

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

SATURDAY, THE 21ST DAY OF NOVEMBER 2015/30TH KARTHIKA, 1937

CRL.A.No. 402 of 2006 ()

**AGAINST THE JUDGMENT IN SC 1231/2000 of ADDITIONAL SESSIONS COURT, FAST
TRACK (ADHOC)-II, TRIVANDRUM DATED 08-02-2006**

IN CP 97/2000 OF JUDICIAL FIRST CLASS MAGISTRATE -II,NEDUMANGAD

APPELLANT(S)/ACCUSED:

**MANIYAN, S/O.CHELLAPPAN,
KUNNUPURATHU VEEDU, ERAPOOTTU PARA, MEMALA
KOTTAKKAKOM MURI, VITHURA VILLAGE.**

**BY ADVS.SRI.T.A.UNNIKRIISHNAN
SRI.K.SATHEESH KUMAR**

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA, REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.BHAVADASAN, J.

Crl.A. No. 402 of 2006

Dated this the 21st day of November, 2015

J U D G M E N T

The accused faced trial for the offence punishable under Section 55(a) and (b) of the Abkari Act. After trial, he was found guilty of the offence punishable under Section 55 (a) of the Abkari Act. He was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of three months.

2. On 27.11.1999, at about 5.00 p.m., PW5, who was the Sub Inspector of the Station, along with PW3 and others went for patrolling duty. When they reached a place called Memala, they received reliable information that a person by name Maniyan is vending in illicit liquor at a place called Erappottupara. They proceeded to that place. On the way, on the southern side of a house, they happened to see the accused standing with a bottle having a capacity of 750ml

and a glass. He was approached by the officers. He tried to run away from the place. He was prevented from doing so. On examination of the contents in the bottle, PWs 3 and 5 were convinced that the content was arrack. The accused was arrested on the spot. They returned to the Station and registered crime as per Ext.P3 FIR. The accused was produced before court and Ext.P4 property list was drawn up. Investigation was completed by PW4 and final report was laid by him 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, Thiruvananthapuram under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track (Ad hoc) No. II, Thiruvananthapuram, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Section 55(a) & (b) and 58 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 5 examined and had Exts.P1 to P4 marked. M.O.s 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 he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He adduced no evidence.

8. On appreciation of the evidence in the case, the trial court formed the opinion that the prosecution has succeeded in establishing the possession of the contraband

articles with the accused and therefore convicted him for the offence under Section 55(a) of the Abkari Act.

9. Assailing the conviction so made, the learned counsel appearing for the appellant pointed out that there is absolutely no evidence in this case regarding the sample that is said to have been collected and sent to the chemical examination. Neither PW5 the Detecting Officer nor PW3 who had accompanied him say about any sampling done by PW5. The mahazar namely, Ext.P1 also does not mention about any sampling having been done. It is also significant notice according to the learned counsel no forwarding note is produced before the court and therefore there is no specimen seal also available to the court. Such being the situation, the learned counsel contended that the conviction cannot stand. He drew support from the decisions 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) in this regard.

10. The learned Public Prosecutor tried to sustain the conviction on the basis of the evidence furnished by PWs 3 and 5. The learned Public Prosecutor pointed out that whatever may be the circumstances, the court below found the evidence to be convincing enough to warrant a conclusion that the offence has been committed and there is no justification to interfere with the same.

11. Time and again, this Court has indicated that mere seizure of contraband article by itself is not sufficient. In the case on hand, PW5 is the Detecting Officer and PW3 had accompanied him. They say about having seen the accused standing with a bottle of 750ml capacity and a glass. They also say that the bottle was seized from him and its contents were identified as arrack. But neither of them say that any sampling was done at the spot. Ext.P1 is the mahazar prepared by PW5. That is also totally silent regarding any sample having been drawn by either PW5 or PW3. Ext.P4 is the property list. Surprisingly enough, that also does not

mention anything about any sample having been taken or being presented before court. Therefore, the question as to who had taken the sample remains a mystery. It has been stated by this Court times without number that it is absolutely necessary to examine the person, who had taken the sample, to ensure the authenticity of the same. In the case on hand, there is no evidence regarding that aspect. None of the witnesses depose about any sample having been taken or having produced it before court.

12. To crown it all, there is no forwarding note also produced and marked by the prosecution. In the decisions cited by the learned counsel for the appellant, the significance and importance of the need to produce the forwarding note containing specimen seal has been emphasized.

13. 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.”

14. 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.”

15. 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."

16. If that be the law, obviously, the case on hand fails to meet the required standards. There is no forwarding note containing the sample of specimen seal available before court.

17. In the light of the above facts, this Court is unable to uphold the conviction passed by the court below.

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