseph v State of Kerala (2009 (4) KHC 537). It is therefore contended that conviction will have to be set aside.

7. Learned Public Prosecutor on the other hand relied on the testimony of P.Ws. 1 and 5 and contended that their evidence is consistent and uniform regarding detection, seizure, sampling, labelling etc. and inspite of searching cross examination nothing could be brought out to show that they are speaking falsehood. There is also no indication at all in the evidence of P.Ws. 1 and 5 to show that they had any ill-will against the accused or they have made him as accused with

oblique motive. It is true that independent witnesses have turned hostile. But then, there is Ext.P1 mahazar which is a contemporaneous document drawn up by P.W.1 at the time of detection and it contains all the details spoken to by P.Ws. 1 and 5. It is too difficult to accept the plea that such a claim could have been concocted at that point of time. Therefore, the court below was justified in coming to the conclusion that the contraband article was seized from the possession of the accused. But is that enough is the question.

8. It is not certainly so in the light of the decisions referred to above. This court has indicated that the prosecution is bound to produce the forwarding note at least a requisition note which contains the specimen sample seal so as to enable the court to ensure that the sample that was sent for analysis is authentic or in other words it is the same sample that was taken from the contraband article seized from the possession of the accused.

9. In the decision reported in Krishnan v. State (2015(2) K.L.T. 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 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.”

10. In the decision reported in Joseph v. State of Kerala (2009(4) KHC 537), it was observed 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.”

11. A reading of the above decisions will leave one in no doubt that the only guarantee which the court has regarding this aspect is by comparison of the sample seal shown in the forwarding note. One cannot omit to note that

the forwarding note contains a column for providing specimen seal. In the case on hand, the forwarding note has not been produced and there is also no indication of the specimen sample seal or any seal alleged to have been used for sealing the sample or the balance contraband article. In the light of the principles laid down in the decisions referred to above, on this short ground, the appellant is entitled to succeed.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and the accused shall stand acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.