

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

CRL.A.No. 908 of 2006 ()

**AGAINST THE JUDGMENT IN SC 30/2005 of ADDITIONAL SESSIONS COURT, FAST
TRACK - I, PALAKKAD DATED 04-03-2006**

APPELLANT(S)/ACCUSED NO.1 TO 3:

- 1. PURUSHOTHAMAN @ RAJAN,
S/O. KRISHNAN, KULATHIL VEEDU, VELLIYAD
MANNANUR.**
- 2. PRADEEPKUMAR, S/O. PURUSHOTHAMAN,
KULATHIL VEEDU, VELLIYAD, MANNANUR.**
- 3. SURESH BABU, S/O. SANKARAN,
VAVULLY VEEDU, VELLIYAD, MANNANUR.**

BY ADV. SRI.C.C.THOMAS (SR.)

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA, REP. BY
SUB INSPECTOR OF POLICE, OTTAPALAM POLICE STATION
PALAKKAD DISTRICT, REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 908 of 2006

Dated this the 15th day of December, 2015

J U D G M E N T

The accused, six in number, were put in the dock and tried for the offence punishable under Section 55(a) of the Abkari Act. Among them, accused Nos. 1 to 3 were found guilty and accused Nos. 4 to 6 were acquitted of all charges levelled against them. The convicted accused were sentenced to undergo rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of six months each.

2. The incident which gave rise to this case occurred on 19.02.2002. At the relevant time, PW1 was the Circle Inspector attached to Chelakkara Police Station. While he was on duty in connection with a festival in a temple, he happened to see the accused engaged in the act of selling liquor. Knowing the activities of the accused, PW1 and others reached near them. On seeing the Police party, three

of the persons escaped. The other three were taken into custody and search of their body was conducted. From the loins of A1 and A2, two bottles of 180ml capacity were seized and from the loins of A3, one bottle of 180ml of arrack was seized. Samples were taken from all the five bottles and they were separately sealed and labelled. ₹430/- obtained from the body search of A1 was also seized. Case was registered in the name of the accused persons. Ext.P3 is the FIR. PW5 was the Sub Inspector of Cheruthuruthi Police Station at the relevant time. He had gone along with PW1. He also speaks about the seizure and sealing of articles. PW4 conducted investigation in the case. Ext.P5 is the scene mahazar prepared by him. He prepared Ext.P6 forwarding note and received Chemical Analysis Report namely, Ext.P7 Subsequently, the investigation was completed and charge was laid 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, Palakkad under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track-I, Palakkad 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(a) 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. MOs 1 and 2 series were got identified and marked.

6. After the close of 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 are innocent.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. They chose to adduce no evidence.

8. The court below, greatly impressed by the evidence of PWs 1, 2 and 5, taken along with the contemporaneous document namely, Ext.P1, found accused Nos. 1 to 3 guilty and held the accused Nos. 4 to 6 not guilty of the offence and they were acquitted.

9. Challenging the conviction and sentence of A1 to A3, it is contended by the learned counsel for the appellants that the forwarding note marked in this case does not contain the specimen sample seal and that is fatal to the prosecution. For the above said proposition, the learned counsel relied 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). On this short ground, it is contended by the learned counsel for the appellants that the appellants will

have to succeed.

10. The learned Public Prosecutor on the other hand contended that the evidence of PWs 1 to 4 taken along with the contemporaneous document and the prompt production of the accused before court, amply justify the conclusion drawn by the lower court and it does not call for any interference.

11. It is true that PWs 1, 2 and 5 give a consistent version regarding the incident and their statements are consistent with each other and there is no contradiction or inconsistency between their evidence. They speak about how they happened to locate the accused persons and how they seized the articles from the accused persons. They also speak about the sampling done at the place of occurrence and also having drawn up the mahazar concerned at the site itself.

12. Even though these witnesses were cross examined at length, nothing could be brought out from their evidence

to show that they are speaking falsehood. There is no reason to disbelieve them. Had this been the dispute of the case, the contention raised by the learned Public Prosecutor could have been accepted. But in the case on hand, the dispute is regarding the absence of sample seal in the forwarding note.

13. 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. 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.”

16. From a reading of the above decisions, one can easily understand the significance and importance of filing of the forwarding note and also the necessity to show the specimen seal in the forwarding note. Probably, that is the

only guarantee which the court has to ensure that the sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused. In the case on hand, there is no such sample seal and therefore, the authenticity of the sample of the specimen seal is in doubt. If that be so, the Chemical Analysis Report can have no value at all.

17. In the light of the decisions cited above, it follows that the appellants are entitled to succeed.

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

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge