

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. 301 of 2006

AGAINST THE JUDGMENT IN SC 780/2001 of ADDITIONAL DISTRICT &
SESSIONS COURT (FAST TRACK NO.I) THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:

SURESH, S/O.AGASTHIAN,
KARIYARAVILA VEEDU, MUDAKKAL DESOM,
VEILOOR VILLAGE, THIRUVANANTHAPURAM.

BY ADV. SRI.P.K.MUHAMMED

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA.

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. 301 of 2006

Dated this the 16th day of October, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act and therefore he was convicted and sentenced to undergo rigorous imprisonment for 1 ½ years and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for six months.

2. The prosecution allegation is that on 19.8.1998 P.Ws. 1 and 6 along with other officers had gone on routine patrol duty, and when they reached Mundackal junction, they happened to see the accused coming along with a black can in his hand. Seeing the Excise Officers, he became panic and he was intercepted and in the presence of independent witnesses the can was seized, contents was examined and by taste and smell it was identified as arrack. The accused was arrested and the can was sealed, on which label was also affixed

containing the signature of the accused, P.W.1 and independent witnesses. P.W.1 claims to have prepared Ext.P2 mahazar. They returned to the office and entrusted the accused, the records and the articles seized for further proceedings.

3. P.W.5 is the Excise Preventive Officer at Kazhakuttom Excise Office, and on that day, according to him, P.Ws. 1 and 6 had produced the accused, the records and the contraband articles before him and he registered crime as per Ext.P5 occurrence report. The accused was produced before the court on the same day. Articles seized were also forwarded to the court. He also claims to have preferred the requisition for sending the articles for chemical examination. P.W.2 was the then Excise Range Inspector and he conducted investigation in the case. He recorded statements of witnesses and he obtained Ext.P4 chemical analysis report. After completing investigation, he laid charge before court.

4. The court, before which final report was laid took cognizance of the offence. Finding that the offence is one 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 Court-I), Thiruvananthapuram for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 55(a) 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 6 examined and had Exts.P1 to P5 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. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. 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.

6. Presumably, mainly based on the evidence of P.Ws.1 and 6 and also the contemporaneous document and also the prompt production of materials before court, the court below formed the opinion that the offence has been made out and therefore conviction and sentence followed. The said conviction and sentence are assailed in this appeal.

7. Learned counsel appearing for the appellant raised three points for consideration. According to the learned counsel, property list is not seen produced before court. There is no forwarding note sent to court. There was no evidence regarding sampling done by any person.

8. According to the learned counsel, from the evidence of P.Ws. 1, 6 and 5 it can be seen that no sample was taken from the spot and the entire contraband article was produced before court. Of course, P.W.5 says about having

made requisition for forwarding the articles for chemical examination, There is also no property list produced. Therefore, it cannot be said that the sample had been forwarded to court. Even otherwise, going by the evidence of P.Ws. 1 and 6, there is no case for them that sampling was done. Learned counsel then pointed out that then the only conclusion that can be drawn is that the sampling was done from the court. In that case, there should be clear evidence to show as to who had taken the sample, when it was taken and under what authority. In the absence of any evidence in that regard, it is not possible to say that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. In support of the above contention, learned counsel relied on the decision reported in *Nalinakshan v. State of Kerala* (2012(4) KHC 464). Learned counsel contended that on that ground, conviction cannot stand.

9. Learned Public Prosecutor very vehemently tried to support the finding of the court below. According to the learned Public Prosecutor, these are only technical pleas. Since the evidence of P.Ws. 1 and 6 infact show the arrest of the accused and especially when the articles, the documents and the accused were promptly produced before the court concerned, certain technical omissions cannot stand in the way of the prosecution establishing the case beyond reasonable doubt and the court accepted the same. Contending for the position that there is no ground made out to interfere, she prayed for a dismissal of the appeal.

10. One would wish to accept the contention of the learned Public Prosecutor. True, the three points raised are technical in nature. But technicalities have a role to play in the case of this nature. Probably the omissions pointed out are the only safeguards available to the accused to show that he is innocent. Those are omitted to be carried out, necessarily the

consequence will be fatal.

11. Coming now on to the facts of the case, it is true that P.Ws. 1 and 6 say about the detection and arrest of the accused. They say about having seized the contraband, sealed and labelled the same. But neither of them say that they had taken sample from the spot. P.Ws. 1 and 6 say that they returned to the office and handed over the accused and the documents to P.W.5. It is true that P.W.1 says that he has prepared Ext.P1 mahazar at the place of occurrence. P.W.2 says about having conducted investigation. But he does not say that he had prepared the forwarding note or sent it to court. He has no case that he had taken sample from the office. P.W.2 laid charge before court.

12. As rightly pointed out by the learned counsel for the appellant, there is no material to show as to who had taken the sample and from where. Obviously, it had been taken from the court. In that case, the thondi clerk has to be

examined. Absence of the evidence of the thondi clerk is fatal. It will not be possible to say that the sample if taken from the court was the one taken from the contraband seized from the possession of the accused.

13. One need not labour much on this aspect in the light of the decision cited by the learned counsel for the appellant, i.e., the decision in *Nalinakshan v. State of Kerala* (2012(4) KHC 464). In the said decision it was held as follows:

“4. According to P.W.1 sample was taken from the Court and it was forwarded to the chemical examiner. P.W.1 would further state that after sampling the remaining quantity of liquor was destroyed as evidenced by Ext.P3(a) order whereby the Magistrate ordered to take sample and destroy the balance. Ext.P5 is the report of the chemical examiner certifying that the sample contained 25.16% of ethyle alcohol by volume. Other than the so called order of the learned Magistrate for taking sample and destroying the remaining quantity, there is no evidence regarding the taking of sample and the destruction of the contraband. Who took the sample, when took and when it was forwarded to the chemical

examiner are not at all borne out by the evidence. Neither any witness was examined regarding the taking of the sample or any report of any staff of the court regarding the compliance of the order of the Court is brought in evidence. In effect, Ext.P5 is relating to the contraband seized by P.Ws. 1 and 4. IN the above circumstance, I am not inclined to give any reliance to Ext.P5 and to come to a conclusion of guilty. Courts below had gone wrong in relying upon Ext.P5 to arrive at a conclusion of guilt. Therefore, the revision petitioner is entitled to an order of acquittal.”

14. In the absence of search list, which gives the court details regarding the articles produced before court, absence of forwarding note which desisted the court from verifying whether sample was taken or not or lack of evidence regarding the sample taken, makes the position fatal to the prosecution. Unless it is shown that the sample was taken from the contraband seized from the possession of the accused, it will not be possible to hold that the accused is guilty of the offence.

15. In the case on hand, the three infirmities pointed out stare at the face of the prosecution. It is rather surprising to note that the court below omitted to take note of these vital aspects and simply carried away by the oral testimony of P.Ws. 1 and 6 and contemporaneous document, the seizure mahazar. Though they are relevant and significant, they are not the only material for determining whether the offence has been made out or not. Preparation and production of property list and production of forwarding note, which enable the court to verify whether the sample seal is affixed, and also the evidence regarding the sampling are essential before a conviction can be entered into in a case of this nature. The prosecution has miserably failed to establish these facts. If that is so, the benefit should go to 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 him.
His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.