

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

CRL.A.No. 468 of 2006

AGAINST THE JUDGMENT IN SC 225/2000 of ADDL.SESIONS FAST
TRACK COURT (ADHOC)NO.IV, THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:

RADHA, D/O.SREEMATHY,
KOCHUVEEDU, KOLATHARA, AYILAM DESOM,
MUDAKKAL VILLAGE, CHIRAYINKEEZHU TALUK.

BY ADVS.SRI.M.DINESH
SRI.BASANT BALAJI

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 468 of 2006

Dated this the 16th day of October, 2015.

JUDGMENT

The accused was found guilty of the offence punishable under Sections 8(1) and (2) of the Abkari Act and therefore she was convicted and sentenced to undergo rigorous imprisonment for six months and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for three months. Set off as per law was allowed.

2. The prosecution allegation is that on 20.5.1998 while P.Ws. 3 and 4, the Excise Officers, were on patrol duty, when they reached in front of a public market, a lady was seen coming along the road holding a can. Seeing the Excise Officers, she became nervous and suspicion arose in the mind of the officers. They seized the can and examined the contents. The can which had a capacity of 2 ½ litres contained some liquid. On examination by taste and smell, it was

revealed as arrack. In the presence of independent witnesses, the accused was arrested and mahazar was prepared at the place of occurrence as Ext.P1. P.W.4 is the person who prepared the arrest memo which is marked as Ext.P2 and intimation of arrest is marked Ext.P3. They returned to the office along with the accused, the records and the articles seized and registered crime as Crime No. 14 of 1998 as per Ext.P4 occurrence report. Property list prepared by him is Ext.P5 and requisition given by him for chemical analysis is Ext.P6. Along with the remand report, he had the accused, the records and the articles seized produced before court. P.W.5 is the Excise Inspector at the relevant time, who recorded statements of witnesses, verified the records and laid final report before court.

3. The court, before which final report was laid took cognizance of the offences. Finding that the offences are 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 (Adhoc) No.IV, Thiruvananthapuram for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Sections 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 P7 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. She denied all the incriminating circumstances brought out in evidence against her and maintained that she is innocent and that she has been falsely implicated. Finding that she could not be acquitted under Section 232 Cr.P.C., she was asked to enter on her defence. She chose to adduce no evidence.

5. Mainly based on the evidence of P.Ws.3 and 4 and also the contemporaneous document and also impressed by the fact that all the documents, accused and articles were promptly produced before court, the court below felt that that gives considerable credence to the prosecution story and believing the same, the accused was convicted and sentenced as already mentioned. The said conviction and sentence are assailed in this appeal.

6. Learned counsel appearing for the appellant contended that this appeal may have to succeed on a short ground. It is clear from the evidence of P.Ws.3 and 4 that no sample was taken from the place of occurrence nor they had forwarded any sample for chemical analysis report. That means that the sample was taken from the court. If that be so, the prosecution has to establish as to who had taken the sample and from where, when and how it was taken. In the

absence of any evidence in that regard, it is not possible to say that the sample sent for chemical analysis is the one taken from the contraband article seized from the possession of the accused. In support of the above contention, he relied on the decision reported in *Nalinakshan v. State of Kerala* (2012(4) KHC 464) wherein an identical question was considered. For want of evidence in that regard, learned counsel pointed out that conviction cannot stand.

7. Learned Public Prosecutor on the other hand contended that the court below even in the absence of the details as mentioned above was impressed by the evidence of P.Ws. 3 and 4 and since the contemporaneous records also supported the evidence of P.Ws. 3 and 4 found that the offence has been committed by the accused. There are no grounds to interfere with the said finding.

8. Alas, the prosecution has to fail on the ground mentioned by the learned counsel for the appellant. As rightly

pointed out by the learned counsel for the appellant, there is no case for the prosecution that either P.W.3 or P.W.4 had taken sample at the time of seizure. P.W.5 the Investigating Officer has also no case that he has taken sample from the station or elsewhere.

9. The result is that the property list marked as Ext.P5 also indicate that no sample had been taken and the entire contraband article was produced before court.

10. Obviously, it means that the sample was taken from the court. If that be so, it was obligatory on the part of the prosecution to establish as to who had taken the sample and when it was taken and under what authority. In the absence of any evidence in that regard, it is not possible to say that the sample which was sent for chemical analysis was the one taken from the contraband article seized from the possession of the accused.

11. This issue was considered by this Court in the decision cited by the learned counsel for the appellant, wherein it was held as follows:

“4. According to P.W.1 sample was taken from the Court and it was forwarded to the chemical examiner. P.W.1 would further state that after sampling the remaining quantity of liquor was destroyed as evidenced by Ext.P3(a) order whereby the Magistrate ordered to take sample and destroy the balance. Ext.P5 is the report of the chemical examiner certifying that the sample contained 25.16% of ethyle alcohol by volume. Other than the so called order of the learned Magistrate for taking sample and destroying the remaining quantity, there is no evidence regarding the taking of sample and the destruction of the contraband. Who took the sample, when took and when it was forwarded to the chemical examiner are not at all borne out by the evidence. Neither any witness was examined regarding the taking of the sample or any report of any staff of the court regarding the compliance of the order of the Court is brought in evidence. In effect, Ext.P5 is relating to the contraband seized by P.Ws. 1 and 4. IN the above circumstance, I am not inclined to give any reliance to

Ext.P5 and to come to a conclusion of guilty. Courts below had gone wrong in relying upon Ext.P5 to arrive at a conclusion of guilt. Therefore, the revision petitioner is entitled to an order of acquittal.”

12. The principle laid down in the above decision applies to the facts of this case and therefore the same fate would follow in this case also.

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

P. BHAVADASAN,
JUDGE

sb.