

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 16TH DAY OF NOVEMBER 2015/25TH KARTHIKA, 1937

CRL.A.No. 310 of 2006

AGAINST THE JUDGMENT IN SC 143/2004 of ADDITIONAL SESSIONS COURT
FAST TRACK COURT -1 (ADHOC), MANJERI DATED 23.01.2006

APPELLANT/ACCUSED:

APPU ALIAS SUBRAMANIYAN, S/O.THANARI CHATHU,
KURUMBALANGODE AMSOM VENDEKKUMPOTTY,
NILAMBUR TALUK, MALAPPURAM (DT).

BY ADV. SRI.T.K.AJITH KUMAR

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
EXCISE INSPECTOR, NILAMBUR RANGE, MALAPPURAM DT.
BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.310 OF 2006

Dated this the 16th day of November, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Sections 8(1) and 55(g) of Abkari Act. After trial, he was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for six months. Set off as per law was allowed.

2. On 16.04.1999, PW1, Excise Inspector of the special squad along with his team of officers was on routine patrol duty. At about 5.30 p.m, they reached Idimuzhakki junction and when they were in front of a shop of Balan Nair, they received reliable information that the accused is distilling illicit liquor in his house. PW1 prepared the search memo and sent it to court and proceeded towards the place of incident. The house of the accused was searched and from the western corner of a room, a

can having a capacity of 2½ liters was seized and it contained 1 ½ liters of arrack. He happened to see two pots having 10 liters capacity containing full of wash. Each of the items were identified as arrack and wash respectively. PW1 then took a sample of 200 ml of arrack in a bottle of 375ml capacity and also took a sample of wash in a bottle of 750ml. He had the can and the samples sealed. He prepared Ext.P2 arrest memo and had the accused arrested. Ext.P3 is the search list and Ext.P4 is the mahazar prepared by him at the spot and on the material objects, he had the labels containing the signatures of accused, witnesses and himself affixed. The balance wash after taking sample was destroyed at the place of incident itself.

3. PW5, on 17.04.1999, took over investigation. He received the articles brought by PW1 and registered crime and Ext.P7 is the occurrence report. He prepared the property list and had the articles produced before court. He recorded the statement of witnesses. PW6 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, Manjeri. That court made over the case to Additional Sessions Court Fast Track-I (Ad hoc), Manjeri for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence punishable under Sections 8(1) and 55(g) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 7 examined and Exts.P1 to P12 marked. M.O.s I and II were 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. Impressed by the evidence furnished by PW1 taken

along with Exts.P3 and P4 which are contemporaneous documents and also the chemical analysis report Ext.P10, court below came to the conclusion that the offence had been made out and accordingly, conviction and sentence followed.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant pointed out that PW1, after seizure, had entrusted the articles to one Ummer from whom PW5 took custody of the articles. Learned counsel pointed out that the said Ummer has not been examined and there is no guarantee that the articles were in safe custody. It is further contended that the forwarding note namely, Ext.P9 contains the seal of the court and does not contain the seal of the officer namely, PW1. Drawing attention to the evidence of PW1, it was contended that he is categorical in his statement that he had affixed his seal on the sample and the balance articles. The mahazar does not contain the seal affixed by him. PW5, the investigating officer who admittedly prepared Ext.P9 forwarding note has not seen the seal of PW1. It is contended that there is no specimen of the seal affixed on the sample that is fatal. For the said proposition,

learned counsel relied on the decision in **Krishnan** vs. **State** (2015 (2) KLT SN 8). It is therefore contended that there is no guarantee that the sample which reached the laboratory is the sample taken from the contraband article seized from the possession of the accused.

10. Learned Public Prosecutor, on the other hand, very vehemently contended that normally the court does not affix seal on forwarding note and it has to be the seal of the officer concerned. It is significant to notice, according to the learned Public Prosecutor, that the properties were produced soon after detection and Exts.P3 and P4 contain a true narration of the incident which took place at the house of the accused. These documents along with the testimony furnished by PW1 corroborate by the evidence furnished by PW5 is sufficient to show that the offence has been committed. At any rate, according to the learned Public Prosecutor, court below chose to accept the prosecution version and found the accused guilty. There are no grounds made out to interfere with the conviction and sentence.

11. Of course, there is some substance in the submission made by the learned counsel for the appellant that Ummer in whose custody the articles were at least for a brief period was not examined. Assuming that it does not cause any harm to the accused, the question of seal agitated by the learned counsel for the appellant is a serious matter. It is no doubt true that PW1 says that he had taken sample from both arrack and wash and both the samples were sealed and labeled by him. He, however, does not mention anything about the nature of seal used by him and neither PW3 nor PW4 says the specimen of the seal used by him.

12. 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. The necessity for the prosecution to furnish specimen seal which is to be compared with the seal on the sample has been highlighted in the above decision. The court felt that the only guarantee which the court can to ensure that the sample

which reached the laboratory is the sample taken from the contraband seized from the possession of the accused is by comparison of the seal said to have been affixed by the person who had taken the sample. PW1 has no case that he had shown the seal affixed by him to PW5. PW5 had no case that he had seen the seal affixed by PW1. PW5 has also no case that the seal found on the forwarding note is the specimen of the seal which was affixed by PW1. A perusal of the seal now found in the forwarding note would indicate that it is court seal. At any rate, there is no assertion by any of the prosecution witnesses that the seal found in the forwarding note now present before court is the seal used by PW1. If that be the case, there is no guarantee that the sample which reached the chemical analysis laboratory is the sample taken from the contraband article seized from the possession of the accused.

14. Following the principles laid down in the decision referred to above, this appeal has to succeed.

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 is 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.