

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

CRL.A.No. 304 of 2006 ()

**AGAINST THE JUDGMENT IN SC 670/2002 of ADDITIONAL DISTRICT & SESSIONS
COURT (ADHOC)-II, KOLLAM DATED 12-01-2006**

APPELLANT(S)/ACCUSED:

**ROY ALIAS PALLAN ROY, S/O.VARGHESE,
PULLIKKADE, BUNGLOW PURAYIDATHIL, VADAKKUMBHAGOM WARD
KOLLAM EAST VILLAGE.**

BY ADV. SRI.THOMAS K. PHILIP

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 15-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 304 of 2006

Dated this the 15th day of December, 2015

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 55(a) & (i) of the Abkari Act. Even though he was found guilty on both counts, sentence was imposed only for the offence under Section 55(i) of the Abkari Act. He was sentenced to suffer rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of one year.

2. PW2 was functioning as the Sub Inspector of Kollam East Police Station. On 08.05.2001, as usual, he along with his team of officers had set out for patrol duty. When they reached near the Shaw International Hotel, they received reliable information about the accused vending in Indian Made Foreign Liquor. PW1 and his team of officers had gone out to that place and they found a person standing

there with a glass in one hand and a bottle in the other hand engaged in the sale of liquor. Seeing the Police Officers, he dropped the bottle and the glass and then tried to escape from the place taking with him the big shopper bag. The Police team effectively intercepted him and the big shopper was seized from his possession. They could find bottles of Indian Made Foreign Liquor in the bag of various capacities. 15 bottles of 180ml Rum etc. were seized. They took a sample from one of the bottles and sealed and labelled the same. He was arrested at the spot and from his pocket, currency notes were recovered. The samples were sealed and labelled and so also the balance contraband article. Ext.P1 mahazar was prepared on the spot. They returned to the Station and registered crime as per Ext.P2 FIR. PW2 prepared the property list namely, Ext.P3 and on 09.05.2001, the articles seized were attempted to be produced before the court, but the court did not receive the same as it was a holiday. The articles were kept in safe

custody and then the articles were produced on 29.05.2001. He made a requisition to have sample sent for chemical analysis and the certificate thus got is Ext.P4. PW3 took over investigation and prepared the scene mahazar. He recorded statement of witnesses, completed the investigation and laid charge before court.

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

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Sections 55(a) & (i) 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 3 examined and had Exts.P1 to P7 marked. MOs 1 to 8 were got identified and marked.

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. Accepting the evidence of PWs 1 and 2 and relying on Ext.P1 and also the fact that articles and the accused were promptly produced before court concerned, the court below was of the opinion that those items of evidence were sufficient to fasten liability on the accused and thereby, convicted and sentenced him as already mentioned.

9. The learned counsel for the appellant assailing the conviction and sentence pointed out that the appellant will have to succeed on a short point. The learned counsel pointed out that it was mandatory on the part of the prosecution to have the forwarding note marked so as to enable the court to have a glimpse at the sample seal which is said to have been affixed on the sample so as to ensure that the sample that reaches the laboratory is the sample taken from the contraband article seized from the possession of the accused. Reliance was placed on the decisions reported **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) in this regard. In the light of the absence of the forwarding note, the learned counsel submitted that the conviction will have to be set aside.

10. Though the learned Public Prosecutor tried to sustain the conviction by relying on the evidence of PWs 1

and 2 and Ext.P1 mahazar, he had no answer for the absence of forwarding note containing the sample seal also.

11. 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.”

12. 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.”

13. 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."

14. It is quite evident from a reading of the above decisions that the production of forwarding note and also that the forwarding note should contain the specimen of the sample seal, is an absolute necessity. In the absence of that document, this Court had held that the authenticity of the sample sent for chemical analysis cannot be determined. If that be so, the principle laid down in the above decisions applies with all force to the facts of the present case and the conviction and sentence will have to be necessarily set aside

on that ground.

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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//True copy//

P.A. to Judge