

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

CRL.A.No. 442 of 2006 ()

**AGAINST THE JUDGMENT IN SC 944/2001 of ADDITIONAL SESSIONS COURT FAST
TRACK, (ADHOC)-II, TRIVANDRUM DATED 11-01-2006**

CP 156/2000 OF JUDICIAL FIRST CLASS MAGISTRATE-II, ATTINGAL

APPELLANT(S)/ACCUSED:

**SUNTHARI, D/O.BHARGAVI,
MULLANKUNNU VEEDU, IDAVILAKOM MURI, VEILOOR VILLAGE.**

BY ADV. SRI.M.SREEKUMAR

RESPONDENT(S):

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 13-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 442 of 2006

Dated this the 13th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 8(1) and 58 of the Abkari Act. She was found guilty. Accordingly, she was 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 period of three months.

2. The incident in which the accused was arrested with the contraband is said to have taken place on 07.10.1998. PW2 at the relevant time was working as the Preventive Officer of the Kazhakkuttom Range. He as usual, on 07.10.1998 at 9.30 a.m., set out for patrolling duty along with his team of officers and while they were on their way, they happened to come across the accused coming along the road carrying a can. Feeling suspicious about the movement of the lady, she was intercepted and the can was

seized. By taste and smell, the content was identified as arrack. Pointing out to the accused that she had committed an offence, she was arrested. The can seized from the possession of the accused was sealed and the label was affixed. The label contained the signatures of PW2 and the witnesses. Ext.P1 mahazar was prepared at the place of incident. PW2 returned to the office and prepared Ext.P2 occurrence report. He prepared Ext.P3 property list and produced it before court. Investigation was conducted by PW2, who received Ext.P4 Chemical Analysis Report and after completion of investigation, 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, 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 (Adhoc) 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 Sections 8(1) 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 3 examined and had Exts.P1 to P4 marked. MO1 was got identified and marked.

6. After the close of prosecution evidence, the accused was questioned under Section 313 Cr.P.C. She denied all the incriminating circumstances brought out in evidence against her and maintained that she is innocent. She also pointed out that she had not done any act which would constitute an offence. However, she pointed out that her brother Sahadevan was involved in one of such incidents and to wreck vengeance, she has been falsely implicated.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C., she was asked to enter on her defence. She chose to adduce no evidence.

8. The trial court felt that the evidence of PWs 2 and 3, the two officers who detected the offence, seized the contraband article and drew up Ext.P1 mahazar, are sufficient enough to arrive at a conclusion that the offence has been made out beyond reasonable doubt. Conviction and sentence followed.

9. The learned counsel appearing for the appellant pointed out that this appeal will have to succeed on a very short ground. Admittedly, according to the learned counsel, PWs 2 and 3 do not say that sample was taken from the spot. In fact, the evidence is overwhelming to the effect that the entire article, that the accused was said to have been in possession of, was produced before court as per the thondi list and the occurrence report. That means, according to the learned counsel, that the sample was taken from the court.

There is no evidence at all to worth the name as to who had taken the sample from the court and when it had been done. There is also no evidence to show the specimen seal used to seal the sample. In support of his contentions, the learned counsel relied on 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). It is therefore contended that the conviction and sentence cannot stand.

10. The learned Public Prosecutor on the other hand pointed out that PWs 2 and 3 have categorically stated that the contraband was seized from the possession of the accused and there is no reason to suspect their version. They are experienced officers and they can identify the content by smell and taste. It is not necessary to bank on the Chemical Analysis Report for the purpose of coming to the conclusion that the accused was carrying arrack. Therefore, it is contended that the conviction has only to

stand.

11. One has to say that the contention raised by the learned Public Prosecutor cannot stand. Of course, PWs 1 and 2 among whom PW2 is the Preventive Officer led the patrolling party and they happened to see the accused coming across the road with a can. Both of them do speak about having intercepted the lady and seized the can from her possession and examined its contents. Their version is consistent with regard to the fact that as soon as the article was seized, she was arrested and the contraband article seized was sealed and labelled and the label contained the signatures of PW2 and the witnesses. The evidence of PW2 further goes to the extent of showing that he returned to the station and drew up the occurrence report and prepared the property list. PW3 completed the investigation.

12. One fact is very clear from the evidence of PWs 2 and 3 and also Ext.P1 mahazar and the property list produced by the prosecution and that is no sample was

taken by either PW2 or PW3. The sample, if at all any taken, must have been from the court. That a sample was taken is evident from Ext.P4, the Chemical Analysis Report would show that the laboratory did get a sample with respect to the case on hand. The question then is who had taken the sample and how it was taken.

13. Obviously, it must have been by the Thondi Clerk attached to the court where the contraband article was produced. In such cases, this Court had occasion to hold that the Thondi Clerk who had taken the sample must be examined and his/her non examination should prove fatal to the prosecution. In the case on hand also, there is no clue as to who had taken the sample from the contraband seized and produced before the court.

14. Further, to add to the agony of the prosecution, even though Ext.P4 the Chemical Analysis Report shows that the seal was found intact, the prosecution has not produced the specimen of the seal which was used to seal the sample.

The non-production of the specimen seal and the absence of the same was considered in the decisions cited by the learned counsel for the appellant.

15. 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.”

16. 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."

17. 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."

18. The result is that there is no guarantee that the sample was taken from the contraband seized from the possession of the accused and it was the same sample which had reached the laboratory. In the absence of evidence in that regard, it will not proper for this Court to sustain the conviction. Merely based on the evidence of PWs 1 and 2, it will not be appropriate in the absence of the evidence regarding the sampling to convict the accused, as prosecution relies heavily on the Chemical Analysis Report to prove the offence.

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 her. Her bail bond shall stand cancelled and she is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge