

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

CRL.A.No. 792 of 2006 ()

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AGAINST THE JUDGMENT IN SC 62/2001 of ADDITIONAL SESSIONS COURT (ADHOC)-
II, KASARAGOD**

APPELLANT(S)/ACCUSED::

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K.V. PRASAD, AGED 26 YEARS,
S/O. KRISHNAN, ADUKKATH PARAMBA, HOSDURG TALUK
KASARAGOD.**

**BY ADVS.SRI.M.SASINDRAN
SRI.M.B.PRAJITH**

RESPONDENT(S)/RESPONDENT::

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.BHAVADASAN, J.

Crl.A. No. 792 of 2006

Dated this the 30th day of October, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) and (2) of the Abkari Act. He was found guilty and accordingly, he was convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of three months.

2. The incident in this case said to have occurred on 26.04.1999. PW1 was the Preventive Officer attached to Excise Range Office, Hosdurg and PW2 was another Preventive Officer attached to the same office. While they along with other officers were on routine patrol duty, they happened to come across the accused carrying a can. When he saw the excise officials he became panicky and tried to escape. He was intercepted and the can was seized. On examination, it was found to contain arrack. The can having a capacity of 5 litres contained 4 litres of arrack. PW1 took a

sample of the same and arrested the accused after preparing Ext.P1 arrest memo. He says that after the sample was prepared, it was sealed and labelled. The label contained the signature of the accused, PW1 and the date, time etc.. He prepared Ext.P2 mahazar at the place. He returned to the Range Office with the accused, contraband articles and the documents. PW5, at the relevant time was the Excise Range Inspector of Hosdurg. The records, the accused and article seized by PW1 were produced before him and he prepared Ext.P3 occurrence report. He prepared the property list Ext.P4 and sent it to court. He also prepared Ext.P5 forwarding note and obtained Ext.P6 Chemical Analysis Report. The investigation was conducted by one Krishnan who is no more. PW5 says that he had taken statements of witnesses and he filed the final report.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the

case to Sessions Court, Kasargod under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, (Ad hoc) II, Kasargod for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offence punishable under Section 8(1) and (2) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 5 examined and had Exts.P1 to P7 marked. MO1 was got identified and marked.

6. After the close of 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.

7. 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.

8. On accepting the evidence of PWs 1 and 2 taken along with Ext.P2 mahazar and also the fact that the accused, seized articles and the documents were produced before court on the very next day, the court below was greatly impressed with the prosecution case and found the accused guilty. The conviction and sentence followed.

9. The learned counsel for the appellant contended that this appeal will have to succeed on a very short ground apart from all other infirmities regarding sampling, keeping of the sample etc.. One glaring aspect is the non affixing of the sample seal in the forwarding note which is marked as Ext.P5. There is no mention of the seal used in Ext.P2 also. Therefore, it is not possible to say that the sample sent is the sample taken from the contraband article seized from the possession of the accused. In support of his case, he relies on the decisions reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), **Majeedkutty v. Excise**

Inspector (2015 (1) KLT 624) and **Krishnan v. State** (2015 (2) KLT SN 8). It is therefore contended that the conviction cannot stand.

10. The learned Public Prosecutor on the other hand pointed out that the evidence of PWs 1 and 2 are sufficient when taken along with Ext.P2 mahazar and justified the finding of the court below that the offence has been made out. There is no case for the accused that they had any ill-feeling or oblique motive towards the accused so as to falsely implicate him.

11. The evidence regarding detection, seizure, sampling etc. are confined to the evidence of PWs 1 and 2. Both are Excise Officials. They while on patrol duty happened to come across the accused carrying a can of 5 litres with him and on seeing them, the accused tried to escape and he was intercepted and the can was seized from his possession. On examination of the contents, it was found to contain 4 litres of arrack. Thereafter, PW1 says that

he had taken a sample from the same and affixed seal and label on the same. He also says that he also sealed and labelled the balance contraband also. This version of PW1 get support from PW2 also. Both of them say that the accused was arrested from the spot and Ext.P2 mahazar was prepared by PW1. It is their uniform version that thereafter, they returned to the Excise Range Office with the accused, article seized and the documents and handed them over to officer in charge of the station who is none other than PW5.

12. PW5 accepts having received the articles, records and the accused and he says about having drawn up the occurrence report. He also says about having prepared the property list and also the forwarding note. However, investigation was conducted by one Krishnan, who is no more.

13. It is true that the evidence of PWs 1 and 2 are consistent regarding the detection, sampling etc.. Even though they were cross examined at length, no statement

which would discredit them could be brought out from their evidence. There is nothing to show that they had any oblique motive to falsely implicate the accused. Further, their evidence get support from the contemporaneous document namely, Ext.P2. So to a certain extent, the lower court was justified in its conclusion that the seizure has been proved.

14. The question is whether that by itself is sufficient. In the decisions cited by the learned counsel for the appellant, the significance of not affixing the sample seal in the forwarding note was considered in detail.

15. In the decision reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), it was held 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.”

16. In the decision reported in **Krishnan v. State** (2015 (2) KLT 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 evident 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.”

17. In the decision reported in **Majeedkutty v. 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.”

18. In the case on hand, neither in Ext.P2 nor in Ext.P5 we get a description of the sample of the seal said to have been affixed by PW1 while taking the sample or affixing the seal on the balance contraband articles.

19. Therefore, following the principles laid down in the above three decisions, it follows that there is no guarantee that the sample sent to the Chemical analysis is the sample taken from the contraband seized from the possession of the accused. If that be so, the accused is entitled to be acquitted.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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