

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

CRL.A.No. 943 of 2006 ()

**AGAINST THE JUDGMENT IN SC 2468/2004 of ADDITIONAL SESSIONS COURT FAST
TRACK (ADHOC) III, TRIVANDRUM DATED 19-04-2006**

IN CP 51/2004 OF JUDICIAL FIRST CLASS MAGISTRATE-II,TRIVANDRUM

APPELLANT(S)/ACCUSED:

**KRISHNAN @ KAPPALANDI KRISHNAN,
S/O.DAAMODARAN, KOLLUMURI VEEDU, VAIKKALATHUMURI
ATTIPRA VILLAGE, THIRUVANANTHAPURAM.**

BY ADV. SRI.BLAZE K.JOSE

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA, REPRESENTED BY THE
EXCISE INSPECTOR, KAZHAACKUTTOM, REP BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 943 of 2006

Dated this the 04th day of December, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) & (2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer simple imprisonment for 1½ years and to pay a fine of ₹1 lakh with a default clause of imprisonment for a further period of three months.

2. The incident occurred on 05.12.2003. On that day, while PW1, the Assistant Excise Inspector along with PW2 and others was on routine patrol duty, they happened to see the accused coming along the road with a plastic bag. He was intercepted and the bag was seized and it was found to contain a can of 10 litres capacity with 7 litres liquid in it. The contents were examined and it was revealed to be arrack. PW1 took 200 ml of arrack as sample in a bottle having a capacity of 375ml. The sample bottle as well as the balance contraband article was sealed and labelled as

per the requisite procedures. The labels contained the signatures of the accused, witnesses and PW1. Ext.P1 mahazar was prepared at the spot and Ext.P2 is the arrest memo. PW1 claimed that he returned to the office and registered crime No. 60/2003 as per the occurrence report namely, Ext.P4. He claims to have been in charge of the Excise Inspector. On 06.02.2003, the contraband article and the accused were produced before court. The property list marked as Ext.P5 and Chemical Analysis Report is Ext.P6. PW5 took over investigation and visited the place of occurrence. He verified Chemical Analysis Report, took statements of witnesses, 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, Thiruvananthapuram 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-III, Thiruvananthapuram, 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 8(1) & (2) 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 P8 marked. MOs 1 and 2 were got identified and 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 was innocent.

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. The court below greatly impressed by the evidence PWs 1 and 2 taken along the contemporaneous document namely, Ext.P1 mahazar and also the fact that the accused and the articles were promptly produced before court, felt that these evidence were sufficient to show that the offence has been made out against the accused. Conviction and sentence followed.

9. Assailing the conviction and sentence, the learned counsel for the appellant pointed out that this appeal will have to succeed on two grounds. First among them is that the detection was by an incompetent officer as could be clear from the evidence of PW3. In the light of the decisions reported in **Unni v. State of Kerala** (2009 (2) KHC 661), the entire proceedings will have to fail. The second ground urged is that the forwarding note does not contain the specimen seal. In the decision 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), the absence of specimen seal in the forwarding note should prove fatal to the prosecution.

10. Elaborating on the first aspect, the learned counsel for the appellant pointed out that at the relevant time, as per the notification in force at the relevant time, only Officers of and above the rank of an Excise Inspector are empowered to detect, investigate and lay final charge before court. They alone are qualified to be Abkari Officer. PW3 was only an Assistant Excise Inspector and he was incompetent to detect the offence and conduct any investigation in the matter.

11. Elaborating on the second aspect, the learned counsel pointed out that it is by now well settled that the forwarding note preferred by the investigation agency should contain a specimen of the seal used so as to enable the court to ensure that sample sent for chemical analysis is the sample taken from the contraband articles seized from the possession of the accused. In the absence of such a

seal, the authenticity of the sample is in doubt.

12. The learned Public Prosecutor is tried to sustain the conviction by pointing out that the evidence of PWs 1 and 2 are sufficient to show that there was a proper detection of the offence and the accused was carrying illicit arrack. Added to this, according to the learned Public Prosecutor, is the contemporaneous document which gives a narration of the incident. At any rate, according to learned Public Prosecutor, the lower court found the evidence to be sufficient and convincing enough to come to the conclusion that offence has been made. No grounds are made out to interfere with the same.

13. After having heard the learned counsel for the appellant and learned Public Prosecutor and after having peruse the records, it is difficult to accept the contention made by the learned Public Prosecutor.

14. In the decision reported in **Unni v. State of Kerala** (2009 (2) KHC 661), it was held as follows:

“To prove the guilt of the accused for the possession of the contraband, that is, five litres of arrack in a jerry can, as alleged, the prosecution relied entirely on the evidence of two Police officers connected with the detection and seizure of the contraband, who were examined as PWs 1 and 2. PW 1, Asst. S.I. Of Police, who detected the crime and seized the contraband, had no authority to do so, is the attack raised by the learned counsel for the accused, relying on the notification of SRO No. 321/1996 and also the decision rendered by this Court in Sabu v. State of Kerala, 2007 (3) KHC 753: 2007 (4) KLT 169. If it was a case of accidental detection without prior information, then it could be stated that any police officer was expected to prevent the commission of any offence and taking the offender into custody. But this was a case, even according to the prosecution, PW 1, the Asst. S.I. of Police received prior information of sale of illicit arrack in the residential building of the accused. He proceeded to that spot, pursuant to that information indicated that he went there to have a raid of the building, and, search the place. When a raid over the residential building for detection of Abkari offence is involved, necessarily and inevitably

the mandate covered by S.31 of the Act applies with full force. There is nothing in evidence to show that PW1 complied with the formalities for conducting search over the residential building of the accused. Immediately on getting information, he rushed to the spot and reaching there, found the accused with a jerry can beside the courtyard of his building, seized the contraband into custody and arrested him, is the prosecution case. As per S.4 of the Abkari Act, the Government had authorised only certain Officers of the State to detect or investigate the offences contemplated under the Abkari Act. The Asst. S.I. of Police, as per the notification issued by the Government, is not authorised nor empowered to detect or investigate the abkari offences. Having regard to the fact that PW 1 went over to the residential building of the accused pursuant to information that sale of illicit arrack was conducted there, prima facie, indicating that he went over to proceed with a search of that building, that too, without complying with the formalities, it follows that whatever acts performed by him pursuant to reaching the spot could not be taken as having been done with the sanction of law. No doubt, illegality or irregularity in a search will not by itself vitiate

the evidence collected by the search and there is no bar in relying upon the evidence collected in such search to inculcate the accused. But in the given case, what has come out is that the prosecution at a later stage had developed a case that at the relevant time, PW 1, the Asst. S.I. of Police was in charge of the police station, and as such he was competent to detect a crime and seize the contraband. PW 1 has no such case when he was examined before the Court. So much so, the assertion of PW 4 that PW 1 at the relevant time was in charge of the S.I. of police since that officer was on leave cannot be given much value. So, there is much force in the submission of the learned counsel for the accused that PW 1 was not an authorised officer competent to detect and investigate an offence under the Abkari Act, and as such the detection made by him was unauthorised. The accused in the given facts is entitled to the benefit of doubt since PW 1 was not empowered to detect and investigate the crime. So much so, it has to be concluded that the conviction and sentence imposed against the accused are liable to be set aside, and I do so. The accused is found not guilty and acquitted of the offence under S. 55 (a) of the Abkari Act. Fine amount, if any, remitted by

the accused shall be refunded to him. Appeal is allowed.”

15. Admittedly, PW1, going by his own evidence was only an Assistant Excise Inspector at the relevant time. He though claims to be in charge of the Excise Inspector, there is no evidence whatsoever in that regard. There is nothing to show that he was in fact discharging the duties of an Excise inspector. Even if he had done so, it is extremely doubtful whether he can be treated as an authority empowered to detect the offence. It therefore follows that the actions taken by PW1 is incompetent in law and is unauthorized.

16. Apart from the above fact is the second contention. 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.”

17. 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.”

18. 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.”

19. This Court has taken a consistent view that providing specimen sample seal and forwarding it are the essential ingredients necessary to attract the offence for the simple reason that that alone is the guarantee for the court 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 absence of the specimen seal in the forwarding note, it cannot be said that the offence as against the accused is proved.

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