

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. 425 of 2006

AGAINST THE JUDGMENT IN SC 833/2003 of ADDL. SESSIONS COURT
FAST TRACK-I, ALAPPUZHA.

APPELLANT(S)/ACCUSED:

NATARAJAN, S/O. NANU, CHANPPUMTHARA,
KIZHAKKATHIL, KANDALLOOR THEKUM MURI,
KANDALLOOR VILLAGE, KARTHIKAPPALLY TALUK.

BY ADVS. SRI.S.SANAL KUMAR
SMT.BHAVANA VELAYUDHAN

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, 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:

P. BHAVADASAN, J.

Crl.Appeal. No. 425 of 2006

Dated this the 15th day of December, 2015.

JUDGMENT

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 undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for six months. Set off as per law was allowed.

2. The prosecution case as disclosed from the records is that on 23.3.2002 while P.W.1, the Preventive Officer of the Excise Department and P.W.2, Guard of the same department were on routine patrol duty along with other officers, they happened to see the accused trying to conceal a plastic can having capacity of one litre from the view of the excise officials. Hearing the noise of the vehicle, in which P.Ws. 1 and 2 were travelling, the accused tried to ran away.

He was intercepted and the can was seized. On identification, by taste and smell, the contents were found to be arrack. The accused was arrested and sample of 200 ml was taken in a bottle having 375 ml capacity. The sample so taken as well as the balance contraband article were sealed and labelled. The label affixed contained the signature of the accused, the witnesses and P.W.1. Ext.P1 is the mahazar prepared at the spot. Later they produced the accused, seized articles and the documents before the Excise Inspector concerned.

3. The Excise Inspector, who received the above articles is no more. He prepared Ext.P2 occurrence report and also the property list. He is also said to have made the requisition for sending the articles for chemical examination. P.W.4 was the Investigating Officer who recorded statements of witnesses, obtained chemical analysis report, completed investigation and laid charge before court.

4. The court, before which final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Alappuzha. The said court made over the case to Additional Sessions Court Fast Track-I, Alappuzha for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Section 8 (1) and (2) 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 4 examined and had Exts.P1 to P4 marked. M.O.1 was 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.

6. The court below mainly influenced by the evidence furnished by P.Ws. 1 and 2 and the contemporaneous document Ext.P1 came to the conclusion that the prosecution has succeeded in establishing the case against the accused beyond reasonable doubt and found him guilty. Conviction and sentence as already mentioned followed.

7. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that this appeal will have to succeed on a very short ground. It has been held by this Court on several occasions that marking of the forwarding note containing the specimen seal of the officer concerned is an essential requirement for a proper prosecution. Learned counsel relied on the decisions reported in Joseph v State of Kerala (2009(4) KHC 537) and Krishnan v.

State (2015 (2) K.L.T. SN 8). According to the learned counsel, the non-production of the forwarding note and the non-furnishing of the sample seal should end in failure of the prosecution case.

8. Learned Public Prosecutor tried to salvage the situation relying on the evidence of P.Ws. 1 and 2 and Ext.P1 mahazar. Learned Public Prosecutor contended that once their evidence is believed and accepted, it follows that the seizure has been proved and thereafter the chemical analysis report is only a formality. It is also contended that viewed in that angle, non-marking of the forwarding note and the absence of sample seal are of no consequence.

9. After having heard learned counsel for the appellant and the learned Public Prosecutor and having perused the records, this Court felt that the appellant is entitled to succeed. It is well settled that mere proof of seizure is not sufficient and marking of forwarding note is a

requirement and in the absence of which the court cannot ensure the authenticity of the sample sent for chemical analysis. It is in this context the necessity to produce the forwarding note assumes importance.

10. Forwarding note contains the purpose for which the examination is sought for and there is also space for providing sample seal. 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.”

11. 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.”

In all these decisions, it has been held that forwarding note is a significant item of evidence and in the absence of specimen seal, the court could not be sure about the sample sent for chemical examination. If that be the law, there is no reason as to why that principle should not be applied to the present case. Admittedly no forwarding note has been produced and no specimen seal is provided otherwise. Relying on the principle in the above decisions, it follows that there is no authenticity for the sample said to have been sent for chemical analysis. In the absence of forwarding note it has to be held that the prosecution against the appellant should end in failure.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the court below are set aside and the accused shall stand acquitted of the charges

levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P. BHAVADASAN,
JUDGE

sb.

//True copy//

P.S. To Judge