

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 27TH DAY OF OCTOBER 2015/5TH KARTHIKA, 1937

CRL.A.No. 767 of 2006

AGAINST THE JUDGMENT IN SC 273/2001 of ADDL. SESSIONS COURT
(ADHOC-I), KASARAGOD.

APPELLANT(S)/ACCUSED:

RAMESAN @ THIMMAPPA,
S/O.RAMAPPA POOJARI, NULLIPADY, KASABA,
KASARAGOD MUNICIPALITY.

BY ADV. SRI.M.RAMESH CHANDER

RESPONDENT(S)/STATE:

1. STATE,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA
ERNAKULAM.

2. EXCISE INSPECTOR,
KASARAGOD.

BY PUBLIC PROSECUTOR SMT. S.HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
27-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 767 of 2006

Dated this the 27th day of October, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty and therefore convicted and sentenced him to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for one month.

2. The incident in this case occurred on 21.1.1999. P.W.5 was the Excise Circle Inspector. He with P.W.3, who was then the Preventive Officer, and along with others had gone on routine patrol duty. When they reached near Ayyappa Bhajana Mandiram, they happened to see the accused with a sack on his head coming along the road. Seeing the departmental vehicle the accused became nervous and tried to conceal himself. He was intercepted and the contents of the sack was examined. It contained a can having the capacity of 35 litres.

On opening the can, it was found to contain a liquid. By taste and smell, the liquid was recognized as arrack. The accused was arrested. P.W.5 took sample in a bottle and had the bottle sealed and labelled. The label contained the signature of the accused, P.Ws. 1, 2 and P.W.5. The balance quantity of liquid as well as the can were also sealed and labelled as has been done in the case of sample taken by P.W.5. Ext.P1 mahazar was prepared at the place of incident. On the same day by 2.30 p.m. P.W.5 had the accused, articles and the documents produced before the Range Office. Since P.W.3 was in charge of Range Inspector, he registered crime as per Ext.P2 occurrence report. He prepared Ext.P3 property list. The accused and the articles were produced before court. P.W.4 prepared the forwarding note and obtained Ext.P5 report. Investigation was conducted by P.W.6 who after questioning the witnesses and completing investigation laid charge before court.

3. The court, before which final report was laid took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Kasaragode under Section 209 Cr.P.C. after complying with the formalities. The said court made over the case to Additional Sessions Court (Adhoc-I), Kasaragode for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 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 6 examined and had Exts.P1 to P6 marked. M.Os. 1 and 2 were 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. In the written statement filed by him, he claimed to be a registered headload

worker at the new bus stand. On the date of the incident, he was unloading some plastic cans from a stage carriage plying between Kannur and Kasaragod. He was arrested by the Excise officials and a case was foisted on him. He denied having any role in the incident.

5. 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.

6. Based on the evidence furnished by P.Ws. 3 and 5, the contents of the contemporaneous document Ext.P5, the chemical analysis report and also the evidence of two independent witnesses, though they had turned hostile admitted their signature on Ext.P1 mahazar, the court found that the prosecution has succeeded in establishing the case against the accused. Conviction and sentence as already mentioned followed.

7. Assailing the conviction for the offence under Section 55(a) of the Abkari Act, learned counsel appearing for

the appellant submitted that the court below has omitted to note certain crucial aspects which has a bearing on the issue at hand. It was pointed out that even going by the prosecution case, the articles, the accused and the documents were produced before the Range Office on the very same day itself by P.W.5 and P.W.3 had registered the case. The prosecution case, according to the learned counsel, is that on the very same day itself, the accused, article and the documents were produced before court. Attention was drawn to the fact that the forwarding note was prepared by P.W.4 on the next day and sent to the court. Referring to the evidence of P.W.5, it was pointed out that he had affixed his personal seal on the sample going by the testimony given by him in court. Learned counsel highlighted the fact that the forwarding note was prepared by P.W.4 who claims to have affixed the seal on the original forwarding note. Learned counsel pointed out that it is not clear from the evidence as to the nature of the seal affixed on the original forwarding note

and as to whether the seal belongs to P.W.4 or was it the seal of P.W.5 who claims to have sealed the sample at the place of occurrence. At any rate, according to the learned counsel, Ext.P1 mahazar does not make mention of the nature of seal affixed by P.W.4 and so also Ext.P4, the copy of the forwarding note marked in the case does not contain the sample seal as is required under the provisions of law. Learned counsel relied on the decisions reported in *Majeedkutty v. Excise Inspector* (2015(1) K.L.T. 624) and *Krishnan v. State* (2015 (2) K.L.T. SN 8) and contended that in the absence of any mention of seal in the mahazar and in the absence of specimen seal shown in the forwarding note which is marked before court, it could not be said that the sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused. On this ground, the accused is entitled to acquittal.

8. Learned Public Prosecutor on the other hand contended that the quantity seized is huge amounting to 35

litres and the case put forward by the accused that he was falsely implicated remains unsubstantiated. Referring to the statement under Section 313 Cr.P.C., it was contended that the case put forward by the accused was that while he was unloading articles from a stage carrier, he was intercepted by the Excise Officers and taken to the Excise office and case was foisted on him. His case is that he was engaged in unloading along with his co-workers. If that be true, learned Public Prosecutor pointed out that there is nothing which prevented the accused from examining any one of his co-workers to establish the said fact. That he was arrested by the excise officers is admitted by him. It is also significant to note, according to the learned Public Prosecutor that the accused, articles and the documents were produced on the same day before court and also there are no inconsistencies or contradictions in the evidence of P.Ws. 5 and 3 who are the detecting officer and the officer who had accompanied P.W.5 regarding the detection of the offence. Further the acts done

by P.W.5 is reflected in Ext.P1 mahazar which is a contemporaneous document. The prompt drawing up of Ext.P1 and the prompt production of accused and the articles before court ruled out any opportunity for manipulation of documents or foisting false case on the accused. These aspects considerably weighed with the lower court and those aspects cannot be easily ignored. The mere fact that the details of sample seal is not seen mentioned in Ext.P1 and also Ext.P4 does not contain the sample seal cannot be taken aid of by the accused to seek acquittal. At any rate, according to the learned Public Prosecutor, the court below was greatly impressed by the available evidence and has come to the conclusion that the evidence adduced before court is sufficient to prove the case against the accused beyond reasonable doubt. Accordingly, it is contended that there are no grounds made out to interfere with the conviction and sentence passed by the court below.

9. The detection and the various acts done by P.W.4 are spoken to by P.Ws.5 and 3. P.W.5 was the detecting officer and P.W.3 is the Preventive Officer who had accompanied P.W.5. They gave uniform and consistent version regarding the detection. They speak about the carrying of a sack on his head by the accused and such other things. Even though they were cross-examined at length, nothing could be brought out to show that there was inconsistency in their evidence or that what they were speaking is not true and correct. Both of them speak about having arrested the accused and prepared Ext.P1 mahazar.

10. The evidence of P.W.3 is to the effect that after the detection of the offence, they returned to the Range Office and handed over the article, the accused and the documents to the Range Officer. P.W.4 was then in charge of the Range Officer. P.W.4 took over all those articles produced in the Range Office and registered the case. He speaks about the production of the accused and the documents before the

court on the very same day.

11. P.W.4 is the Range Officer. He claims to have prepared the forwarding note and sent it to court, copy of which is marked as Ext.P4. Surprisingly enough, he says that he was not questioned by the Investigating Officer. P.W.6 the Investigating Officer, laid charge before court.

12. The main contention taken by the learned counsel for the appellant, as has already been referred to, is regarding the absence of description of seal in Ext.P1 and so also the absence of sample seal in Ext.P4. One cannot omit to not that forwarding note was prepared by P.W.4 and sample was taken by P.W.5. In cross-examination by the accused, P.W.5 says that he had affixed his personal seal. However, there is no mention about the seal affixed in the forwarding note filed by P.W.4. One may recall here that the forwarding not was sent to the court only on the next day. It is here that the absence of description in Ext.P1 regarding the seal used and also the absence of sample seal in Ext.P4 assumes

significance and importance. It is also surprising to note that the prosecution did not feel it necessary to produce the arrest memo also. This Court had occasion to consider the consequence of absence of description of the seal used in the mahazar and also the absence of seal in the space provided in the forwarding note, copy of which is produced before court.

13. In the decision reported in *Majeedkutty v. Excise Inspector* (2015 (1) K.L.T. 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.”

14. 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.”

15. This Court was of the view that absence of description of the seal used in the mahazar and also the absence of the specimen seal in the copy of the forwarding note produced before court may be sufficient to create suspicion regarding the sample that has actually been sent for examination. At any rate, the court could not be convinced that the seal found on the sample analysed and seal affixed are the same. In other words, there is no guarantee that the sample analysed is the sample taken from the contraband seized from the possession of the accused.

16. If that be so, the the ratio of the decisions referred to above also applies to the facts of this case. Neither in Ext.P1 nor in Ext.P4 there is any description of the nature of specimen seal used so as to enable the court to come to a

definite conclusion that there is no tampering with the sample and that the sample analysed was the sample taken from the contraband article seized from the possession of the accused. In the light of the principle laid down in the decisions referred to above, it is difficult to find that the prosecution has succeeded in establishing the case against the accused beyond reasonable doubt.

17. It is true that Ext.P1 contemporaneous document and the evidence of P.Ws. 3 and 5 to a great extent support the prosecution case. There is also nothing to doubt the version of the officers, namely, P.Ws. 3 and 5. But in the light of the principles referred to above, their evidence cannot be of much help to the prosecution case.

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.