

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA,
1937

CRL.A.No. 880 of 2006 (A)

AGAINST THE JUDGMENT IN SC 792/2004 of ADDITIONAL DISTRICT &
SESSIONS COURT (ADHOC)-I, PATHANAMTHITTA.

APPELLANT(S)/ACCUSED NO.1.:

KRISHNAN KUTTY, S/O. DAMODARAN,
THANNIKKAMALAYIL VEEDU, THURUTHIKKADU MURI,
KALLOOPPARA VILLAGE, PATHANAMTHITTA DISTRICT.

BY ADV. SRI.O.V.MANIPRASAD

RESPONDENT(S)/COMPLAINANT.:

THE STATE OF KERALA,
(THE SUB INSPECTOR OF POLICE, PERUMPETTY POLICE
STATION, CRIME NO.13/2002), REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
21-12-2015, ALONG WITH CRA. 934/2006, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. Nos. 880 & 934 of 2006

Dated this the 21st day of December, 2015.

JUDGMENT

Three accused persons were prosecuted for the offence punishable under Sections 8(1) and (2) of the Abkari Act. Among them, the second accused was lucky to be acquitted, while the first and third accused were less fortunate and they suffered conviction and they were sentenced to undergo rigorous imprisonment for two years each and to pay fine of Rs1,00,000/- each, in default to undergo simple imprisonment for two years each. Set off as per law was allowed.

2. The prosecution story runs thus:

The incident which gave rise to his case occurred on 24.1.2002. At that time, P.W.5 was the Sub Inspector of Perumpetty Police Station. On the date of incident, while P.W.5 was on patrol duty, he received reliable information that in the shop, T.S. No.20 at Vella, illegal vending of arrack is being

carried on. He prepared a search memo and went to the shop in question. Behind the varenda there were two rooms and in the northern room one person was standing behind a table holding 1 ½ litre plastic bottle and two glasses. He was pouring into the two glasses before him the liquid contained in the bottle. At that time, P.W.5 and others approached him. He tried to escape. But he was effectively prevented. He is the third accused in this case. He claimed to be a salesman of the shop which was run by the Co-operative Society of which the first accused was the Chief Promoter. Based on his disclosure, accused Nos. 1 and 2 were arrested. From the contraband seized from the possession of the third accused, sample was taken in a bottle having capacity of 180 ml. Sample so taken was sealed and labelled. Ext.P1 mahazar was prepared. Third accused was arrested. P.W.5 returned to the station and based on the records available with him, registered Crime No. 13 of 2002 under Sections 8(1) and (2) of the Abkari Act.

Ext.P6 is the FIR. He had the properties produced before court by way of Ext.P8 property list. He identified the articles seized at the time of search. He preferred a forwarding note with a requisition to send the sample for chemical examination and the report obtained is Ext.P12. He completed investigation and 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, Pathanamthitta. The said court made over the case to Additional District and Sessions Court (Adhoc)-I, Pathanamthitta 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 8(1) and (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 6 examined and had Exts.P1 to P13 marked. M.Os. 1 to 3 were got identified and marked. After the close of the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent. Finding that they could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. They chose to mark Ext.D1, a part of the statement given by P.W.1.

5. The court below seems to have been greatly impressed by the evidence of P.Ws. 1 and 5 and Ext.P1 contemporaneous document and concluded that offence has been established against the accused except the second accused. The result was that accused Nos. 1 and 3 were convicted and sentenced as already mentioned.

6. The Society of which the third accused is the salesman is sought to be represented by the first accused who is shown to be the Chief Promoter of the Society. It is interesting to note, according to the learned counsel that at the time when the offence was detected, he was not the Chief Promoter. He might have been the Chief Promoter at the time of its organization, but he cannot be treated as owner of the shop. Further, learned counsel pointed out that this appeal may have to be allowed on a very short ground. Learned counsel pointed out that forwarding note produced before court which is marked as Ext.P9 does not contain the specimen of the sample seal and hence the prosecution has to fail.

7. Learned Public Prosecutor relying on the evidence of P.Ws. 1 and 5 contended that once seizure of the contraband article is proved, nothing more remains to be established and one need not look into the chemical report at

all. That being the position, it is imprudent on the part of this Court to interfere with the finding of the trial court on the ground that no specimen sample seal is seen affixed in the forwarding note.

8. Even though the argument of the learned Public Prosecutor looks attractive, on a deeper probe, it can be found to be without basis. This Court in the decision reported in *Krishnan v. State* (2015(2) K.L.T. SN 8) 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.”

9. 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.”

It is very significant to notice the object and purpose of the forwarding note. In the decision of this Court, the Court had occasion to hold that the specimen sample seal provided in the forwarding note is the only guarantee for the court to come to the conclusion that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. In the absence of specimen sample seal in the forwarding note, it may not be possible for the court to hold that proper sample had been sent for chemical analysis. In the case on hand, Ext.P9 requisition also does not contain the specimen sample seal etc. Therefore, in the light of the decisions of this Court, it cannot be held that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. Further, it is significant to note that accused Nos. 1 and 2 were

arrayed as accused on the basis of the statement said to have been made by the third accused. Whatever that be, in the light of the fact that no specimen sample seal is made available, it is not necessary to consider the other aspects.

For the above reasons, these appeals are allowed, the conviction and sentence passed by the trial court against accused Nos. 1 and 3 are set aside and it is held that they are not guilty of the offences alleged against them. They are acquitted of the charges levelled against them. Their bail bonds shall stand cancelled and they are set at liberty.

P. BHAVADASAN,
JUDGE

sb.