

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 11TH DAY OF DECEMBER 2015/20TH AGRAHAYANA, 1937

CRL.A.No. 702 of 2006 ()

AGAINST THE JUDGMENT IN SC 724/2003 of ADDL.SESIONS JUDGE,
FAST TRACK-I, ALAPPUZHA DATED 28-02-2006
(CP 17/2003 of J.M.F.C., RAMANKARY)

APPELLANT(S)/ACCUSED.:

1. VIJAYAN, S/O.KUNJAPPAN, SATHEESH BHAVAN,
VALLIYARA, KAINAKARI PANCHAYATH, WARD 11
KAINAKARI VILLAGE, KUTTANAD TLAUK, ALAPPUZHA DIST.
2. SIJI, S/O.SISUPALAN, PAYILTHARA VEEDU,
KUTTAMANGALAM MURI, KAINAKARI PANCHAYATH, WARD NO.1
KAINAKARI VILLAGE, KUTTANAD TALUK, ALAPPUZHA DISTRICT.

BY ADVS.SRI.SUDHEENDRAN. K.Y.
SRI.N.ASHOK KUMAR

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
CHIEF SECRETARY, THROUGH THE EXCISE INSPECTOR
KUTTANAD RANGE, BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT.LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ami/

P.BHAVADASAN, J.

Crl.A.No.702 of 2006

Dated this the 11th day of December, 2015.

J U D G M E N T

The accused two in numbers were prosecuted for the offences punishable under Sections 8(1) and (2) of the Abkari Act. They were found guilty and therefore they were convicted and sentenced to undergo rigorous imprisonment for 3 years and to pay a fine of Rs.1,00,000/- each and in default, to undergo simple imprisonment of 6 months each and set off as per law was allowed.

2. The incident which give raise to this case occurred on 21.3.2001. On that day PW1, the Preventive Officer attached to the Excise Enforcement and Anti Narcotic Special Squad, Alappuzha, along with PW2 of the same status, were on routine patrol duty, and when they reached near Marthandam lake by about 4.15 p.m., they happened to see that the accused persons coming along the road and the 1st accused was carrying a can having a capacity of 35 ltrs.

Seeing the Excise officials, they tried to escape, which was effectively prevented. The can was seized and its contents were examined. The can contained about 9 ltrs. of some sort of a liquid and by taste and smell it is identified as arrack. On a search of the body of the 2nd accused, a bottle of 1 ltr. capacity and a glass were seized. The liquid contained in the bottle was identified as arrack by taste and smell. Samples were taken from both the can as well as from the bottle and thereafter sealed and labelled. The labels contained the signatures of the witnesses, the accused and PW1. Ext.P1 mahazar was prepared on the spot. Thereafter Pws.1 and 2 went to the Excise Range office and handed over the accused, contraband article and the records to PW5. PW5 received the accused and the records, and on that basis, registered Crime No.5/01 as per Ext.P2 occurrence report. Ext.P3 property list was prepared by PW3 and he claims that requisition was made to send the

samples for chemical examination. Investigation was done by PW6. He recorded the statement of witnesses and received Ext.P4 chemical analysis report. He completed investigation and laid charge before the court.

3. The court, before which the final report was submitted, took cognizance of the offences and on finding that the offence is exclusively triable by a court of Sessions, committed the case under Section 209 Cr.P.C., after following the necessary procedures, to the Sessions court, Alleppey, and the said court made over the case to the court of Additional Sessions Judge, Fast Track court, Alleppey, for trial and disposal.

4. The latter, on receipt of the records and on appearance of the accused, the court framed charge for the offences punishable under Sections 8(1) and (2) of the Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution therefore

examined Pws.1 to 6 and Exts.P1 to P4 were marked. Mos.1 to 3 were got identified and marked. After closing of the prosecution evidence, the accused were questioned under section 313 of Cr.P.C., wherein they denied all the incriminating circumstances put to them and maintained that they were innocent. On the finding that they could not be acquitted under section 232 of Cr.P.C., they were asked to enter on their defence. They had chosen to adduce no evidence.

5. Presumably impressed by the evidence of Pws.1 and 2 and also Ext.P1 mahazar, the court below came to the conclusion that the offence has been established as against the accused persons and accordingly convicted and sentenced them, as already mentioned. The learned counsel appearing for the appellants, assailing the conviction, pointed out that this appeal will have to succeed on a very short term. According to the learned counsel, it is well

settled that a forwarding note must be produced before the court and it should contain the specimen sample with seal. If those are absent, it creates a doubt regarding the authenticity of the sample, that are said to have been sent for chemical analysis to the laboratory and that vitiate the entire proceedings. Reliance was placed on a decision reported in **Majeedkuty Vs. Excise Inspector (2015(1) KLT 624)**.

6. Hence on the basis of the principles laid down in the above decision, it is contended that the conviction will not stand.

7. The learned Public Prosecutor on the other hand tried to sustain the conviction mainly based on the evidence of Pws.1 and 2 and Ext.P1 mahazar. The learned Public Prosecutor pointed out that Pws.1 and 2 gave a consistent and uniform version regarding the incident and there is nothing to disbelieve their version at all. Their version is

fortified by the recitals in Ext.P1 mahazar which is a contemporaneous document. It is very clear therefore that the contraband was found in possession of the accused persons.

8. No doubt it is true that Pws.1 and 2 deposed about the details of detection. They gave a uniform version and it is deposed by them that while they were on patrol duty, they happened to see 1st and the 2nd accused persons coming along the way and the 1st accused carrying a can of 35 ltr. capacity which contained a liquid which was identified as arrack. As far as the 2nd accused is concerned, on search of his body, a bottle was recovered which too contained arrack. PW1 deposed about the sampling and also about the sealing and labelling on the sample and arrest of the accused. They had also stated about labelling of the balance contraband contained in the bottle and can, and also about the preparation of Ext.P1 mahazar. If these were enough for

a conviction, probably the learned Public Prosecutor was right in her submission and the offences as alleged are made out. But unfortunately it has been observed by this Court that, it is absolutely necessary for the prosecution to produce the forwarding note and it should contain the specimen sample seal, so that the court can verify the same and make sure about the authenticity of the sample sent for chemical analysis. In the decision reported in 2015 (1) KLT 624, cited above, 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."

This Court went to the extent of observing that in the absence of a forwarding note containing the specimen sample seal, the authenticity of the sample becomes very doubtful. This Court is definite in its view that in the absence of forwarding note and specimen sample seal, the authenticity of the sample seal is under serious doubt.

If that is the law as of now, surely the case on hand falls within the ambit of the decision cited above. The conviction and sentence cannot survive. The appeal is allowed. The conviction and sentence imposed by the court below is set aside and the accused stand acquitted of all the charges levelled against them. Their bail bond shall stand cancelled and they are set at liberty.

Sd/-
P.BHAVADASAN,
JUDGE.

ami/14/12/15

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P.A. to Judge