

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

CRL.A.No. 909 of 2006

AGAINST THE JUDGMENT IN SC 917/2001 of ADDL. DISTRICT &
SESSIONS COURT, (FAST TRACK COURT-I), THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:

ASOKAN @ AMBILI,
S/O.SOMARAJAN, BABY MANDIRAM,
VALAKUZHI PACHA,
KALLARA VILLAGE, THIRUVANANTHAPURAM.

BY ADV. SRI.LATHEESH SEBASTIAN

RESPONDENT(S)/STATE:

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

BY PUBLIC PROSECUTOR SMT. MADHUBEN.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
28-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 909 of 2006

Dated this the 28th day of October, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty and therefore was convicted and sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.1,00,000/–, in default, to undergo rigorous imprisonment for one year.

2. The date of occurrence is 9.9.2000. On that day, P.W.3, the Sub Inspector of Venjaramoodu Police Station, and P.W.5 were on law and order patrol duty. When they reached near Kalamachal market, they got reliable information regarding the sale of arrack by a few persons. By about 9–10 p.m. they reached the place. They found 2–3 persons standing there against a wall at the market. Seeing the police officers, one of them, who had a can in his hand, ran away

with the can. He had a glass also with him. The other two persons also ran away. Police officers followed the person who carried the can, intercepted him and seized the can. By taste and smell, the liquid was identified as arrack. The accused was arrested at the spot and Ext.P2 mahazar was prepared. P.Ws. 3 and 5 along with the records and the accused returned to the police station and registered crime as per Ext.P3 FIR. The accused, seized articles and the documents were produced before court. The can which was found in the possession of the accused had a capacity of 10 litres and it contained 7 litres of arrack. A sum of Rs. 110/- kept in the pocket was also seized, which according to the prosecution was obtained by sale of arrack. Investigation was done by C.W.5 and was verified by P.W.4. He obtained Ext.P4 chemical analysis report and after completing the investigation laid charge before court.

3. The court, before which final report was laid took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thiruvananthapuram under Section 209 Cr.P.C. after following the requisite procedures. The said court made over the case to Additional District and Sessions (Fast Track Court No.1), Thiruvananthapuram for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 55(a) 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 5 examined and had Exts.P1 to P4 marked. M.Os. 1 to 3 were got identified and marked. After the close of the 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. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

5. The court below, finding the evidence of P.Ws.3 to 5 convincing enough supported by narration in Ext.P2 mahazar, chemical analysis report Ext.P4, found it sufficient to hold the accused guilty. Conviction and sentence as already mentioned followed.

6. Learned counsel appearing for the appellant assailing the conviction pointed out that there were several infirmities in the prosecution case. According to the learned counsel, there is ten days delay in producing the articles before court and that delay is not explained. That by itself is sufficient to vitiate the conviction. Further, it is pointed out that there is no evidence to show that the sample was taken from the spot as P.Ws. 3 and 5 did not say about having taken

sample. It is not discernible from the evidence as to from where the sample was taken and who had taken the sample which was sent for chemical analysis. It is also contended that Ext.P2 mahazar did not make mention of any sample so taken from the contraband seized. It also does not make mention of the seal used by the detecting officer.

7. Relying on the decisions reported in Ravi v. State of Kerala (2011(3) K.L.T. 353), Majeedkutty v. State of Kerala (2015(1) K.L.T. 624) and Krishnan v. State of Kerala (2015(1) K.L.T. SN 8) it has been pointed out that since forwarding note and arrest memo are also not produced, the prosecution has to fail.

8. Learned Public Prosecutor tried to support the conviction on the basis of the evidence furnished by P.Ws.3 and 5 and Ext.P2 mahazar. Learned Public Prosecutor contended that the court below found the evidence sufficient enough to convict the accused and there is no reason to take a

different view.

9. Apart from the question of delay, there is considerable force in the submission that there is no evidence as to who had taken the sample and from where the sample had been taken. Ext.P2 mahazar is totally silent regarding the taking of sample from the spot. P.Ws. 3 and 5 also did not say in chief-examination that they had taken sample from the contraband article seized from the possession of the accused. P.W.4 also does not say as to who had taken the sample and from where the sample was taken. Apart from this, there is the non-production of arrest memo and forwarding note. The prosecution has not adduced any evidence on the crucial aspects, namely, sampling, sealing and labelling of the contraband seized from the possession of the accused.

10. In the decision reported in *Ravi v. State of Kerala* (2011(3) K.L.T. 353), it was held as follows:

“13. It is difficult for us to believe that PW4 had produced the properties on 25.08.1997 and the Thondy Section Clerk refused to receive the properties on the ground that he was too busy. Even assuming that such a thing happened, we would have expected the prosecution to examine the Thondy Section Clerk to substantiate the above explanation. For reasons best known to the prosecution the Thondy Section Clerk was not examined. If so, it cannot be assumed that the property was in the safe custody of PW4 until their production before Court after 16 days. There is the possibility that the properties would have been tampered with. The prosecution, in a case of this nature 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 by change of hands in a tamper-proof condition. (Vide State of Rajasthan v. Daulath Ram (AIR 1980 SC 1314) and Valsala v. State of Kerala (1993 (2) KLT 550 (SC)). No conviction can be entered against the accused in a prosecution as the present one 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 (See Sathi v. State of Kerala (2007 (1) KLT SN 57 (C.No.82) and Sasidharan v. State of Kerala (2007 (1) KLT 720). There is no satisfactory link evidence to show that it was the same bottles seized from the appellant which eventually found their way into the hands of the Chemical Examiner and that there was no meddling or tampering with the bottles while they were in the custody of P.W.4. Hence the result of Ext.P7 Chemical Analysis cannot be applied against the appellant.”

11. In the decision reported in Majeedkutty v. Excise Inspector (2015 (1) K.L.T. 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.”

12. In the decision reported in Krishnan v. State (2015(2) K.L.T. 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.”

13. In the absence of any details as to from where the sample had been taken and who had taken, it is not possible to come to the conclusion that the sample which reached the Laboratory is the sample taken from the contraband article seized from the possession of the accused. The principle laid down in the above decisions applies to the facts of this case and there is no reason as to why the ratio of the said decisions should not be applied to the facts of this case also.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

sb.