

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

CRL.A.No. 907 of 2006 ()

**AGAINST THE JUDGMENT IN SC 5/2005 of ADDITIONAL DISTRICT & SESSIONS COURT
(ADHOC-I), PATHANAMTHITTA DATED 05-04-2006**

IN CP 92/2004 OF JUDICIAL FIRST CLASS MAGISTRATE-II, PATHANAMTHITTA

APPELLANT(S)/ACCUSED:

**BABU, S/O. GANGADHARAN,
AGED 40 YEARS, VAZHAVILAYIL VEEDU, ERAM KARA
MALAYALAPUZHA VILLAGE, KOZHENCHERRY TALUK.**

BY ADV. SRI.PHILIP M.VARUGHESE

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 907 of 2006

Dated this the 03rd day of December, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(g) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of two years. Set off as per law was allowed.

2. The incident which gave rise to the case occurred on 10.07.2002. PW1 was the Excise Range Inspector, Konni at that point of time. On the day of incident, he along with PW2 and others were on routine patrol duty. When they reached near the granite quarry belonged to one Anandan, they saw the accused coming along the way with two cans; one in each hand. Seeing the excise officials, he kept them down and ran away from the place. Though chased, he could not be apprehended. The excise party returned and

examined the contents of the cans. They were convinced that it was wash. Each of the cans had a capacity of 15 litres and each of the cans contained 10 litres of wash. Two samples were taken and samples were sealed and labelled and the labels contained the signature of the witnesses and PW1. After taking the sample, the balance wash was destroyed on the spot. Ext.P1 is the mahazar prepared by PW1 at the spot. They returned to the Station along with the documents and the contraband articles and registered crime as per Ext.P2 occurrence report. Ext.P4 is the property list. Ext.P5 is the Chemical Analysis Report. PW5 took over investigation under the instruction of the Assistant Excise Commissioner. He recorded statements of witnesses and he claims to have gone to the place of occurrence. His successor in office namely, PW6 completed investigation and laid charge before court.

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, Pathanamthitta, under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional District & Sessions Court (Adhoc)-I, Pathanamthitta, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 55(g) 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 6 examined and had Exts.P1 to P7 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. He also added that his house is situated close to the alleged granite quarry owned by Anandan. When he complained

about the quarrying work done in the quarry as it caused damage to his house which resulted in Anandan getting annoyed and that resulted in falsely implicating the accused.

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. Acting on the evidence of PWs 1 and 2 and also based on Ext.P1 mahazar and also the Chemical Analysis Report, the court below came to the conclusion that prosecution has succeeded in establishing the case against the accused and therefore, convicted and sentenced him as already mentioned.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant raised two main contentions for consideration. They are; (1) the forwarding note along with the sample seal has not been produced before court and that is fatal to the prosecution and (2) there is no finding that the even assuming wash was

recovered from the possession of the accused, it is intended for manufacture of liquor. The learned counsel, highlighting on the above aspects, contended that the court below simply ignored the non-production of the forwarding note as of little consequence. In fact, there is no consideration regarding this aspect at all by the lower court. The learned counsel for the appellant pointed out that this aspect has been considered in the decision reported in **Joseph v. State of Kerala** (2009 (4) KHC 537) and **Krishnan v. State** (2015 (2) KLT SN 8). Elaborating on the second point, the learned counsel for the appellant pointed out that it is not sufficient that articles or utensils or materials are seized from the possession of the accused. The prosecution has an added burden to show that the materials, still, utensils or apparatus so seized is for the purpose of manufacturing liquor. There should be pleadings and evidence in that respect. This aspect also has not been noticed by the court below. Hence, it is contended that on all these grounds, conviction is

unjustifiable.

10. The learned Public Prosecutor on the other hand contended that the evidence of PWs 1 and 2 are clinching enough and there is no inconsistency in their evidence. The learned Public Prosecutor pointed out that whatever may be the circumstances, the court below found their evidence to be convincing enough to warrant a conclusion that the offence has been committed and there is no justification to interfere with the same.

11. The evidence regarding the detection of the offence remains confined to the testimony of PWs 1 and 2. They give a uniform version of the incident. Both of them say that while on patrol duty, they happened to come across the accused going along the road carrying two cans. On seeing them, he kept the can down and ran away from the place. Both of them say about PW1 having seized the cans and examined its contents. They also speak about the sampling done by PW1 and they also say that thereafter,

they returned to the Station along with the contraband articles and the records. Even though these witnesses were cross examined at length, nothing could be brought out from their evidence to show that they are speaking falsehood.

12. The evidence of PWs 1 and 2 get support from the narration in seizure mahazar which is a contemporaneous document. It is seen that PWs 3 and 4, the two independent witnesses turned hostile to the prosecution. However, that does not mean that the evidence of PWs 1 and 2 are to be discarded. It could therefore be said that some article was seized from the possession of the accused.

13. The next question is whether that by itself is sufficient. 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.”

14. 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.”

15. A reading of the above decisions shows that it is mandatory that the prosecution produces the forwarding note containing the sample seal so as to enable the court to ensure that the sample that has reached the laboratory is the sample taken from the contraband article seized from the possession of the accused. In the absence of the forwarding note with sample seal, no reliance can be placed on the Chemical Analysis Report stating that the seal found on sample is tallied with the specimen seal. Admittedly in

the case on hand, except for saying that forwarding note has been filed before the court, it is not seen marked also. There is nothing to show that it contained the sample seal also. Therefore, the appellant is entitled to succeed on this ground.

16. Equally formidable is the second ground pointed out by the appellant. It is not sufficient to show that the materials, still, utensils etc. have been seized from the possession of the accused. The prosecution has an added burden to show that the articles so seized are intended for the manufacture of liquor other than toddy or any intoxicating drug etc.. Apart from the fact that there is no evidence to show that either the accused is engaged in illegal distillation or that he is a regular supplier to a person who is indulged in such an activity. In the absence of any evidence in that regard, it may not be possible to convict the accused under Section 55(g) of the Abkari Act.

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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P.A. to Judge