

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 22ND DAY OF DECEMBER 2015/1ST POUSHA, 1937

CRL.A.No.478 of 2006

AGAINST THE JUDGMENT IN SC 834/2000 of ADDL. DISTRICT & SESSIONS
COURT (ADHOC)-I, KOLLAM DATED 28-02-2006

APPELLANT/2ND ACCUSED:

SREE RANI, D/O. GOPALAN,
THAYYIL VEEDU, CHEMMAKKADA, KUZHIYAM CHERI,
PERUNADA VILLAGE, KOLLAM DISTRICT.

BY ADV. SRI.B.MOHANLAL

RESPONDENT/COMPLAINANT:

STATE OF KERALA REPRESENTED BY THE
SUB INSPECTOR, KOTTIYAM POLICE STATION
KOLLAM DISTRICT THROUGH THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
22-12-2015, ALONG WITH CRA.561/2006, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal Nos.478 & 561 OF 2006

Dated this the 22nd day of December, 2015.

J U D G M E N T

Two persons were prosecuted for the offence punishable under Sections 55(a) and (i) of Abkari Act. Both of them were found guilty. The 1st accused was convicted for the offence under Section 55(a) of Abkari Act and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for one year. The 2nd accused was convicted for the offence under Section 55(i) of Abkari Act and was sentenced to suffer rigorous imprisonment for four years and to pay a fine of Rs.2 lakhs with default clause of simple imprisonment for two years. Crl. Appeal No.478/2006 is by the 2nd accused and Crl. Appeal No.561/2006 is by the 1st accused. Since the facts of the appeals are the same, they have been disposed of by a common judgment.

2. The prosecution story runs as follows:

The incident in this case is said to have occurred on

22.06.1998. At the relevant time, PW5 was functioning as Sub Inspector of Kottiyam Police Station. He had gone for routine patrol duty along with his team of officers on the date of incident also and by about 5.30 p.m, when they reached Thazhuthala Junction, they received reliable information that arrack is being sold in a toddy shop No.T.S.67 which is situated on the eastern side of P.K. Junction. They went to the toddy shop and conducted a search. On the eastern side of the shop, there is a hall and on the western side of that hall, there is a room in which they found a can having a capacity of 50 litres containing full of liquid. On the southern side of the hall, below a wooden stand, in a green polythene cover, they found 36 small polythene covers each containing 100ml of liquid. PW5 would say that he examined the contents of the can by taste and smell and was satisfied that it was arrack. He opened one of the covers and examined that by taste and smell and that also turned out to be arrack.

3. According to prosecution, 1st accused was working as a salesman and was arrested from the spot. The 2nd accused is the

licencee of the shop. Apart from the cover opened for identifying the article, PW5 would say that he opened another cover also and transferred the contents of the two packets in a bottle having a capacity of 375ml. He also took a sample of 300ml of arrack in a bottle of 375 ml capacity from the can also. The rest of the contraband articles, can and bottles were sealed at the spot itself. On those bottles, PW5 says that he had affixed labels containing the signature of accused, witnesses and himself. The balance 34 packets were tied into a bundle and that were also sealed and labeled. Ext.P2 is the mahazar prepared by him. That too contained the signature of witnesses and PW5. He thereafter returned to the station with the accused, contraband articles and registered Crime No.247/98 as per Ext.P3 First Information Report. He would further say that from 22.06.1998 till 18.07.1998, since no conveyance was available to him, he kept the articles under his custody. He prepared Ext.P4 property list, obtained Ext.P5 chemical analysis report, recorded statement of witnesses, completed investigation and laid charge before court.

4. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Kollam. The said court made over the case to Additional District and Sessions Court (Adhoc)-I, Kollam for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Sections 55(a) and (i) of Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried.

5. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P6 marked. M.O.s I and II were got identified and marked.

6. After the close of the prosecution evidence, accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C, they were asked to enter on their defence. They had marked Ext.D1.

8. Mainly impressed by the evidence of PWs 4 and 5 and also taking the aid of Ext.P2 mahazar, court below came to the conclusion that the offences have been made out. Conviction and sentence as already mentioned followed.

9. Challenging the conviction, learned counsel appearing for the appellants contended that the court below has acted mechanically without applying its mind and that has resulted in miscarriage of justice. Merely because PWs 4 and 5 gave a consistent version of the incident and that Ext.P2 narrates the incident in detail does not mean that the offence is made out. The prosecution is bound to explain the long delay in producing the articles before court. The detection of offence was on 22.06.1998 and even accepting the prosecution case, the articles were produced before court only on 18.07.1998. That is nearly one month after the detection. Of course, PW5 does say that it was within his custody. He would say that there was no conveyance available to him. According to the learned counsel, it is hard to accept that version.

10. Learned counsel appearing for the appellants further

pointed out that no forwarding note is produced and marked in the case and there is no specimen seal available for comparison which is fatal to the prosecution. For the said proposition, learned counsel relied on the decisions in **Majeedkutty** vs. **Excise Inspector** (2015 (1) KLT 624) and in **Krishnan** vs. **State** (2015 (2) KLT SN 8). It is therefore contended that the conviction cannot stand.

11. Learned Public Prosecutor, on the other hand, tried to justify the conviction and pointed out that there is oral testimony to establish the guilt of the accused and therefore one need not worry about anything else. If the evidence of PWs 4 and 5 are found to be cogent and convincing enough, then there is no reason to disbelieve them. The court below has considered the evidence in considerable detail and found to be without blemish. This Court sitting in appeal, unless under compelling reasons, may not be justified in interfering with the findings of the court below.

12. After having heard the learned counsel for the appellants, learned Public Prosecutor and also after having

perused the records, this Court feels that there is considerable force in the submission made on behalf of the appellants. Admittedly, offence was detected on 22.06.1998. It is seen from the records that the articles were produced before court only on 18.07.1998. It is true that PW5 says that he had kept the articles in his custody. There was a question as to why he kept the articles under his custody till 18.07.1998. He explained that there was no conveyance available to him. This is a totally unacceptable statement. It is inconceivable that there is no conveyance available to him for nearly a month. Nothing prevented PW5 from entrusting the article to a person deputed for court duty. In the decision in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), the impact of delay was considered and it was held that unexplained delay in producing the contraband before court is fatal to prosecution.

13. It is significant to notice that the articles were not promptly produced before court. Since the long delay in producing the article before court remains unexplained, the consequence mentioned in the above decision must follow. That

should have been sufficient to dispose of the appeals. But it is pointed out by the learned counsel for the appellants that no forwarding note is prepared and sent to court. On perusal of records and materials available before this Court, it appears to be so.

14. In the decision in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624), it has been 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.”

15. In the decision in **Krishnan** vs. **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 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.”

16. In the light of the above decisions, it is unnecessary to debate on the consequence of non production of forwarding note and providing of specimen of sample seal in the forwarding note. The principles laid down in the above decisions apply to the facts of the case and the prosecution should fail on that ground also.

For the above reasons, these appeals are allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused persons are not guilty of the offence. They stand acquitted of the charges levelled against them. Their bail bonds shall stand cancelled and they are set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A to Judge.