

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. 409 of 2006

AGAINST THE JUDGMENT IN SC 722/2001 of ADDITIONAL DISTRICT &
SESSIONS COURT (FAST TRACK - I), THIRUVANANTHAPURAM
DATED 17-02-2006

APPELLANT/ACCUSED:

SASIDHARAN, S/O. SREENIVASAN,
PUTHENVILA VEEDU, ELAKAMON DESOM, AYIROOR VILLAGE.

BY ADVS.SRI.P.M.SANEER
SMT.ASHA CHERIAN

RESPONDENT/STATE:

THE STATE OF KERALA,
REPRESENTED BY THE EXCISE INSPECTOR, VARKALA -
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI-31.

BY SMT. S. HYMA, 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. 409 of 2006

Dated this the 16th day of November, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Section 55(a) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for six months.

2. The incident in this case occurred on 27.5.1998. P.W.1 was then working as Excise Inspector of Varkala Excise Range. On that day, he along with P.W.2 and others had gone on patrol duty. When they reached Chavadimukku market at about 8.15 p.m., the accused was seen coming along the way carrying a paper packet. Seeing the excise officials he tried to hide himself. That caused suspicion in the minds of the excise officials and they intercepted and seized the paper packet which he had with him. On unwrapping the packet, it was

found to contain a bottle having a capacity of 750 ml with full of liquid in it. By taste and smell, the liquid was identified by the officers as arrack. The accused was arrested after preparing the arrest memo and Ext.P1 mahazar was prepared. Ext.P2 is the arrest memo. According to P.W.1, the bottle seized was sealed and labelled and the label contains the signatures of the accused, P.W.1 and the witnesses. He then returned to the station and prepared Ext.P4 occurrence report. He conducted investigation in the case also. The accused and the articles were produced before court on the same day. It is stated by him that he made a requisition to the court to take sample and send it for chemical examination. P.W.3, the successor-in-office of P.W.1, verified the records, obtained Ext.P5 chemical analysis report and laid charge before court.

3. The court, before which final report was laid took cognizance of the offence. Finding that the offence is one exclusively triable by a court of Sessions, the said court

committed the case to Sessions Court, Thiruvananthapuram. Under Section 209 Cr.P.C. The said court made over the case to Additional District and Sessions Court (Fast Track I), Thiruvananthapuram for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 55(a) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 3 examined and had Exts.P1 to P5 marked. M.Os. 1 and 2 were got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. 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.

5. The court below greatly impressed by the evidence adduced by P.Ws. 1 and 2 so also the prompt production of the articles before court and also based on the chemical analysis report came to the conclusion that the prosecution has established the case against the accused beyond reasonable doubt. Accordingly, the conviction and sentence followed.

6. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that this appeal will have to succeed on a very short ground. According to the learned counsel, there is no evidence regarding sampling and on a reading of the evidence of P.W.1, it would appear that he had requested the court to take sample. Further, it is contended that no forwarding note is prepared and the sample seal is not proper so as to enable the court to compare the same. Drawing attention to the evidence of P.W.1, it was pointed out that no sample was taken at the place of

occurrence and the same was taken at a later point of time.

7. Learned Public Prosecutor pointed out that the evidence of P.Ws. 1 and 2 are sufficient enough to show that offence has been committed as alleged by the prosecution. At any rate, the trial court has found the evidence to be convincing enough and there is no reason as to why this Court should take a different view.

8. True, as pointed out by the learned Public Prosecutor, if the evidence of P.Ws. 1 and 2 alone need to be looked into and of course, the seizure of the contraband from the possession of the accused stands established. But in law that is not sufficient. The article seized from the possession of the accused should be established to be arrack as claimed by the prosecution. Ext.P4 report says that the articles produced before court are a bottle containing 750 ml of coloured arrack and paper in which the bottle was wrapped. It is true that the accused, the article and the documents were

produced before court. It is not very clear as to who had taken the sample. At any rate, there is nothing in the evidence of P.Ws.1 and 2 to show that they had taken sample from the contraband article. It would appear that the sample was taken from the court as is discernible from the evidence of P.W.1. If that be so, the thondi clerk will have to be examined. (See the decision reported in Manikantan Pillai v. State of Kerala (2013 (4) KLT SN 139)). That has obviously not done in the present case and there is no guarantee that the sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused.

9. To make things worse for the prosecution, no forwarding note is seen produced or marked in the case. The result is that there is no specimen seal available before court which the public analyst has claimed to be tallying with the seal found on the sample sent for analysis. Consequence of absence of sample seal has been considered in the decisions

reported in Krishnan v. State (2015(2) K.L.T. SN 8) and Joseph v. State of Kerala (2009(4) KHC 537).

10. In the decision reported in Krishnan v. State (2015(2) K.L.T. 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.”

11. In the decision reported in Joseph v State of Kerala (2009(4) KHC 537), it was observed 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.”

12. Therefore, it follows that the prosecution has not succeeded in establishing the guilt of the accused beyond reasonable doubt and the conviction and sentence cannot

stand.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.