

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. 67 of 2009

AGAINST THE JUDGMENT IN SC 153/2008 of ADDITIONAL DISTRICT
COURT (ADHOC) FAST TRACK NO.1, THRISSUR.

APPELLANT(S)/ACCUSED:

SOMAN, S/O.PUZHANKARA KUNJUKUTTAN,
AGED 55 YEARS, ARAMBILLY DESOM, ANJOOR VILLAGE,
THRISSUR TALUK.

BY ADVS.SRI.C.A.CHACKO
SMT.C.M.CHARISMA
SRI.N.A.SHAFAEEK

RESPONDENT(S)/COMPLAINANT:

THE STATE OF KERALA, REPRESENTING
EXCISE INSPECTOR, ANTHIKKAD, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR 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. 67 of 2009

Dated this the 4th day of November, 2015.

JUDGMENT

Having found that the accused is guilty of the offences punishable under Section 8(2) of the Abkari Act, he was convicted and sentenced to suffer rigorous imprisonment for a period of two years and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for two months.

2. The incident in this case is said to have occurred on 4.11.2004. At the relevant time, P.W.1 was functioning as C.I. of Excise Enforcement and Anti Narcotic Special Squad, Thrissur. He, on the date of the incident, along with P.W.2 and others went on patrol duty as usual. When they reached a place called Ayinipara, in front of a statute on the Panchayat road, they found a person with a can. It was seen that he was trying to pour something into a glass. Seeing the Excise officers, it is alleged that he tried to hide the can and the

glass. That created suspicion in the mind of the officers. They seized the can and examined the contents. The can contained 10 litres of liquid. By taste and smell it was identified as arrack. All these were done in the presence of independent witnesses. Arrest memo was prepared and the accused was arrested. P.W.1 claims to have taken 200 ml as sample from the can in a bottle having the capacity of 375 ml. The balance contraband article was also sealed and labelled like the sample taken by P.W.1. The labels affixed on both the items, i.e., on the sample as well as on the balance contraband article, contained the signature of the accused, independent witnesses and P.W.1. P.W.1 prepared Ext.P1 mahazar of what had transpired at the spot and that is Ext.P1. Thereafter they handed over the accused, the articles and the documents before the Range office, Anthikkad.

3. P.W.6 was then functioning as Preventive Officer of Anthikkad Excise Office. On that day, he was in charge of the Excise Inspector also. According to him, on 4.11.2004

P.W.1 brought the accused, contraband article and the documents to the station which were received by him and as per Ext.P7 occurrence report he registered crime. Remand report prepared by him is Ext.P8. He prepared list of the property which is Ext.P9 and he claims that he produced the accused, documents and the articles in the evening of 4.11.2004. But the court refused to take into custody the contraband articles and asked him to bring it on the next day and the articles were again brought to the court on 6.11.2004.

4. P.W.5 was the Excise Inspector at the relevant time. He took over investigation of the case. He prepared Ext.P4 scene mahazar, recorded statements of witnesses, obtained sketch of the place of incident, Ext.P5, and obtained Ext.P6 chemical analysis report. He laid final charge before court.

5. 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, Thrissur under Section 209 Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court (Adhoc) Fast Track No.I, Thrissur for trial and disposal.

6. The latter court, on receipt of records and on appearance of the accused framed charge for the offences punishable under Section 8(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 6 examined and had Exts.P1 to P9 marked. M.Os.1 and 2 were got identified and 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. He also stated that he had not committed any act which would constitute an offence. 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.

7. The court below in the light of the evidence furnished by P.Ws. 1 and 2 and in the light of Ext.P1 and also the fact that the accused and the records were promptly produced on the date of detention itself before the Magistrate came to the conclusion that the prosecution has succeeded in establishing the case beyond reasonable doubt against the accused and therefore convicted and sentenced him as already mentioned.

8. Assailing the conviction and sentence, learned counsel pointed out that certain crucial aspects have been omitted to be noticed. P.W.6, the Preventive Officer, who registered crime was not competent to act in that manner. Going by the notification then in existence, officers of and above the rank of Excise Inspectors alone can detect offence under the Abkari Officer and that is fatal to the prosecution. It was then contended that even though the articles were seized on 4.11.2004, they were produced before the court only on

6.11.2004. There is no reasonable explanation for the delay. Learned counsel for the appellant also brought to the notice of this Court that the arrest memo and the intimation memo were also not produced before court. Accordingly, it is contended that the delay in producing the articles before court will have to be viewed in the above circumstances. Finally, it is contended that no forwarding notice is produced before court and there is no evidence regarding the sample seal said to have been sent for chemical analysis. Of course, the learned counsel pointed out that the chemical analysis report, namely, Ext.P6 does show that the sample seal compared well. As to what exactly is the sample seal, there is no evidence. Even the mahazar, namely, Ext.P1, does not contain a specimen of the sample seal. Relying on the decision reported in Rajamma v. State of Kerala (2014 (1) K.L.T. 506). Learned counsel contended that the non-filing of the forwarding note containing the specimen seal has been considered by this Court as fatal to the prosecution case and on that score also

the accused is entitled to an acquittal.

9. Learned Public Prosecutor on the other hand contended that the evidence of P.Ws. 1 and 2, the two officers who had detected the offence and also carried out various functions under the Act are clear to the effect that the incident had happened as alleged. Their evidence is uniform and consistent regarding the incident and so also Ext.P1, the contemporaneous document, contains the entire details of what had done by P.W.1 at the spot. Again, it is contended that the prompt production of the accused and the documents would show that there could not have been a chance for fabrication or manipulation of the case. As far as the delay is concerned, P.W.6 has categorically stated that he had produced the article on 4.11.2004 itself, and the court refused to receive it on that day and therefore it had to be produced before court the day after, i.e. on 6.11.2004. It is also stated that from the moment of seizure till the time it was produced before court, the articles were in safe custody. There can be

no ambiguity regarding the custody of the article during the interregnum. The accused has no case that the property produced on 6.11.2004 is not the property which was seized from his possession on 4.11.2004. In the absence of any such suggestion, there is not much consequence in the short delay of producing the property before court. As regards the forwarding note, it was contended that the chemical analysis report Ext.P6 shows that the seal compared well with the seal on the sample and that is sufficient in law. The contention therefore is that no grounds are made out to interfere with the conviction passed by the court below.

10. The evidence regarding detection, arrest, seizure, sampling, preparation of records etc remains confined to the testimony of P.Ws. 1 and 2 who are the Excise Officers. Two independent witnesses, namely, P.Ws. 3 and 4 except for admitting their signature on Ext.P1 mahazar, denied having seen the seizure of the contraband article from the possession of the accused.

11. P.Ws. 1 and 2 do say that on 4.11.2004 while they were on patrol duty, they happened to come across the accused with a can and feeling suspicious, they seized the can from him. The can contained a liquid, which on examination was found to be arrack. They then speak about having arrested the accused, prepared sample and packed both the sample and the balance contraband article and sealed and labelled the same. They also say about P.W.1 having drawn up Ext.P1 mahazar. Both of them then say that the accused, the articles seized and the documents were produced before the Range Office. Even though these two witnesses were cross-examined at length, their evidence stands scrutiny. Nothing could be brought out in their cross-examination to show that there was any ill-motive on the part of the Excise Officers, namely, P.Ws. 1 and 2, to falsely implicate the accused. Their evidence suffers from no infirmities and therefore the court below was right in accepting their evidence.

12. Since the independent witnesses, P.Ws. 3 and 4 have turned hostile, technically it could be said that there is no corroboration for the statements of P.Ws. 1 and 2. But one cannot omit to notice that Ext.P1 mahazar, which is the contemporaneous document, was promptly produced before the Magistrate along with the accused. That contains the narration of the entire thing that has transpired at the spot and contains the signature of the accused, witnesses and P.W.1. That also mentions that the seal used was 'T.V.R'. The consequence of mentioning of the seal in Ext.P1 will be dealt with a little later. Suffice to say that the evidence of P.Ws. 1 and 2 taken along with Ext.P1 to a great extent establishes the prosecution case of seizure.

13. Unfortunately for the prosecution, for reasons best known to them, neither the arrest memo, nor the intimation given to the relative was produced.

14. Coming to the first of the contentions about the incompetency of P.W.6 to register the case, there is no merit in

the contention. It is true that the relevant Government Order empowers officers of the rank of Excise Inspector and above to perform the various functions under the Abkari Act. But it is quite different to say that it is same as registering a crime when the Preventive Officer was put in charge of the Excise Inspector. Had it been a case where the Preventive Officer was involved in the detection or in the investigation of the offence, the position would have been different. Here, all what P.W.6 has done is to receive the accused, records and the documents in the office since he was the Station House Officer at the relevant time and registered a crime on that basis. There is no detection by him and there is no investigation by him. Therefore, the embargo applicable in the case of detection and investigation do not apply to the registration of crime.

15. Indeed there is delay of two days in producing the article before court. However, P.W.6 has in his evidence stated that the accused, articles and the documents were produced before the learned Magistrate in the evening of

4.11.2004 itself. But the articles were not received by the Magistrate, they were asked to be brought on the next day. From the endorsement on the property list, it is seen that the court received the article on 6.11.2004. However, P.W.6 had stated that during the time from which the articles were handed over to him till it was produced before court, he is in custody of the articles. On this aspect, there is no cross-examination. Therefore, that contention has also necessarily to fail.

16. Formidable is the contention based on the absence of production of the forwarding note. It is through the forwarding note that the officer concerned makes a requisition for sending the article for chemical examination. This Court in a number of decisions held that the copy of the forwarding note kept in the court should contain the specimen seal. Merely because, the accused is arrested and the contraband article is produced, it does not lead to the conclusion that the offence has been committed by him. It is

true that in Ext.P1 the nature of the seal used is seen mentioned. But as such no sample is provided in Ext.P1 mahazar. The forwarding note prepared and sent to court contains the specimen seal. Therefore, one fact is very clear and that is the insistence of providing a specimen of the sample seal is only to ensure that the sample which reached the chemical analysis laboratory is the sample taken from the contraband article seized from the possession of the accused.

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

“11. A Division Bench of this Court in the decision reported in Ravi v. State of Kerala (2011(3) K.L.T. 353) has held that, the prosecution has a duty to show that the sample allegedly drawn from the contraband article said to have seized from the possession of the accused reached the hands of the chemical examiner in a fool proof condition. On application of the above dictum in the present case and in the light of the facts and circumstances referred to above, it cannot be said that the prosecution has is no guarantee that Ext.P3 chemical analysis report represents the sample allegedly drawn

from the contraband article seized from 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.”

18. The principle laid down in the above decision is attracted to the facts of the case wherein it was held that non-production of forwarding cannot be taken lightly. It has an important role in determining whether the accused was carrying the contraband article. If that be the law, then necessarily the prosecution has to fail on that basis.

19. This Court is not forgetting the fact that Ext.P1 mentions about the sample seal used. But unfortunately for the prosecution, no sample seal is seen affixed in Ext.P1 mahazar. Under these circumstances, as noticed in the decision referred to above, the court cannot come to a

conclusion that the sample analysed is the sample taken from the contraband article seized from the possession of the accused. That is a vital link that establishes the case against the accused. That is conspicuously absent in the case. If that be so, the conviction cannot stand.

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.

sb.

P. BHAVADASAN,
JUDGE