

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. 342 of 2006 ()

**AGAINST THE JUDGMENT IN SC 77/2003 of ADDITIONAL DISTRICT & SESSIONS
COURT (ADHOC) FAST TRACK - III, PATHANAMTHITTA DATED 12-01-2006**

IN CP 16/2002 OF JUDICIAL FIRST CLASS MAGISTRATE, ADOOR

APPELLANT(S)/ACCUSED:

**SASANKAN, S/O.BALAKRISHNAN ACHARY,
PUTHANPURA KIZHAKKETHIL VEEDU, KALANJOOR KARA
ADOOR TALUK, PATHANAMTHITTA DISTRICT.**

BY ADV. SRI.C.B.SREEKUMAR

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA REPRESENTED BY
EXCISE INSPECTOR, ADOOR EXCISE RANGE 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. 342 of 2006

Dated this the 15th day of December, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) and (2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of three months.

2. The incident which gave rise to this case occurred on 21.11.1999. PW1 was functioning as the Excise Guard of Adoor Excise Range. As per the prosecution case, one Sri. Abdul Azeez, the Preventive Officer along with his team of officers were on routine patrol duty. When they reached Kallarethu junction, a person was seen coming along the road carrying a plastic bag. Seeing the Excise team, he became panicky and tried to conceal himself. Feeling suspicious, he was intercepted and the plastic bag was

seized. On examination, it contained 14 polythene covers which contained some liquid. One of them was opened and the liquid was identified as arrack by taste and smell. Two other covers were opened and the contents were transferred to a bottle of 180ml capacity. It was taken as sample. The sample was sealed and labelled. The label contained the signatures of the accused, witnesses and the Preventive Officer. Sri. Abdul Azeez, who is no more, had prepared Ext.P2 mahazar also. Thereafter, PW1 would say that they along with the accused and the contraband article returned to the office. PW2 was the Assistant Excise Inspector at the relevant time. He would say that on 21.11.1999, late Sri. Abdul Azeez had brought before him the accused and the seized contraband article and he, after examining them, received the articles and the accused. He prepared Ext.P3 occurrence report. Ext.P4 is the property list. PW4 took over investigation from 13.03.2000. He recorded statements of witnesses and obtained Ext.P7 Chemical

Analysis Report. After completing investigation, he 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, Pathanamthitta 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), Fast Track-III, Pathanamthitta, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 8(1) and (2) 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 4 examined and had Exts.P1 to P7 marked. MOs 1 to 3 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 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, on an appreciation of the evidence in the case, came to the conclusion that the offence has been established as against the accused and accordingly, convicted and sentenced him as already mentioned. The conviction and sentence are assailed in this appeal.

9. According to the learned counsel for the appellant, this appeal will have to succeed on the very short ground. It is by now well settled, according to the learned counsel, that forwarding note must be marked before court and it should also contain the specimen seal of the officer concerned. In

the absence of either the forwarding note or the sample of specimen seal, prosecution cannot succeed. For the said proposition, the learned counsel relies on the decision reported in **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). It is further contended that PW2, who received the articles, the accused and the documents from late Abdul Azeez, was only an Assistant Excise Inspector. According to the learned counsel for the appellant, he was not competent to detect the offence going by the provisions of the Act or notification issued by the Government. If that be so, according to the learned counsel, all proceedings are *non-est* and cognizance could not have been taken on such a incompetent proceedings.

10. The learned Public Prosecutor relying on the evidence of PW1 contended that the evidence of PW1 taken along with Ext.P2 mahazar are sufficient to show that the

detection was proper and correct and there is no infirmity pointed in the detection. The non-marking of forwarding note is only a technical issue, the learned Public Prosecutor pointed out that, that shall not stand in the way of holding the accused guilty. In short, the contention is that no grounds are made out to interfere with the conviction and sentence.

11. It is true that PW1, who had accompanied the Preventive Officer was only an Excise Guard, does say about the detection of the crime. He says about how they happened to come across accused and what happened thereafter. He speaks about the sealing and labelling of the sample as well as the balance contraband article. He also makes mention of the fact that the mahazar was prepared and the arrest memo was prepared.

12. PW2, admittedly, was the Assistant Excise Inspector at the relevant time. He does not qualify to be an Abkari Officer as contemplated in the Act. The question as

to whether he could have received the accused, the contraband article seized is a vexed question. If one strictly goes by the provisions of the Act, Section 40 of the Abkari Act stand in the way. It is not necessary to consider that aspect in this case for the simple reason that this appeal can be disposed of on another ground.

13. None of the witnesses namely, PW1 or PW4 say anything about having sent a forwarding note to the court requesting to have the sample sent for chemical analysis. That means there is no forwarding note marked in this case.

14. 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.”

15. 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.”

16. 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."

17. A reading of the above decisions leaves one in no doubt that it is mandatory to have the forwarding note marked and not only that, forwarding note should also

contain the specimen of the seal used by the officer concerned. This Court felt that, that is absolutely necessary to establish the authenticity of the sample sent for chemical examination. Therefore, there is no guarantee in this case that the sample analysed in the chemical analysis laboratory is the sample taken from the contraband article seized from the possession of the accused. Having failed to conform to the above two standards, it is extremely difficult to sustain the conviction.

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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P.A. to Judge