

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 22ND DAY OF DECEMBER 2015/1ST POUSHA, 1937

CRL.A.No.844 of 2006

AGAINST THE JUDGMENT IN SC 339/2005 of ADDITIONAL SESSIONS COURT
(ADHOC-I), ERNAKULAM DATED 08-03-2006

APPELLANT/ACCUSED:

RAJAN, S/O. THOMMACHAN, KONATH,
KURUMBANTHURUTH KARA, CHENNAMANGALAM VILLAGE,
PARAVOOR TALUK.

BY ADVS.SRI.B.PREMOD
SMT.RENI.T.A

RESPONDENT/COMPLAINANT:

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

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
22-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.844 OF 2006

Dated this the 22nd day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence 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 two years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for one year. Set off as per law was allowed.

2. The incident which gave rise to the case occurred on 18.12.2003. The prosecution case is that PW1 who was the Circle Inspector of Paravoor Excise Range received reliable information that the accused was keeping arrack in his house. He prepared search memo and sent it to court. He along with other officers went to the house of accused for search and they reached the house of the accused by about 3 a.m. The house was searched. The house faced south. On the eastern side of the bed room, there is a cot laid in the east west direction and

below that cot, they found two cans having capacity of 2½ litres each. They examined the cans. One of the cans was seen to contain 2 litres of arrack and the other contained 1 litre of arrack. Two samples were taken from each of the cans and the samples were sealed and labeled and the label contained the signature of PW1 and the witnesses. The cans which were seized were also sealed and labeled and that labels contained the signature of accused, witnesses and PW1. Ext.P2 is the mahazar prepared by PW1. PW1 would say that he returned to the office along with the seized articles and the accused and entrusted them to the Range Inspector, Paravoor.

3. PW5 was the Excise Inspector. He says that PW1 had produced the accused, contraband articles and documents before him and on that basis, he registered Crime No.50/2003 as per Ext.P10 occurrence report. PW5 would also say that he had sent the property list, Ext.P11 to court. He had also preferred forwarding note for sending the sample for chemical analysis. Ext.P13 is the report so obtained. PW5 would say that subsequent investigation was conducted by Excise Circle

Inspector, Aluva as per the orders of Assistant Excise Commissioner. It is suffice to say that investigation was completed and charge was laid.

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, Ernakulam. The said court made over the case to Additional Sessions Court (Adhoc-I), Ernakulam for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Sections 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 7 examined and Exts.P1 to P14 marked. M.O.s 1 and 2 were got identified and marked. Ext.X1 was marked as court exhibit.

6. After the close of the prosecution evidence, 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 the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. Exts.D1 and D1(a) were marked on his side.

8. The court below mainly basing its conclusion on the evidence of PW1 who is the detecting officer taken along with Ext.P2 mahazar formed the opinion that the accused is guilty and accordingly, convicted and sentenced him as already mentioned.

9. Learned counsel appearing for the appellant, assailing the conviction and sentence, contended that this appeal will have to succeed on a very short ground. Drawing attention to the forwarding note, it is contended that no specimen of sample seal is shown on the forwarding note which is obligatory. Relying on the decision in **Krishnan** vs. **State** (2015 (2) KLT SN 8), it is contended that failure to provide specimen of sample seal in the forwarding note is detrimental to the prosecution and in the absence of specimen of sample seal, there is no guarantee that the sample sent for analysis is the sample taken from the contraband seized from the possession of accused. According to the learned counsel, the conviction and sentence cannot stand.

10. Learned Public Prosecutor, on the other hand, contended that the contention raised by the learned counsel for the appellant is on highly technical aspect. In fact, contraband is detected from the hands of the accused. It is contended that the court below is justified in finding the accused guilty.

11. In the absence of sample seal, the court could not have verified whether the sample before court is the sample taken from the contraband seized from the possession of accused. In the decision in **Krishnan** vs. **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 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. The above decision highlights the necessity and purpose of providing specimen of sample seal in the forwarding note. That is the only guarantee the court has to ensure that the sample sent for analysis is the sample taken from the contraband seized from the possession of accused. One of the decisions goes to the extent of drawing a presumption that absence of sample seal in the forwarding note indicates that there may not have any seal affixed at all. Even if we does not go to that extent, the necessity to provide sample seal in the forwarding note cannot be overlooked. Sample seal is intended to be affixed on the

forwarding note for the simple reason that there is a specific space provided for that purpose in the forwarding note.

13. For the above reasons, this Court is unable to uphold the conviction and sentence.

In the result, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Sections 8(1) and (2) of Abkari Act are set aside and it is held that the accused is not guilty of the offence. He stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.