

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

CRL.A.No. 308 of 2006

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AGAINST THE JUDGMENT IN SC 607/2000 of ADDL.SESIONS COURT  
FAST TRACK - III, THIRUVANANTHAPURAM DATED 01.02.2006

APPELLANT/ACCUSED:

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ANANDAN @ KODUMANIYAN, S/O. KUTTAN,  
KOINGIKKAVILA VEEDU, KODUVAZHANNUR DESOM  
KODUVAZHANNUR VILLAGE, CHIRAYINKEEZHU TALUK  
THIRUVANANTHAPURAM DIST.

BY ADVS.SRI.S.SUDHEESHKAR  
SRI.SIJU KAMALASANAN

RESPONDENT/COMPLAINANT:

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STATE OF KERALA,  
REPRESENTED BY CHIRAYINKEEZHU EXCISE RANGE OFFICER  
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA,  
ERNAKULAM.

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
19-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Crl. Appeal No.308 OF 2006**  
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**Dated this the 19<sup>th</sup> day of November, 2015.**

**J U D G M E N T**

The accused faced prosecution for the offences punishable under Sections 8(1) and (2) of Abkari Act for having carried 10 liters of arrack. He was found guilty and was therefore convicted and sentenced to suffer simple imprisonment for 1½ years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for four months.

2. The incident is said to have occurred on 01.09.1998. PW3, the Preventive Officer, along with superior officer in charge of the station had gone for routine patrol duty on 01.09.1998 also. At about 12.30 in the night, when they reached near the tea shop run by one Babu, they happened to see three persons going along the way including the accused. One of them was carrying a can. They were intercepted and the can was seized and when the contents were examined by taste and smell it was turned out to be arrack. The Excise Inspector who was the

leader of the patrolling party prepared Ext.P1 mahazar and it is stated by PW3 that the entire commodity i.e. the 10 liter can with 10 liter arrack was sealed and labeled and the label contained the signatures of accused, witnesses and the officer concerned. They then returned to the station and CW4 Excise Inspector who was the detecting officer registered crime as per Ext.P5 occurrence report. Ext.P6 is the property list drawn up by him.

3. Investigation was done by PW4. He recorded the statement of witnesses, prepared the forwarding note Ext.P7 and obtained the chemical analysis report Ext.P8. After completing investigation, he laid charge before court.

4. The court before which charge 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 the accused, framed charge for the offence under Sections 8(1) and (2) of Abkari Act. The accused pleaded not

guilty to the charge and claimed to be tried.

5. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P8 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. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

7. 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.

8. Probably, based on the evidence furnished by PW3, Preventive Officer who had accompanied the officer who lead the patrolling party and who had detected the offence taken along with the mahazar prepared by Excise Inspector which narrated the incident in detail and also impressed by the prompt production of accused, articles seized and documents before court, the trial court came to the conclusion that the offence had been made out. Conviction and sentence followed.

9. Assailing the conviction and sentence, learned counsel

appearing for the appellant raised mainly two points for consideration. The first ground is that it can be seen from the records that no sample was taken from the place of occurrence and sample was taken much later. There is no evidence as to who had taken sample and from where it was taken and when it was taken. In the absence of any evidence in this regard, it could not be said that sample which reached the laboratory is the sample taken from the contraband seized from the possession of the accused. The next ground urged is that the forwarding note produced by the prosecution does not contain the sample seal. It is also fatal to the prosecution. For the above proposition, learned counsel relied on the decision in **Krishnan vs. State** (2015 (2) KLT SN 8).

10. Learned Public Prosecutor had no answer to the above two contentions.

11. On reading of Ext.P1 mahazar, Ext.P6 property list and the evidence of PW3, it becomes crystal clear that the can containing 10 liters was seized from the possession of the accused and no sample was taken from the spot. In fact, a

reading of the evidence of PW3 and Ext.P1 would clearly show that whole of the contraband article was sealed and labeled by CW4. Obviously, it means that the entire commodity must have been produced before court. Then it follows that sample must have been taken from court. There is absolutely no evidence as to when the sample was taken, how the sample was taken and from where the sample was taken. It is by now well settled that it is absolutely necessary for the prosecution to examine the thondi clerk of the court who had been authorised to take sample from the contraband seized from the accused. There is absolutely no evidence in this regard in this case.

12. Learned counsel appearing for the appellant is justified in his submission that there is no guarantee at all that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. Equally formidable is the second ground urged by the learned counsel regarding sample seal. In the decision in **Krishnan** vs. **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 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.”

13. It is not necessary in this case to consider the necessity for the prosecution to furnish specimen seal in the column provided in the forwarding note since it has been detailed in the decision referred to above. The absence of sample seal adds agony to the prosecution.

14. For the above reasons, this Court is unable to uphold the conviction and sentence passed by the court below.

In the result, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the offence. He stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN  
JUDGE**

smp

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P.A to Judge.