

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

CRL.A.No.439 of 2007

AGAINST THE JUDGMENT IN SC 409/2005 of ADDL. SESSIONS COURT
FAST TRACK - III, PALAKKAD DATED 14-02-2007

APPELLANT/ACCUSED:

E.KRISHNAN, AGED 40 YEARS,
S/O.GOVINDAN, ERIKKANCHERI VEEDU, KARIMPUZHA VILLAGE,
KARIMPUZHA DESOM, OTTAPALAM TALUK.

BY SRI.C.C.THOMAS (SENIOR ADVOCATE)

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
EXCISE INSPECTOR, EXCISE RANGE OFFICE, CHERPULASSERY
PALAKKAD DISTRICT BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
18-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.439 OF 2007

Dated this the 18th day of November, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(a) 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 six months. Set off as per law was allowed.

2. The prosecution case against the accused is that on 30.04.2001, while PW1 was functioning as Preventive Officer of Cherpulassery Excise Range Office, as usual, at 4 p.m, he along with a team of officers, went for patrol duty. When they reached near Ambady theatre at Sreekrishnapuram, the accused was seen coming along the road carrying a plastic bag. He became nervous and jittery on seeing the Excise Officials. Feeling suspicious, he was intercepted and the bag was seized. The bag contained a can and certain bottles wrapped in a paper. The can

was opened and the liquid was examined by taste and smell and it turned out to be spirit. The can had a capacity of 10 liters and the volume of spirit in the can was 4 liters. On unwrapping the papers, it was found 6 bottles having a capacity of 375 ml each of Old Port XXX Rum. He opened one of the bottles and by taste and smell, he convinced that it was Indian Made Foreign Liquor. After preparing the arrest memo, accused was arrested. From the can, 180ml of liquid in a bottle having a capacity of 375 ml was taken as sample and so also the liquid in the bottle which was opened. Both were sealed and labeled. On the label, signatures of accused and PW1 were affixed. He prepared Ext.P2 seizure mahazar. The balance contraband articles were also sealed and labeled. He produced the accused, contraband articles and documents in his office. The officer then in charge of the station received the accused, records and the contraband articles and registered crime as per Ext.P6 occurrence report. It would appear that he prepared the property list and forwarding note and had the accused produced before court.

3. PW5 took over the investigation. He prepared the scene

mahazar, Ext.P3 and obtained chemical analysis report, Ext.P5. He recorded the statement of witnesses, completed the investigation and laid charge before court.

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, Palakkad. The said court made over the case to Additional Sessions Court Fast Track-III, Palakkad for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Section 55(a) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P6 marked. M.O.s 1 to 7 were got identified and marked.

6. The court below found the evidence of PWs 1 and 4 to be acceptable taken along with Ext.P2 mahazar which, according to the court below, was a contemporaneous document and on the basis of the chemical analysis report, came to the conclusion that

the offence had been made out and accordingly, convicted and sentenced the accused as already mentioned.

7. Learned counsel appearing for the appellant, assailing the conviction and sentence, pointed out that the very preparation of Ext.P2 seizure mahazar itself is in doubt. PW1, detecting officer, says that seizure mahazar was written by one Vamadevan. PW5 was asked a question whether there was a preventive officer named Vamadevan. His answer was negative. If that be so, the version given by PW1 is belied.

8. Apart from the above fact, learned counsel appearing for the appellant pointed out that the person who had registered the crime, who had prepared the property list and who had prepared the forwarding note was not examined. It is not discernible from the evidence on record as to when the property was produced before court and as to who had produced the property before court. Learned counsel then pointed out that the forwarding note is not seen marked in the case. So, there is no evidence of sample seal available for court to compare. If that be so, going by the decision in **Krishnan** vs. **State** (2015 (2) KLT SN 8), the

prosecution should fail.

9. Learned Public Prosecutor, on the other hand, contended that the evidence of PWs 1 and 4 are sufficient in law to come to the conclusion that there has been seizure of the contraband article from the possession of the accused. If any further material is required, that is furnished by Ext.P2 mahazar prepared by PW1 though written by somebody else. The prompt production of accused and articles before court gives further credence to the prosecution case. At any rate, according to the learned Public Prosecutor, the court below has chosen to accept the version given by PWs 1 and 4 and there is no reason to take a different view.

10. The contention raised by the learned Public Prosecutor is unacceptable for more reasons than one. First of all, detection was on 30.04.2001 and the endorsement on the arrest memo and on the mahazar produced in court is that they were received only on 04.05.2001. No explanation is offered for the considerable delay. Further, as rightly pointed out by the learned counsel for the appellant, the person who had registered the

crime, who had prepared the property list and who had drawn up the forwarding note has not been examined. No reasons are given for his non examination. Even though, normally, drawing of seizure mahazar may not be much significant, the contention based on the absence of property list and forwarding note assumes considerable significance. Even assuming that PW4 whose name is Varmadevan was the person who had actually written the seizure mahazar, going by the evidence of PW1, that does not cure the other defects in the case. For reasons best known to the prosecution, they did not feel it necessary to produce the property list nor did they feel it proper to examine the person who had registered the crime and drawn up those documents. Probably, it is because that from the endorsement seen on the documents, arrest memo and mahazar are seen produced before court only on 04.05.2001.

11. The significance of non production of forwarding note and non availability of sample seal for comparison has been considered in the decision referred to by the learned counsel for the appellant i.e. **Krishnan** vs. **State** (2015 (2) KLT SN 8). In

the said decision, 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 case on hand, as already noticed, property list is not produced. So, it is not certain that the samples alleged to have been taken by PW1 were produced in time. It is surprising to note that the property list and the forwarding note though prepared are not seen marked. Result is that, those documents cannot be looked into for the purpose of this case.

13. On the evidence in this case, it has to be taken that there is no forwarding note and if that be so, there is no sample seal available for court to compare. The principles laid down in the decision referred to above apply to the facts of this case. If that be so, conviction cannot stand.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below 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