

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA,  
1937

CRL.A.No. 315 of 2007  
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AGAINST THE JUDGMENT IN SC 778/2004 of ADDITIONAL DISTRICT &  
SESSIONS COURT (FAST TRACK-I), THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:  
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VENU @ MANIKUTTAN, AGED 35,  
S/O.VISWANATHAN, MANKATTUVILAKOM VEEDU,  
NEAR NEHRU JUNCTION, ATTIPRA VILLAGE,  
THIRUVANANTHAPURAM.

BY ADV. SRI.BLAZE K.JOSE

RESPONDENT(S)COMPLAINANT:  
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THE STATE OF KERALA REPRESENTED BY  
THE EXCISE INSPECTOR, AMARAVILA EXCISE RANGE,  
REP BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
18-12-2015, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

P. BHAVADASAN, J.

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Crl.Appeal. No. 315 of 2007  
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Dated this the 18<sup>th</sup> day of December, 2015.

JUDGMENT

Two persons were prosecuted, among whom the first accused, who faced prosecution for the offence under Section 55(a) and 8(2) of the Abkari Act suffered conviction at the hands of the court below and he was sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.1,00,000/–, in default, to undergo rigorous imprisonment for one year.

2. The incident which gave rise to this case occurred on 10.1.2000. On that day, P.W.3, who was working as the Sub Inspector of Thumba Police Station, claims to have got information that two persons are trying to conceal arrack. He along with P.W.1 and others proceeded to the spot and found that two persons were engaged in digging pits so as to conceal the can containing arrack. When they approached the

accused, they tried to run away but they were prevented from doing so. Thereafter P.W.1 opened the can which was attempted to be concealed by the accused persons and by taste and smell identified the contents as arrack. 15 litres of arrack was stored in a can having capacity of 20 litres. All the articles were seized and Ext.P1 mahazar was prepared. Thereafter P.W.3 returned to the station and registered crime as per Ext.P3 FIR. He conducted investigation in the case and recorded statements of witnesses. Ext.P4 is the property list produced by him. Investigation was almost completed by P.W.3 and his successor in office., P.W.2, after getting chemical analysis report laid charge before court.

3. The court, before which final report was laid took cognizance of the offences. 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 District and

Sessions Court Fast Track-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) read with 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 3 examined and had Exts.P1 to P4 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. 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. The court below accepting the evidence of P.Ws. 1 and 3 and also the endorsement on the reverse side of

Ext.P4 came to the conclusion that the prosecution has succeeded in establishing the case against the accused and therefore convicted and sentenced him as already mentioned.

6. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that the court below has not applied its mind to the facts of the case and has acted in a mechanical manner. It is true that P.Ws. 1 and 3 do say about going to the place where the accused were seen digging pits and also having seized the article. Even assuming it to be true, that may not be sufficient for a conviction. Learned counsel pointed out that the arrest memo is not produced, no forwarding note is seen produced and admittedly going by the prosecution evidence itself, that is P.Ws. 1 and 3, no sample was taken from the spot. That means, the sample must have been taken from the court. If that be so, the person who took sample has necessarily to be examined and that has not been done. To crown it all, no

forwarding note containing the specimen sample seal is produced. Non-production of the forwarding note or the absence of specimen sample seal is fatal as could be seen from the decisions reported in Krishnan v. State (2015(2) K.L.T. SN 8) and Joseph v State of Kerala (2009(4) KHC 537). Therefore, the conviction cannot be sustained.

7. Learned Public Prosecutor on the other hand attempted to support the finding of the court below. Placing complete reliance on the evidence of P.Ws. 1 and 3 and taking aid of the endorsement on Ext.P4, it was contended that all things have been done in proper manner and there is no infirmity in the prosecution proceedings. Learned Public Prosecutor on the other hand pointed out that the evidence now available has been found to be sufficient by the court below to hold against the accused and there is no reason as to why this court should interfere.

8. If things were as stated by the learned Public Prosecutor, interference may not have been possible. But a reading of the evidence and the nature of evidence adduced by the prosecution present a dismal picture. It is no doubt true that P.Ws. 1 and 3, among whom P.W.3 was the Sub Inspector do say about having received information that two persons were engaged in the act of concealing liquor. Here, one must remember that in the case on hand, P.W.3 was acting on prior intimation, but nowhere in his evidence he had stated that he had prepared the search memo and sent it to court. Ext.P4 is the property list produced before court. The court below was greatly impressed by the endorsement on the reverse of Ext.P4 that sample taken and balance quantity may be ordered to be kept in the police station concerned.

9. The court failed to note that that would indicate that sample was taken from the court. The question obviously

arises as to who has taken the sample. In such case, it is well settled that the thondi clerk who was responsible for taking the sample must be examined before court. In the case on hand, none of the witnesses say about the sampling at all. As to who had taken the sample, when it was taken and where it was taken all remain a mystery. If as a matter of fact, sample was taken from the court, it must have been under orders of the learned Magistrate concerned. There is no such claim made by any of the witnesses also.

10. To crown it all, the forwarding note is not seen produced. However, the court below referred to it in plenty for convicting the accused. One fails to understand as to how a document which is not marked can be relied on for the purpose of convicting the accused. Apart from the above aspect, reliance placed on the forwarding note cannot be sustained for the simple reason that that is not put to the accused when he was questioned under Section 313 Cr.P.C. If

that be so, that item of evidence could not have been acted upon.

11. In the decision reported in Krishnan v. 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.”

12. In the decision reported in Joseph v 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.”

13. The above decisions make it abundantly clear that the production of forwarding note and the availability of specimen sample seal are a must for a prosecution to succeed. This court had occasion to observe that the availability of specimen sample seal is the only guarantee which the court has to ensure that the sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused. In the case on hand, the forwarding note has not been produced. It could thus be seen that the prosecution case suffers from serious irregularity and infirmities and this Court finds it extremely difficult to concur with the lower court which held that the offence has been established beyond reasonable doubt.

For the reasons stated above, this Court is unable to sustain the conviction. Hence 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.