

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

CRL.A.No. 397 of 2006

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AGAINST THE JUDGMENT IN SC 637/2004 of ADDITIONAL DISTRICT AND  
SESSIONS COURT (ADHOC) -I, PATHANAMTHITTA DATED 15-02-2006

APPELLANT/ACCUSED:

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RAJAN, S/O.THANCKACHAN,  
PARAPATTU COLONY, PRAKKANAM MURI  
CHENNEERKARA VILLAGE, KOZHENCHERRY TALUK.

BY ADVS.SRI.ANOOP MATHEW ABRAHAM  
SRI.LATHEESH SEBASTIAN

RESPONDENTS/STATE & COMPLAINANT:

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1. STATE OF KERALA, REPRESENTED BY THE  
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
  2. THE EXCISE INSPECTOR,  
PATHANAMTHITTA.

BY SRI.C.K. JAYAKUMAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
08-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Criminal Appeal No.397 OF 2006**  
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**Dated this the 8<sup>th</sup> day of September, 2015.**

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

The accused was prosecuted for the offences punishable under Sections 8(1) and (2) of Abkari Act. He was found guilty and was therefore convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for two years. Set off as per law was granted.

2. The incident in this case is alleged to have taken place on 13.07.1998. PWs 1 and 2, Excise Officers, were on routine patrol duty on that day and they, while passing along the road, happened to see the accused holding a bottle. Seeing the excise vehicle, he became nervous and panicked and that created suspicion in the mind of PWs 1 and 2. They stopped the vehicle and intercepted the person. In the presence of witnesses, they seized the bottle which the accused was holding and found that it contained 700ml of liquid. By taste and smell they realised

that the liquid contained in the bottle was arrack. A can was also near him which too contained 2 litres of arrack. That was seized. So also a glass was found at the place. PW1 prepared Ext.P1 mahazar and had the contraband articles properly sealed. He had a label affixed on the articles and M.O.1 is the bottle, M.O.2 is the cannas and M.O.3 is the glass seized. The accused was arrested and Ext.P2 is the arrest memo. They returned to the office along with the accused and the contraband articles which were entrusted to the Excise Range Inspector, Pathanamthitta. PW4, the then Excise Inspector prepared the occurrence report and that is Ext.P5. He prepared the property list and that is Ext.P6. The accused and the articles were produced before court. Investigation was conducted by PW4 who laid charge before court.

3. Judicial First Class Magistrate Court-I, Pathanamthitta before which final report was laid took cognizance of the offences and on finding that the offences are exclusively triable by a Court of Sessions, learned Magistrate committed the case to Sessions Court, Pathanamthitta under Section 209 Cr.P.C after following

necessary procedures. The Sessions Court made over the case to Additional District & Sessions (Ad hoc) Court-I, Pathanamthitta for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charges for the offences punishable under Sections 8(1) and (2) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried. The prosecution, therefore, had PWs 1 to 4 examined and Exts.P1 to P7 marked.

4. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances put to him. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined DW1.

5. On evaluation of evidence in the case, the court below found that the prosecution has succeeded in establishing his case. The conviction and sentence already mentioned followed. The said conviction and sentence are assailed in this appeal.

6. Learned counsel appearing for the appellant contended that this appeal will have to succeed on a very short ground.

Considerable reliance is placed by the court below on Ext.P4 chemical examination report to come to the conclusion that the articles alleged to have been seized from the possession of the accused are contraband articles. Ext.P1 mahazar would clearly show that sample was not taken from the spot and there is no evidence to show that any excise official had taken a sample. That leads to a conclusion that sample was taken from court and the person who has taken sample from court and who had forwarded the same for chemical analysis has not been examined. Relying on the decisions in **Ravi vs. State of Kerala** (2011 (3) KLT 353) and in **Rajamma vs. State of Kerala** (2014 (1) KLT 506), learned counsel pointed out that because of the infirmities mentioned above, prosecution has to fail.

7. There seems to be considerable force in the above submission. Ext.P1 mahazar is prepared by PW1. His evidence shows that he did not draw sample from the place or at his office. His evidence is clear to the effect that the same was taken from court. The person who has taken the sample was not examined to show that sampling was done properly. It is also not

discernible from the records as to whether two samples were taken or a single sample alone was taken. It is also interesting to note that PW1 says that he found the labels seen intact which would create further suspicion. This aspect was considered in the decision in **Ravi vs. State of Kerala** (2011 (3) KLT 353) wherein it was held as follows:

"13. It is difficult for us to believe that PW4 had produced the properties on 25.08.1997 and the Thondy Section Clerk refused to receive the properties on the ground that he was too busy. Even assuming that such a thing happened, we would have expected the prosecution to examine the Thondy Section Clerk to substantiate the above explanation. For reasons best known to the prosecution the Thondy Section Clerk was not examined. If so, it cannot be assumed that the property was in the safe custody of PW4 until their production before Court after 16 days. There is the possibility that the properties would have been tampered with. The prosecution, in a case of this nature 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 by change of hands in a tamper-proof condition. (Vide State of Rajasthan v. Daulath

Ram (AIR 1980 SC 1314) and Valsala v. State of Kerala (1993 (2) KLT 550 (SC). No conviction can be entered against the accused in a prosecution as the present one 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 (See Sathi v. State of Kerala (2007 (1) KLT SN 57 (C.No.82) and Sasidharan v. State of Kerala (2007 (1) KLT 720). There is no satisfactory link evidence to show that it was the same bottles seized from the appellant which eventually found their way into the hands of the Chemical Examiner and that there was no meddling or tampering with the bottles while they were in the custody of PW4. Hence, the result of Ext.P7 Chemical Analysis cannot be applied against the appellant".

8. Very same issue was considered in the decision in **Rajamma vs. State of Kerala** (2014 (1) KLT 506) wherein it was held as follows:

"10. But mere arrest of the accused with the material objects is not sufficient to establish that the accused has committed the offence punishable under S.55(a) of the Abkari Act. The prosecution has got a further duty to prove that, when the accused was

arrested, she was found in possession of the contraband article as alleged by the prosecution. But to prove the above fact, according to me, there is no evidence. The available evidences are insufficient to discharge the above duty of the prosecution. In the present case, the prosecution has no case that they have prepared a forwarding note and submitted before the court for sending the samples for chemical analysis. In this connection it is relevant to note that, when PW.1 was examined, he had deposed during his cross-examination that he has affixed his personal seal. His deposition reads as :-

“എന്റെ personal seal ആണ് വെച്ചത്. P.B. എന്നാണ്. M.O.1-ൽ ഇപ്പോൾ കാണുന്നത് കോടതിയിലെ seal ആണ്. എന്റെ seal കാണുന്നില്ല”.

So, the case of PW.1 is that he had affixed the personal seal, when he seized and sealed the material objects and the samples. When PW.4 the investigating officer has examined, he had deposed during the cross-examination that:-

“ M.O.1 ഉം sample - ഉം ഞാൻ കണ്ടിട്ടില്ല. Sealന്റെ specimen കോടതിയിൽ കൊടുത്തിരുന്നോ എന്ന് അറിയില്ല. സ്ഥലത്തുവെച്ച് seal ചെയ്താതെ office -ൽ കൊണ്ടുവന്നു വെച്ച് records ഉണ്ടാക്കിയതാണ് എന്ന് പറഞ്ഞാൽ ശരിയല്ല”.

The accused has seriously disputed the claim of PW.1 about the affixture of seal on the material objects as well as on the samples. PW.1 himself has admitted that the seal, which he claimed to have affixed on MO.1, is not seen on MO.1 at the time of his examination. In this case no forwarding note or requisition for sending the samples for chemical analysis is prepared and filed before the court. If a formal requisition or forwarding note is prepared and filed before the court, the same would have contained the sample seal, of the seal allegedly affixed by PW.1 on the sample bottle. 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”.

9. In the light of the principles laid down in the above decisions, it was absolutely necessary for the prosecution to examine the person who had taken samples in court and to show that sampling was properly done. In the absence of any such evidence, it is difficult to accept the case that samples taken and sent are samples of the contraband articles seized from the possession of the accused. It is a reasonable doubt created in that regard. If that be so, benefit should go to the accused.

For the above reasons, this appeal is allowed. Conviction and sentence passed by the court below are set aside and it is held that the prosecution has failed to prove its case. The accused 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