

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

CRL.A.No. 573 of 2006

AGAINST THE JUDGMENT IN SC 770/2001 of ADDITIONAL DISTRICT &
SESSIONS COURT (FAST TRACK COURT -I), THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:

RAJU, AGED 47 YEARS,
S/O.KUNJAN NADAR, PUTHUVAL PUTHEN VEEDU,
CHENKOTTUKONAM, AYIROOPPARA VILLAGE.

BY ADVS. SRI.P.V.ANIL
SMT.R.PADMAKUMARI

RESPONDENT(S)/COMPLAINANT:

THE STATE OF KERALA,
REP. BY THE GOVT. PLEADER,
HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
09-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 573 of 2006

Dated this the 9th day of October, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Sections 55(a), of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to undergo rigorous imprisonment for two and a half years and to pay fine of Rs.1,00,000/–, in default, to undergo rigorous imprisonment for six months.

2. According to the prosecution case on 12.2.1998 P.W.4, the then Preventive Officer of Excise Range, Kazhakuttom along with other officers were on routine patrol duty. At about 5.30 p.m. when they were proceeding along Kattaikonam–Sreekariyam road, P.W.4 happened to see the accused coming along the road with a can in his hand. Seeing the excise party, he became panic and that caused suspicion

in the mind of the excise officers. They approached him and seized the can. On examination of the contents in the can, it was turned out to be arrack and the can contained 500 litres of arrack. Ext.P4 arrest memo was prepared and he was arrested. P.W.4 says that can was sealed and label containing the signatures of the accused, independent witnesses and himself was affixed. Ext.P1 mahazar was prepared. The articles seized, the records and the accused were taken to the Excise Range Office and the then Excise Inspector of Kazhakuttom Excise Range registered crime as per Ext.P3 crime and occurrence report and had the articles produced before court. He also claims to have sought the permission of the court for taking sample from the can and for forwarding the same for chemical examination. P.W.3 had taken over investigation. He recorded statements of witnesses and obtained chemical analysis report namely Ext.P2. 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 case is one exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thiruvananthapuram under Section 209 Cr.P.C. after following the necessary procedures. The said court made over the case to Additional District and Sessions Court (Fast Track Court-I), Thiruvananthapuram 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) 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 P5 marked. M.O. 1 was got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. In which he denied all

the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He added that he was residing at Attakulangara. While he was waiting to board a bus to go to his house, two persons caught hold of him and after sometime excise officers came in their vehicle and he was intercepted and taken to Kazhakuttom Excise Range Office and he was falsely implicated in the case. 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 greatly impressed by the evidence of P.Ws.2 and 4 found that the prosecution has succeeded in establishing the case against the accused especially in the light of Ext.P1 mahazar which supports the case of the prosecution and found the accused guilty and conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

6. Assailing the conviction and sentence, learned counsel for the appellant contended that certain grave irregularities have been omitted to be noticed by the court below and that has resulted in miscarriage of justice. Admittedly, according to the learned counsel, the detecting officer did not take samples of the article seized from the possession of the accused. Significantly, according to the learned counsel, no documents were produced to show that the articles produced before court are the articles seized from the possession of the accused. In other words, the property list has not been marked in the case. Further, from the records it would appear that the samples were taken from the court. As to who had given the request and when the sample was taken and who had taken the sample, there is absolutely no evidence. It is necessary for the prosecution to establish that the proper sampling was done and it was done by a

competent person. The infirmity in sampling was considered in two decisions, namely, Manikantan Pillai v. State of Kerala (2013(4) K.L.T. SN 139) and Sathi v. State of Kerala (2007(1) K.L.T.SN 57 Case No. 82). In the absence of any acceptable evidence regarding sampling it could not be said that the offence is made out. If that be so, the accused is entitled to acquittal.

7. Learned Public Prosecutor on the other hand contended that the evidence of P.Ws. 2 and 4 are sufficient enough to warrant a conviction. According to the learned Public Prosecutor, their evidence gets corroboration from Ext.P1 mahazar and there is no case for the accused that the excise officers were inimically disposed towards him or ill-will towards him. At any rate, according to to the learned Public Prosecutor, the lower court has chosen to accept the evidence of P.Ws. 2 and 4 and there is no ground made out to interfere with the conviction and sentence. Inspite of best efforts, this

Court is unable to accept the contention raised by the learned Public Prosecutor. P.W.2 is the detecting officer. He speaks about having gone on patrol duty along with other officers and having seen the accused on the road with a can. P.W.4 was also along with him. Both these witnesses say that on seeing excise party the accused became panic and that caused suspicion in the mind of the excise officers. They intercepted him and seized the can from his possession and on examination it was found that he was carrying arrack and there was 500 litres of arrack in the can he was carrying. He speaks about the arrest of the accused and preparation of arrest memo and also about preparation of seizure mahazar. Both of them then say that they reached the Excise Range Office and handed over all the articles to the Station House Officer. Evidence of P.W.4 is to the effect that the crime was registered by the then Excise Inspector and he also forwarded the articles from the court for taking sample for to send for

chemical examination. A part of the investigation was done by P.W.4. He would say that he recorded statements of witnesses, completed investigation and laid charge before court.

8. It is significant to notice that there are no records produced by the prosecution to show that what was the property that was produced before the court. Of course, P.Ws. 2 and 4 say that the can which was found in the possession of the accused was seized, sealed and labelled. But one fails to understand the failure on the part of the prosecution to ascertain whether the articles produced before the court are the ones which were actually seized from the possession of the accused. In the absence of the property list, it is not possible to confirm the said fact.

9. Equally well founded is the contention based on defective sampling. As to who had transported the articles for

sampling is not clear. It is also not clear as to who has taken the sample and when. There is nothing to show that there was a forwarding note prepared with a specimen seal. The importance of proper sampling was considered in the decisions referred to above. In the decision reported in *Manikantan Pillai v. State of Kerla* (2004 K.L.T. SN 139), it was held as follows:

“The matter involved in this case was handled by P.W.1 in a reckless manner. He ought to have drawn samples in the presence of the appellant at the time of seizure or atleast on reaching the Excise Office. Here in this case, there is no evidence to show as to who had drawn the sample that was allegedly subjected to chemical analysis, for which Ext.P4 was obtained. There is no evidence to show as to when and where the sample was drawn. There is no evidence to show that the forwarding note was filed by P.W.3. Apart from all these, the copy of the property list has not been produced to show as to when the contraband was produced before court. No conviction can be entered against the accused in a prosecution unless it is proved that the sample

which was analysed was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused. In this case, there is absolutely nothing to show that the sample allegedly subjected to chemical analysis, for which Ext.P4 was prepared, is one drawn from the contraband allegedly seized from the appellant.”

10. In the decision reported in *Sathi v. State of Kerala* (2007(1) K.L.T. SN 57 Case N. 82)m it was held as follows:

“The prosecution in a case of this nature can succeed only if it is proved that the sample which was analysed in the chemical examiner's laboratory was the very same sample which was drawn from the bulk quantity of the alleged contraband substance said to have been possessed by the accused. This is more so when the same might have changed several hands before it reached the hands of the chemical examiner. When there is not even an endorsement on any of the court records to the effect that sampling was done on a particular day and that the same so drawn was forwarded to the chemical examiner's laboratory, there is no question of the court presuming that official acts were

regularly and properly performed. It is this link evidence which is missing in this case. In such circumstances it may not be safe to record a conviction against the accused who is definitely entitled to the benefit of doubt arising therefrom.”

11. Among the two decisions, the facts narrated in the first of the decisions confer well with the facts of the present case and if that is so, there is no reason as to why the benefit should not be given to the accused in this case also. The records show that there was no proper sampling and infact there was no evidence to show that the sample was taken from the contraband article seized from the possession of the accused. In the absence of this crucial evidence, it could not be said that the prosecution has succeeded in establishing the case against the accused. For the above reason, this Court is unable to uphold the conviction and sentence passed by the court below.

This appeal is allowed, the conviction and sentence passed by the trial court are set aside and the accused stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.