

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 26TH DAY OF OCTOBER 2015/4TH KARTHIKA, 1937

CRL.A.No.727 of 2006

AGAINST THE JUDGMENT IN SC 267/2001 of ADDL. SESSIONS COURT FAST
TRACK (ADHOC)-II, TRIVANDRUM DATED 16-03-2006

APPELLANT/ACCUSED:

GRACY @ OMANA, D/O. KUNJI,
KAVUMMOOLA PUTHEN VEEDU, KADAMPANADU MURI,
ARUVIKKARA VILLAGE.

BY ADV. SRI.SUMAN CHAKRAVARTHY.

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY SMT. S.HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
26-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.727 OF 2006

Dated this the 26th day of October, 2015.

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 8(1) and (2) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for three months.

2. PW3 was the Preventive Officer of Nedumangad Excise Office. He along with PW4, Excise Preventive Officer, had gone for patrol duty on 25.06.1999 and when they reached a place called 'Aruvikkara', at about 5 p.m, they happened to see the accused coming along the road carrying a can. Seeing the Excise Officials, when she tried to move away, she was intercepted and the can was seized. By taste and smell, the contents of the can was identified as arrack. The article seized was sealed and labeled and the label contained the signature of accused, witnesses and PW4. The accused was lodged in the After Care

Home since the Circle Inspector of Police was not at station and on the next day the accused along with the articles were produced before court.

3. PW5 is the Investigating Officer and as per Ext.P4 he prepared crime and occurrence report. He prepared the property list, Ext.P5 and produced the articles before court along with the accused. He claims to have taken sample and prepared forwarding note, Ext.P6, and on receiving the chemical analysis report, Ext.P7, he completed the investigation and laid charge before court.

4. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Thiruvananthapuram under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court Fast Track (Adhoc) No.II, Thiruvananthapuram for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offences under Section 8(1) and (2) of Abkari Act. To the charge, accused

pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P7 marked. M.O.1 was got identified and marked.

6. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C. She denied all the incriminating circumstances brought out in evidence against her and maintained that she is innocent. She claimed that she was taken by force to the Excise Office and was falsely implicated in the case.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C, she was asked to enter on her defence. She chose to adduce no evidence.

8. Based on the evidence of PWs 3, 4 and 5 and also the contemporaneous document, Ext.P1 mahazar, court below came to the conclusion that offence has been made out. Conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that there is no proper sampling. Though PW5 says that he had taken sample, he does

not say about sealing and labeling of the sample and even though he says that forwarding note had been filed before court, it does not contain the sample seal and that is absolutely necessary to be affixed. It is therefore contended that in the absence of proper sampling, offence cannot be held to be made out.

10. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 3, 4 and 5 taken along with Ext.P1 mahazar is sufficient to find the guilt of the accused. The accused had no case that PWs 3 and 4 had any axe to grind against him or that they had falsely implicated her. The articles and the accused were promptly produced before court and that guarantees the detection. It is therefore contended that there are no grounds to interfere with the conviction and sentence.

11. After having heard the learned counsel for the appellant, learned Public Prosecutor and also after having gone through the documents, it is extremely difficult to sustain the conviction and sentence. PWs 3 and 4 speaks about detection, drawing of occurrence report, preparation of property list by PW5 etc. PW5 says that he had taken sample. But he does not say

that he has sealed and labeled the same. He only says that sample was taken and forwarding note was prepared. It is significant to notice that neither PW3 nor PW4 makes mention of any sample having been taken from the place of incident. Only PW5 says that he had taken sample and there is no evidence to show that there was any independent witness at the time of taking sample. Further, Ext.P6 forwarding note marked before court does not contain the sample seal. In such a contingency, this Court had occasion to hold that it is fatal to the prosecution and the prosecution must fail on that ground.

12. In the decision in **Majeedkutti** vs. **Excise Inspector** (2015 (1) KLT 624), 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.”

13. In the decision in **Krishnan** vs. **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.”

14. In the decision in **Joseph vs. State of Kerala** (2009 (4) KHC 537), it was observed as follows:

“18. Yet another infirmity in the prosecution case is that there is no request forwarding note either produced or marked to indicate that a request was made to the Magistrate to send the sample bottle to the chemical examiner for analysis. P.W.6 who conducted the investigation, has no case that he had made any such request or

had filed any forwarding note. Likewise, P.W.1 also has no case that he had made a request to the Magistrate to send the sample bottle to the chemical examiner. Ext.P4 certificate of chemical analysis dated 24.11.1997 is relied on by the prosecution to show that the sample bottle was duly despatched to the chemical examiner for analysis. In the absence of any forwarding note or requisition, it is not explained as to how the Magistrate forwarded a sample bottle to the chemical examiner as per his covering letter dated 19.8.1997 referred to in Ext.P4 certificate. Even the office copy of the covering letter has not been produced. The thondi section clerk who was the custodian of the properties before the Magistrate, was not examined to prove matters such as the date of receipt of the property before the Magistrate, the condition in which those properties were received in court including the fact whether a sample bottle was received and if so, whether the seals if any on such bottle were in tact, the date of despatch of the sample to the chemical examiner and the nature of the custody of the sample bottle until then. The prosecution can succeed in securing a conviction against the appellant only if it is shown that the sample which was subjected

to chemical analysis as evidenced by Ext.P4 certificate was the very same sample which was drawn from the bulk quantity of contraband liquor allegedly held by the accused and which after change of hands, eventually reached the hands of the chemical examiner.”

15. If that be so, it necessarily follows that in the case on hand there is no proper forwarding note and that there is no guarantee that the sample sent for chemical analysis was the sample taken from the contraband seized from the possession of the accused.

16. For the above reasons, this Court is unable to uphold the conviction and sentence passed by the court below.

The appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the offence under Sections 8(1) and (2) of Abkari Act. She is acquitted of the charges levelled against her. Her bail bond shall stand cancelled and she is set at liberty.

Sd/-

P.BHAVADASAN
JUDGE

smp