

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

CRL.A.No. 336 of 2006

AGAINST THE JUDGMENT IN SC 288/2000 of ADDL. DISTRICT & SESSIONS
COURT (ADHOC)-I, KOLLAM DATED 17-01-2006

APPELLANT/ACCUSED:

GOPAKUMAR, S/O.MURALEEDHARAN PILLAI,
INDIRALAYAM, THURUTHIKARA MURI, KUNNATHOOR VILLAGE,
KUNNATHOOR TALUK, KOLLAM.

BY ADVS.SRI.M.V.THAMBAN
SRI.K.V.ANIL KUMAR

RESPONDENT/COMPLAINANT:

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

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
03-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.336 OF 2006

Dated this the 3rd day of December, 2015.

J U D G M E N T

The accused in this case who was put on trial for the offence punishable under Section 55(a) of Abkari Act was found guilty and he was therefore convicted and sentenced to suffer simple imprisonment for 6 months and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for one month. Set off as per law was allowed.

2. The prosecution case is that on 18.07.1998, while PW3 along with PW1 and other officers were on routine patrol duty and when they were going along the Panchayath road and reached in front of the house of one Karunakaran, accused was seen coming along the road with a white can. Feeling suspicious, he was intercepted in the presence of two independent witnesses. He was carrying a can of 5 liters capacity which was seized by the Excise Officers. They examined the contents therein and found that the can had 750ml of arrack. A glass was found nearby

which had the smell of arrack. They were also able to recover a bottle of 750ml containing a red colour liquid having the label Negro Lemons XXX Rum-manufactured by Bharat Industries Ltd-Nasik Bombay. By taste and smell, the officers were convinced that it was Rum. Both the can and the bottles were sealed. Ext.P1 is the mahazar prepared at the spot and that contains the signature of PW3 and the witnesses. He entrusted the accused seized articles and documents to his superior officer.

3. PW4 was the Excise Inspector at the relevant time. He received the articles, accused and documents produced by PW3 before him and as per Ext.P4 occurrence report, crime was registered against the accused. He prepared the forwarding note requesting the court to sent the sample for chemical analysis. The report received is Ext.P7. He recorded the statement of witnesses, 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, Kollam. The said court made over the case to Additional District and Sessions Court (Adhoc)-I, Kollam for trial and disposal. The latter court, in receipt of records and on appearance of accused, framed charge for the offence under Section 55(a) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P7 marked. M.O.s I to III 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. He also stated that he has been falsely implicated.

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. The court below, accepting the evidence of PWs 1 and 3 taken along with Ext.P1 mahazar and also the chemical analysis

report Ext.P7, found no reason to disbelieve the prosecution version of the incident and held that the accused is guilty of the offence under Section 55(a) of Abkari Act. Conviction and sentence as already mentioned followed.

9. Learned counsel appearing for the appellant assailed the conviction and sentence mainly on two grounds; 1) the prosecution has not produced the forwarding note alleged to have been filed before court and 2) there is no evidence regarding sample which has been sent to laboratory for chemical examination. Labouring on the above aspect, learned counsel contended that this Court had occasion to observe in a case that production of forwarding note is an absolute necessity for proper prosecution of the accused. The forwarding note contains a column for indicating the specimen of the seal used by the officer concerned. This Court has occasion to hold that that is the only guarantee which the court can have to ensure that the sample which has been sent to laboratory is the sample taken from the contraband seized from the possession of accused. For the above proposition, learned counsel relied on the decisions in

Majeedkutty vs. Excise Inspector (2015 (1) KLT 624) and in **Krishnan vs. State** (2015 (2) KLT SN 8).

10. The second contention taken by the learned counsel for the appellant is that even as would be seen from the evidence of PWs 1 and 3 and also PW4, it is quite evident that sample was not taken at the spot and that exercise was left to be done by the court. In such cases, this Court has occasion to hold that the person who took the sample as per the orders of the Magistrate had to be examined to ensure that proper sampling has been done. That is conspicuously absent in the case. Therefore, there is no guarantee that the sample sent to laboratory is the sample taken from the contraband seized from the possession of accused. On this ground also, according to the learned counsel, conviction will have to be set aside.

11. Learned Public Prosecutor, on the other hand, contended that the evidence of the prosecution witnesses namely, PWs 1 and 3 establishes beyond doubt that the accused was found in possession of contraband articles and M.O.s I to III were recovered from his possession. Ext.P1 mahazar establishes

the said fact and contains the entire narration of facts. Further, learned Public prosecutor pointed out that accused, contraband articles and documents were produced on the very next day before court thereby throwing out the possibility of fabrication of document. At any rate, according to the learned Public Prosecutor, court below has chosen to accept the evidence of PWs 1 and 3 and there is no reason as to why this Court should take a different view.

12. If one is to be simply guided by the evidence of PWs 1 and 3, probably, the submission made by the learned Public Prosecutor might be correct. But it is well settled that mere oral vibration of detection is not sufficient. If one goes by the evidence of PWs 1 and 3, it is clear that they had occasion to intercept the accused and seize the can and had also occasion to seal the articles and label the same. It is clear from their evidence that they had not taken any sample from the contraband seized to sent it for chemical analysis. PW4 speaks about having filed forwarding note. He, in his evidence, specifically says that he has requested the court to take sample

for sending the same for analysis. One conspicuous aspect in the case is that forwarding note is not seen marked. So the court is in dark regarding the seal alleged to have been affixed on the sample. In the decision in **Majeedkutty vs. 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.”

13. If the above decision is to be applied in this case, non production of forwarding note is fatal to the prosecution.

14. Equally formidable is the second ground regarding the sample taken for chemical analysis. As already noticed, the Excise Officer who detected the offence has not taken any sample and going by the evidence of PW4, he had requested the court to take sample. In such cases, this Court has held that it is absolutely necessary to examine the Clerk who, under orders of the presiding officer, had taken sample so as to ensure that proper sampling has been done. In the absence of evidence of that portion, it cannot be said that proper sample was taken for sending it for chemical analysis.

15. The above two factors, as rightly pointed out by the learned counsel for the appellant, are indeed significant and most important. Failure to comply with either of these vitiates the conviction.

For the above reasons, 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 under Section 55(a) of Abkari Act. 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.