

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA,
1937

CRL.A.No. 451 of 2006

AGAINST THE JUDGMENT IN SC 59/2005 of ADDL. DIST. COURT &
SESSIONS COURT (ADHOC) FAST TRACK-III, PATHANAMTHITTA.

APPELLANT(S)/ACCUSED:

ANEESH, S/O. RAJU,
MALAYIL PUTHEN VEEDU, THALAYAR MURI,
KUTTUR VILLAGE,
THIRUVALLA, PATHANAMTHITTA DISTRICT.

BY ADV. SRI.C.B.SREEKUMAR

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
EXCISE INSPECTOR, THIRUVALLA EXCISE RANGE,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 451 of 2006

Dated this the 16th day of December, 2015.

JUDGMENT

The accused stood trial for the offence punishable under Sections 8 (1) and (2) of the Abkari Act. He was found guilty. Therefore, he was convicted and sentenced to undergo simple imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo simple imprisonment for three months.

2. The incident which gave rise to this case occurred on 7.6.2002. At that time, P.W.1 was functioning as the Excise Inspector of Thiruvalla Excise Range and P.W.2 was the Excise Guard. On the date of incident, it is claimed that P.Ws. 1 and 2 and others were on routine patrol duty and while they were coming along Arattukadavu road, they happened to see the accused coming along the road with a white plastic bottle containing some sort of liquid. Seeing the Excise party, he became nervous and tried to hide himself.

Feeling suspicious, he was intercepted and the bottle was seized. It contains 1200 ml of liquid. By taste and smell, the liquid was identified as arrack. He was arrested and Ext.P1 is the arrest memo. From the arrack which was in the possession of the accused, 200 ml was taken in a bottle of 375 ml capacity and the sample and the balance contraband article were sealed and labelled. Thereafter P.W.1 returned to the office along with the accused, records and the seized articles. At the place of occurrence he had prepared Ext.P2 mahazar. After coming back to the office, he registered crime as per Ext.P3 occurrence report. Ext.P4 is the property list and he had the accused and the property produced before the court on the very same day. Ext.P6 is the requisition made to the court to have the sample sent for chemical examination.

3. P.W.5 took over investigation and recorded statements of witnesses. He obtained Ext.P9 chemical analysis report and after completing investigation 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, Pathanamthitta. The said court made over the case to Additional District and Sessions Court (Adhoc) Fast Track-III, Pathanamthitta 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 5 examined and had Exts.P1 to P9 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 considerably influenced by the evidence of P.Ws. 1 and 2 and also the fact that contemporaneous document Ext.P2 drawn up contains all the details and also prompt production of the contraband articles and the accused before the court compelled the court to come to the conclusion that the prosecution has succeeded in establishing the case beyond reasonable doubt. Conviction and sentence followed.

7. Assailing the conviction and sentence, it is contended that the court below was not justified in convicting the accused based on the evidence of P.Ws. 1 and 2. They are official witnesses and there should be some independent evidence atleast to corroborate the version given by P.Ws. 1

and 2 and in the absence of such evidence, conviction cannot stand. It is also contended that forwarding note Ext.P6 does not contain sample seal and that is fatal to the prosecution. For the said proposition, learned counsel relied on the decisions reported in Krishnan v. State (2015(2) K.L.T. SN 8) Joseph v State of Kerala (2009(4) KHC 537). It is therefore contended that the conviction cannot stand.

8. Learned Public Prosecutor contended that the evidence of P.Ws. 1 and 2 are sufficient to show that the contraband article is seized from the possession of the accused. Then there is Ext.P2 which is a simultaneous document prepared by P.W.1 which contained all the details. It cannot be said that there is concoction or fabrication of documents against the accused. The court below has chosen to accept the evidence and this appeal is only to be dismissed.

9. Of course, the evidence regarding detection of the contraband article with the accused is confined to the

testimony of P.Ws. 1 and 2 who are the Excise Inspector and Excise Guard respectively. Both of them gave a consistent and uniform version regarding detection of crime. According to them, as they were going along the road while on patrol duty, the accused was seen coming along the road. His behaviour created suspicion in the mind of the officers and they intercepted him and seized the contraband article from him. They also speak about the arrest of the accused, labelling done of the sample as well as the balance contraband article. P.W.1 says about having returned to the office and preparation of occurrence report also. He speaks about having prepared the property list and also the requisition for sending the sample for chemical examination.

10. It is true that the independent witnesses examined, namely, P.Ws. 3 and 4 did not support the prosecution, though they admitted their signature on the documents. It is not the law that unless the testimony of P.Ws.

1 and 2 is corroborated by an independent evidence, their evidence cannot be accepted. It is by now well settled that if the evidence of the police officers and excise officers are found to be cogent and convincing, and inspires confidence in the mind of the court, there is no need to look into other corroborative items of evidence. In the case on hand, even though P.Ws.1 and 2 were subjected to severe cross-examination, that did not yield any result. Then there is Ext.P2 contemporaneous document which gives all the details. It is too much to say that it is concocted or fabricated.

11. There is one serious flaw. 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.”

12. 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.”

13. In the case on hand also Ext.P6 is the requisition memo. That unfortunately does not contain a specimen sample seal. In the absence of sample seal, going by the principle laid down in the above decisions, there is no authenticity attached to the sample sent for chemical examination. Therefore, a vital limb is snapped away and that cuts at the root of the prosecution case. It is not necessary to highlight the significance and importance of the sample seal here as the same has been specifically dealt with in the decisions referred to above.

Applying the principle laid down in the decisions referred to above, 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.

Sd/-

P. BHAVADASAN,
JUDGE

sb.

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P.S. To Judge