

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. 516 of 2006

AGAINST THE JUDGMENT IN SC 989/2001 of ADDL.S.C.-TRIAL OF
ABKARI ACT CASES, NEYYATTINKARA.

APPELLANT(S)/ACCUSED NO.1:

GOPI, S/O.VARGHESE, NADAR,
BLAKKOTTUKONATH VEEDU, MELEMUKKU, KILIYOOR,
VELLARADA DESOM, NEYYATTINKARA.

BY ADV. SRI.G.SUDHEER

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COUR 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. 516 of 2006

Dated this the 16th day of October, 2015.

JUDGMENT

Two persons were prosecuted for the offences punishable under Sections 55(a) and (i) of the Abkari Act. Among them, the appellant, who is the first accused alone was found guilty. He was therefore convicted and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/–, in default, to undergo rigorous imprisonment for three months.

2. The incident in this case occurred on 10.2.2000. P.W.4 was then functioning as the Sub Inspector of Police, Vellarada Police Station. On that day, while on law and order duty, when they reached Kiliyoor junction they got reliable information that in a property nearby illicit liquor is being sold. They went to the spot. They found one person pouring out liquid in a glass held in his hand. Seeing the police, three

persons at the spot ran away and even though the appellant tried to run away from the place, he was effectively prevented and the article was seized. The can contained nearly 7 litres of arrack. The article seized was sealed and labelled in the presence of witnesses and Ext. P1 mahazar was prepared. P.W.4 returned to the station and registered crime as per Ext.P2 FIR. The accused was produced before court along with the remand report. List of property was also sent to court and the list is marked as Ext.P4. He would claim that he had sent the forwarding note to the court for taking sample from court and sent it for chemical examination. Ext.P5 certificate was obtained by him. During investigation, the second accused was located and he was arrested and produced before court. He completed investigation and laid charge before court.

3. The court before which final report was laid took cognizance of the offence. Finding that the offences are exclusively triable by a court of Sessions, the said court

committed the case to Sessions Court, Thiruvananthapuram. The said court made over the case to Additional Sessions Court for trial of Abkari Act cases, Neyyattinkara 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 55(a) and (i) 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 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. 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.

5. Acting mainly on the basis of the evidence of P.Ws. 3 and 4, among whom P.W.3 is the detecting officer and impressed by Ext.P1 mahazar and also the fact that sample was taken from court for sending for chemical examination, the lower court found the accused guilty and sentenced him as already mentioned.

6. Assailing the conviction and sentence, learned counsel appearing for the appellant raised a preliminary point that there is considerable confusion regarding the sample taken and it is not clear from the evidence as to when and where the sample was taken. It is true, according to the learned counsel that P.W.5, staff of the court concerned, stated that sample was taken by her. Referring to Ext.P4 property list, learned counsel pointed out that the articles seized from the accused were produced before the court on the very same day and the endorsement is to return the article produced. There is no endorsement to the effect that after taking sample

return the article to police. When viewed in the light of that endorsement, it appears difficult for the court below to accept the evidence of the court clerk that the sample was taken as per the order of the Magistrate. There is nothing to show that subsequent to the return of the article, the police has produced the same for further proceedings.

7. Learned counsel went on to point out that there is no forwarding note produced by the prosecution so as to ensure that the seal found on the sample which had reached the Laboratory is the same sample. One may recall here the evidence of P.W.4 that he is definite that a forwarding note was infact sent to the court with requisite sample seal. Strangely enough that is not seen marked in the case. The only conclusion can be that no forwarding note was sent to court.

8. It has to be said that there is considerable force in the submission made by the learned counsel for the

appellant. It is no doubt true that P.W.5, the thondi clerk attached to court concerned does say that she had taken sample as per the direction of the learned JFCM concerned. No document evidencing such transaction is produced. It is not discernible from the evidence of P.W.5 when the sample was taken. The property list, Ext.P4, produced by the investigating officer before the court handing over all the articles, there is an endorsement to return M.O.1 to police station. There is nothing to show that at that point of time the Magistrate had ordered any one of the members of his staff to take a sample. The result is that there is no evidence as to when sample was taken. Here one may recall that on the day of producing the article, it was returned to the police station to kept in safe custody. There is a reasonable suspicion cast about the sample which was sent for chemical analysis.

9. It is not as if the parrot like version given by P.Ws. 3 and 4 are sufficient to warrant a conviction. Here the

mandatory provisions are not complied with and it has serious consequences. The only safeguard is that the seal found in the forwarding note tallies with the seal found on the sample subjected to chemical analysis. It is also necessary to note that in the forwarding note there is a definite column for affixing specimen seal. The provision providing for affixing sample seal has a purpose to serve. It ensures that a seal has been affixed and it has been affixed in the sample which has been sent to the Forensic Science Laboratory. This Court had occasion to consider the consequence of non-affixing of sample seal in the forwarding note in the decision reported in *Krishnan v. State* (2015(2) K.L.T. SN 8) wherein 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.”

10. For the above reason, this Court is unable to uphold the conviction and sentence passed by the court below and a reasonable suspicion is created regarding the sample sent for chemical analysis.

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.