

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA,
1937

CRL.A.No. 63 of 2009

AGAINST THE JUDGMENT IN SC 1073/2005 of ADDL. DISTRICT &
SESSIONS COURT (ADHOC)-I, KOLLAM.

APPELLANT(S)/ACCUSED:

CHRISTOPHER, S/O.VARGHESE,
MUKALUVILA VEEDU, PERAYAM CHERI, MULAVANA VILLAGE,
KOLLAM TALUK.

BY ADVS.SRI.S.GIRISH
SRI.HARIDAS

RESPONDENT(S)/COMPLAINANT:

THE STATE OF KERALA, REPRESENTED BY
THE EXCISE INSPECTOR KOLLAM,
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY GOVERNMENT PLEADER SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
04-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 63 of 2009

Dated this the 4th day of November, 2015.

JUDGMENT

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

2. The incident is alleged to have occurred on 18.7.2002. P.W.3 was the Circle Inspector of Excise Enforcement and Anti Narcotic Squad, Kollam. He along with P.W.1 had gone on routine patrol duty on the date of incident also. When they reached near the house of one Dennisin, through a by-lane by the side of the said building, the accused was seen coming along. Seeing the Excise Officers, he tried to withdraw. He was intercepted and the plastic cover in his

hand was seized. That contained two bottles with some liquid. By taste and smell the officers concerned identified the contraband article as arrack. After preparing arrest memo, the accused was arrested, sample was prepared by taking 200 ml in a bottle having capacity of 375 ml and that was sealed and labelled. So also the two bottles seized. They then returned to the Excise Range Office and handed over the accused, thondi article seized and also the documents drawn up by them to the officer in charge of the station. P.W.2 was the then Assistant Excise Inspector of the Range. On the date of the incident he was in charge of the Excise Inspector and it was during that time, the accused, contraband article and the documents were produced before him. He registered crime as per Ext.P2 occurrence report. He had the accused and the documents produced before court on 19.7.2002. He prepared the forwarding note and obtained chemical analysis report. Investigation was conducted by C.W.7 who recorded

statements of witnesses, completed investigation and laid charge 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, Kollam. The said court made over the case to Additional District and Sessions Court (Adhoc)-I, Kollam 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 4 examined and had Exts.P1 to P7 marked. After the close of the 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. 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.

5. The court below, presumably considerably influenced by the evidence of P.Ws. 3 and 1 taken along with Ext.P1 and also the fact that the accused and the documents were promptly produced before court, came to the conclusion that the prosecution has succeeded in establishing the case against the accused. Conviction and sentence as already mentioned followed.

6. After having gone through the records, and after having heard learned Public Prosecutor, the only point that arises for consideration is regarding the non-filing of the forwarding note. On going through the evidence, it is found that no forwarding note was marked in the proceedings and there is nothing to show that there was such a forwarding note

available.

7. The consequence of non-filing of the forwarding note was considered in the decision reported in Rajamma v. State of Kerala (2014(1) K.L.T. 506) and Krishnan v. State (2015(2) K.L.T. SN 8). The court in those decisions pointed out that mere proof of arrest or production of the contraband article does not lead to an automatic conclusion that the accused is guilty. P.W.2 says about having prepared the forwarding note. It is not seen in the file or seen marked. It must be noticed that the forwarding note contains a specific column for showing the sample seal. It is also significant to notice in this context that Ext.P1 mahazar does not mention about any particular seal at all. It only says that sample of the contraband article and the balance contraband article were sealed and labelled. The nature of seal used is not mentioned in Ext.P1 also.

8. In the decision reported in Rajamma v. State of Kerala (2014(1) K.L.T. 506), it was held as follows:

“11. 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. In the light of the above discussion and in view of the evidence and materials referred to above, particularly in the absence of concrete and cogent evidence in support of the prosecution case it is unsafe to convict the appellant, who is a lady and therefore I am not inclined to concur the conviction recorded by the trial court against the appellant. Resultantly the conviction recorded against the appellant is set aside.”

8. 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.”

9. A reading of the above decision shows that non-production of forwarding note with the sample seal on it is considered to be fatal to the prosecution case. The court feels that marking of forwarding note is necessary and it should also contain the sample seal. The courts have held that that is the only guarantee which the court have to conclude that the article analysed in the laboratory is the one taken from the contraband seized from the possession of the accused. It is significant to notice that in both the cases referred to above, the accused was acquitted.

10. This court finds no reason to deny the benefit which the other accused have got. In the absence of any forwarding note containing the sample seal, as rightly noticed in the decisions referred to above, there is no guarantee that

the sample which has reached the laboratory is the sample taken from the contraband seized from the possession of the accused. In the absence of such a finding, it is not possible to hold that the accused is guilty.

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 him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.