

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937

CRL.A.No.1015 of 2006

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AGAINST THE JUDGMENT IN SC 809/2001 of ADDL.SESIONS COURT FOR  
TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 15.03.2006

APPELLANT/ACCUSED:

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RADHAKRISHNAN,  
S/O. GANGADHARA PANICKER, KADAYARAPUTHEN VEEDU,  
KOTTAMOM, AZHUTHUTHOTTAM, ARAYOOR DESOM,  
CHEKAL VILLAGE, NEYYATTINKARA.

BY ADV. SRI.G.SUDHEER KARAKONAM

RESPONDENT/COMPLAINANT:

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

BY SMT. S. HYMA, PUBILC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
09-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.BHAVADASAN, J.**

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**Crl. Appeal No.1015 OF 2006**  
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**Dated this the 9<sup>th</sup> day of December, 2015.**

**J U D G M E N T**

The accused was prosecuted for the offence punishable under Section 58 of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for three months. Set off as per law was allowed.

2. The incident which gave rise to the case occurred on 17.04.1999. On that day, PW3, Preventive Officer attached to Amaravila Range Office with his team of officers, under instructions from the Excise Inspector, went for patrol duty. On the way, they happened to see the accused coming along carrying a black can. Feeling suspicious, he was intercepted and the can was seized. Excise Officers suspected that it contained some liquid. They examined the liquid by taste and smell and convinced that it was arrack. Arrest memo was prepared and the

accused was arrested. The can was sealed on which the label containing the signature of PW3, independent witnesses and the accused were affixed. Ext.P1 is the mahazar prepared at the spot. PW3 returned to the office along with the contraband articles, accused and the documents and handed over to PW4. On the basis of the report given by PW3, PW4 registered crime No.23/99 as per Ext.P3 occurrence report. Ext.P4 property list was prepared on the same day itself and it was received by the court. The accused was also produced on the same day. PW4 made a request to the court to take sample and sent it for chemical analysis.

3. Investigation was conducted by PW5. He recorded the statement of witnesses and laid charge before court.

4. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Thiruvananthapuram. The said court made over the case to Additional Sessions Court for trial of Abkari Act cases, Neyyattinkara for trial and disposal. The latter

court, on receipt of records and on appearance of accused, framed charge for the offence under Section 58 of Abkari Act. The accused pleaded not guilty to the charge and claimed to be tried.

5. The prosecution therefore had PWs 1 to 6 examined and Exts.P1 to P7 marked. M.O.1 was got identified and marked.

6. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

7. 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.

8. On appreciation of the evidence in the case, the trial court came to the conclusion that the evidence of PW3 taken along with Ext.P1 contemporaneous document are sufficient to show that the contraband has been seized from the possession of accused. Holding so, the conviction and sentence followed.

9. Learned counsel appearing for the appellant assailed the

conviction and sentence on two grounds; 1) there is no evidence of proper sampling and 2) forwarding note is not seen produced and there is no specimen of sample seal available for comparison. Labouring on the above two points, it is pointed out that even though PW6, thondi Clerk, has been examined to prove that the sample was properly taken, his evidence is shabby and it can be easily seen that proper sampling was not done. It is doubtful, according to the learned counsel, whether any sample in accordance with law was taken at all. A reading of the deposition of PW6 will reveal that there was no seal affixed by anybody on the sample. Therefore, there is no guarantee, according to the learned counsel, that sample which was sent for chemical analysis was the sample taken from the contraband seized from the possession of accused.

10. As regards the second contention is concerned, learned counsel for the appellant relied on the decisions in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624) and in **Krishnan vs. State** (2015 (2) KLT SN 8) and pointed out that failure to produce forwarding note containing specimen seal is fatal to

prosecution.

11. Learned Public Prosecutor, on the other hand, tried to justify the conviction and sentence on the ground that the evidence of PW3 taken along with the contemporaneous document namely, Ext.P1 are sufficient to show that the contraband was in fact seized from the possession of accused. Merely because forwarding note is not produced, that by itself is not sufficient to warrant interference.

12. That no sample was taken by PW3 at the time of detection is an admitted fact. He handed over the accused, documents and contraband articles to PW4, Excise Inspector and PW4 accepts the said statement made by PW3. PW4 says that he had made a request to the court to take sample and sent it for chemical analysis. He does not make mention of any seal having been forwarded to the court. It is in this context the evidence of PW6 will have to be appreciated.

13. PW6 is the thondi Clerk at the relevant time. As per his evidence, on 17.04.1999, he received the properties as per the thondi list and registered it as T.No.165/99. He further says that

as per the orders of the Judicial First Class Magistrate Court concerned, he had taken sample of the liquid and that is evident from Ext.P7. In cross examination, however, he admitted that there is no records showing that he had extracted sample of the contraband article and that he acted under the orders of the Judicial First Class Magistrate Court concerned.

14. There is nothing in the evidence of PW4 or PW6 to show that any seal was forwarded by the Excise Department and from the evidence of PW6 it is not clear as to what is the seal that is affixed on the sample. Of course, chemical analysis report namely, Ext.P6 mentions that seal on the bottle was intact and found tallied with the sample seal provided. As to who provided the seal and what was the seal provided, there is absolutely no evidence.

15. At the risk of repetition, it may notice that PW4 only says that he made a request to the court to take sample for sending it for chemical analysis. He does not say that he filed forwarding note containing specimen seal. In the decision in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624), it has

been 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. In the decision in **Krishnan** vs. **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 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.”

17. From a reading of the above decisions, it can be seen that production and marking of forwarding note is not an empty formality and it has considerable importance and significance in the final determination of the case. If that be so, in the absence of any mention by the prosecution as to who provided the seal and since there is no evidence at all to show that any seal as such was affixed on the sample, the prosecution case becomes extremely vulnerable. The principles laid down in the decisions cited above, apply to the facts and circumstances of this case also. Even though PW6 stated about taking of sample and other matters evidenced by Ext.P7, a perusal of Ext.P7 does not disclose those facts. Whatever that be, for the reasons mentioned above, this Court is unable to uphold the findings of the court below.

In the result, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Section 58 of Abkari Act are set aside and it is held that the accused is not guilty of the offence. He stands acquitted of the

charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN  
JUDGE**

smp

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P.A to Judge.