

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. 972 of 2006 ()

**AGAINST THE JUDGMENT IN SC 460/2001 of ADDITIONAL SESSIONS COURT FOR
THE TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 21-04-2006**

APPELLANT(S)/ACCUSED::

**SASIDHARAN, S/O. DAMODARAN,
CHARUVILA VEEDU, VATTAVILA, KOTTUKAL VILLAGE.**

BY ADV. SRI.R.T.PRADEEP

RESPONDENT(S)/COMPLAINANT::

**THE STATE OF KERALA,
REP. BY THE DIRECTOR GENERAL OF PROSECUTION
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**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. 972 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 58 of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of three months.

2. The incident which gave rise to the case occurred on 18.11.1998. On that day, PW3, the Sub Inspector of Police, Vizhinjam Police Station along with other officers had set out on routine patrol duty. On the way, they received reliable information that the accused is carrying on illicit sale of arrack in the property belonged to one Gangadharan. They proceeded to that place and stopped their vehicle a few houses away from the property belonging to Gangadharan and walked to that place. When they reached

the property of Gangadharan, they found the accused standing there with a can. On seeing the Police, he tried to make good his escape. He was intercepted. The can in his possession was seized and they found that it had capacity of 10 litres. It was opened and the contents were examined. By smell and taste, it was found to be arrack. The can contained 7 litres of arrack. They took a sample of 250 ml in a bottle having a capacity of 375ml and it was sealed and labelled in the presence of the accused. On the label, the signatures of the accused, witnesses and PW3 were affixed. The balance contraband article was also sealed and labelled. PW3 prepared Ext.P1 mahazar and then the team along with the accused, contraband articles and the documents returned to the Station. PW3 then as per Ext.P2 FIR, registered Crime No. 217/1998. He drew up the property list namely, Ext.P3 and produced the properties before the court on 19.11.1998. He claims to have prepared the forwarding note and sent it over to the court to have the sample sent

for chemical analysis. The Chemical Analysis Report received by him is Ext.P5. He conducted investigation of the case, took statement 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 for Trial of Abkari Act Cases, Neyyattinkara, 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 58 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

3 examined and had Exts.P1 to P5 marked. MO1 was 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 is innocent. He also had the case that he was falsely implicated with ulterior motive.

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, considerably influenced by the evidence of PW3 and also the contemporaneous document namely, Ext.P1 taken along with the Chemical Analysis Report, came to the conclusion that the prosecution has established the case against the accused beyond reasonable doubt and held him guilty. Conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant raised mainly two points for consideration. According to the learned counsel, Ext.P3, which is the property list, does not indicate that the sample alleged to have been taken by PW3 from the spot has been produced in court. It is not discernible from the record, according to the learned counsel for the appellant, as to when the sample was produced before court or whether it was ever produced before court. The second contention taken is that it was mandatory on the part of the prosecution to have the forwarding note marked so as to enable the court to have a glimpse at the sample seal which is said to have been affixed on the sample so as to ensure that the sample that reaches the laboratory is the sample taken from the contraband article seized from the possession of the accused. Reliance was placed on the decisions reported **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) in this regard. The learned counsel for the appellant pointed out that there is no guarantee as of now that the sample that has been analysed is the sample taken from the contraband seized from the possession of the accused.

10. The learned Public Prosecutor on the other hand contended that the evidence of PWs 2 and 3 the two Police Officers among whom PW3 is the detecting Officer unerringly pointed out the guilt of the accused and their version of the incident is consistent, cogent and convincing enough. Their evidence receives corroboration from Ext.P1, which is contemporaneous document and the chances of manipulation is rather remote. The learned Public Prosecutor pointed out that the court below has analysed the evidence in considerable detail and has come to the conclusion that the offence has been made out. There are no grounds made out to interfere with the said finding.

11. Though the argument of the learned Public Prosecutor may look attractive at the first blush, on a closer scrutiny, it can be found that it cannot stand.

12. It is true that the PWs 2 and 3 give a uniform and consistent version regarding the detection of the contraband article. Both of them say that while they were on patrol duty, they came to know about the illegal activity that is being carried on by the accused in the property of another person. They speak of having gone to the place and found the accused in possession of the can. Both of them speak about having seized the can from the possession of the accused and identified the liquid in the can as arrack. PW3 gets support from PW1 regarding the sampling and sealing and labelling of the sample and then sealing of the balance contraband article. PW3 also says about having returned to the Station and registered crime and having conducted investigation.

13. It is no doubt true that PW3 says that he prepared the property list and had the accused and the property produced before court on the next day itself. Ext.P3 is the property list said to have been produced before court. Unfortunately for the prosecution, it only shows that the can which was seized from the possession of the accused alone had produced before court and nothing is seen mentioned about the sample in the property list submitted before court. The result is that there is no evidence to show that at least as on the date of filing of Ext.P3, the sample was produced before court. That remains unexplained as to when the sample was produced or if it was ever produced. There is no explanation offered as to why the sample does not find a place in the property list said to have been submitted before court.

14. Even though PW3 says that he had prepared a forwarding note and sent it to the court for having the sample sent for chemical analysis, the said request is not

seen marked in the case.

15. 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.”

16. 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.”

17. 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."

18. One only needs to read the above decisions to understand the significance and importance of providing the sample of the seal in the column provided for that purpose in the forwarding note. That probably is the only guarantee which the court can have regarding the authenticity of the sample sent for chemical analysis. This Court had time and again occasion to hold the absence of forwarding note and in the absence of sample seal, it cannot be said that the sample sent for the chemical analysis is the sample taken

from contraband seized from the possession of the accused. There is no reason as to why the principle laid down in the above should not be applied to the facts of the present case.

19. Strangely enough, the court has framed a charge under Section 58 of the Abkari Act, whereas, the charge ought to have been under Section 8 (1) and (2) of the Abkari Act. Anyhow, that is only of academic interest and it is felt that it is not necessary to enter into a decision on that aspect in this case.

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