

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. 480 of 2006 ()

**AGAINST THE JUDGMENT IN SC 230/2000 of ADDITIONAL SESSIONS COURT FAST
TRACK (ADHOC)-IV, TRIVANDRUM DATED 10-02-2006**

IN CP 11/2000 OF JUDICIAL FIRST CLASS MAGISTRATE-I, ATTINGAL

APPELLANT(S)/ACCUSED:

**KUTTAPPAN, S/O.KUNJAN,
SHEEJA MANDIRAM, KARIKKAMKUNNU, MUDAKKAL VILLAGE
CHIRAYINKIL 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 13-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 480 of 2006

Dated this the 13th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) and 8(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 a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of three months. Set off as per law was allowed.

2. The incident in this case is said to have occurred on 08.07.1998. On that day, PW4, the Preventive Officer attached to the Chirayinkeezh Excise Range along with PW3 were on patrol duty. On the way, they found the accused with a can coming from about 50 metres away from the vehicle. Seeing the Excise Officials, he tried to conceal himself which caused suspicion in the mind of the officials, who intercepted him and seized the can from his possession.

The contents were examined and it was recognized as arrack. There were two litres of arrack in the can of 2 ½ litres capacity. After preparing the arrest memo, the accused was arrested as per Ext.P2 arrest memo. Ext.P1 is the mahazar prepared at the spot. PW4 thereafter registered crime as per Ext.P4 occurrence report. He had prepared Ext.P5 property list and also had forwarded the requisition to sent the sample for chemical analysis. Further investigation was carried on by PW5, who recorded statements of witnesses, obtained the Chemical Analysis Report namely, Ext.P7, completed investigation and 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. IV, Thiruvananthapuram, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 8(1) and 8 (2) 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 5 examined and had Exts.P1 to P8 marked. MO1 was got identified and marked.

6. After the close of prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He further added that he was a casual labourer by profession and that there was a toddy shop. That belonged on one Maniachan where the illicit distillation was being carried on. That was set on fire by the people of the locality

and he has been falsely implicated for that purpose.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

8. Convinced by the evidence furnished by PWs 3 and 4 and also the fact that the contemporaneous document has been drawn up and there was prompt production of the accused and the articles before court, the court below was greatly impressed with the prosecution case and found the accused guilty. Conviction and sentence followed.

9. The learned counsel appearing for the appellant contended that this appeal will have to succeed on a very short ground. Admittedly, going by the evidence of PWs 3 and 4, there is nothing to show that sample was taken from the spot. In fact, their evidence is to the effect that the entire articles seized from the possession of the accused were sealed and labelled and produced before court. If that be so, according to the learned counsel, sample must have

been taken from the court, in which case, the examination of that person, who had taken the sample was absolutely necessary to sustain the prosecution case. The learned counsel invited the attention of this Court to 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) and held that in such cases, the examination of the Thondi clerk cannot be dispensed with. Therefore, it is contended that conviction cannot stand.

10. The learned Public Prosecutor on the other hand tried to sustain the conviction on the basis of the evidence of PWs 3 to 5. Emphasis was laid on the evidence of PWs 3 and 4, who give a uniform version about the seizure, apprehension of the accused and there is nothing to show that they had any axe to grind against the accused. Even if there is any flaw in sampling, that does not go into root of the matter as the evidence furnished by PWs 3 and 4 taken

along with the contemporaneous records are sufficient in law to sustain the conviction.

11. Time and again, this Court has emphasized the need for providing the specimen seal in the forwarding in the column shown for the same. This Court has specifically mentioned in several judgments that the need to carefully fill up the forwarding note so as to ensure the proper compliance of statutory provisions. Recently, this Court had occasion to take note of the purpose of showing the specimen seal in the forwarding note.

12. This Court insists for the presence of the specimen seal in the forwarding note so as to ensure that the sample forwarded to the chemical analysis laboratory is the sample taken from the contraband article seized from the possession of the accused, for, that is the only guarantee which the court has.

13. It will be appropriate here to refer to the decision cited by the learned counsel for the appellant.

14. 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.”

15. 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.”

16. 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."

17. In the case on hand also, there is no evidence to show as to who had taken the sample and though the sample seal has been provided by PW4, as long as a person who has taken the sample is not identified or examined, it could not be said that the sample which reached the laboratory for analysis is the sample taken from the contraband seized from the possession of the accused.

18. It could not be said that by the mere statement made by PWs 3 and 4, conclusions could be arrived at that the offence has been made out. Chemical Analysis Report forms a crucial part of the proceedings and unless it is

shown that the sample was properly taken, the accused cannot be mulcted with liability. If that be the law, obviously the conviction cannot stand.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the prosecution has not succeeded in establishing the case against the accused. The accused stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge