

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA,
1937

CRL.A.No. 1100 of 2006

AGAINST THE JUDGMENT IN SC 674/2000 of ADDITIONAL SESSIONS
COURT, FAST TRACK-III, THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:

SASANKAN, S/O. KUNJAN,
PUTHUVAL VILA VEEDU, MANALAKAM DESOM,
THONIKKAL VILLAGE, THIRUVANANTHAPURAM TALUK.

BY ADVS.SRI.SIJU KAMALASANAN
SRI.S.SUDHEESHKAR

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
EXCISE RANGE OFFICER, CHIRANYINKEEZHU
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
10-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 1100 of 2006

Dated this the 10th day of December, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Sections 8(2) of the Abkari Act and he was found guilty. He was therefore convicted and sentenced to undergo simple imprisonment for one year and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for three months. Set off as per law was allowed.

2. P.Ws. 2 and 3 were working as Preventive Officers attached to Attingal Circle Office. They, on 2.12.1998, while on patrol duty, happened to come across the accused who was coming along the road carrying a can. Seeing the Excise officers, he tried to escape from the place. He was prevented from doing so and the can was seized. On examination of the contents, it was turned out to be arrack. He was arrested and label and seal were affixed on the can. The can contained about 2 litres of arrack. Ext.P2 is the

mahazar prepared at the spot. P.W.2 claims that the contraband was sealed and the sealed contraband article along with accused and the records were produced before the Range Office. Further steps in the matter was taken by the Excise Inspector.

3. P.W.4 at the relevant time was in charge of the Excise Range Office as the Excise Inspector was not available and he received the accused, the articles and the records from P.W.2. On the basis of the report filed by P.W.2, he registered crime as per Ext.P5 occurrence report. Ext.P6 is the property list. He says that he had filed a forwarding note and obtained Ext.P6 report.

4. Investigation was done by P.W.5. He recorded statements of witnesses, completed investigation and laid charge before court.

5. 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 as per Section 209 Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track No.III, Thiruvananthapuram for trial and disposal.

6. The latter court, on receipt of records and on appearance of the accused, framed charge for the offences punishable under Section 8 (1) and (2) 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 P7 marked. M.O. 1 was 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 put to 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 however, chose to adduce no evidence.

7. Impressed by the evidence given by P.Ws. 2 and 3 and also the mahazar alleged to have been prepared at the spot, i.e. Ext.P2, the court below came to the conclusion that the offence has been clearly established against the accused and found him guilty and convicted and sentenced as already mentioned.

8. Learned counsel appearing for the appellant assailed the conviction and sentence. According to him, the accused is entitled to succeed on two short grounds. The first among them is that the forwarding note produced before court does not contain specimen seal which is mandatory as has been held by this Court in the decision reported in *Krishnan v. State* (2015(2) K.L.T. SN 8). Then there is no evidence as to who had taken the sample and in all probability, it must have been taken from the court in which case the thondi clerk must have been examined as per the decision of this Court.

Therefore, there is no proof of sample having taken and there is no evidence to show that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. If that be so, the conviction cannot stand.

9. Learned Public Prosecutor tried to sustain the order of conviction based on the evidence of P.Ws.2 and 3 and on Ext.P2 mahazar and contended that if those evidence stand scrutiny, there is no need to doubt the prosecution version of the incident. Merely because there is no evidence of sampling, no specimen seal and non-production of the forwarding note, that may not be a ground to acquit the accused. In fact the court below found that even in the absence of these factors, there is sufficient material to come to the conclusion that offence has been made out. No grounds are made out to interfere with the conviction.

10. If one is to go by the evidence of P.Ws. 2 and 3 and the contents of Ext.P2, probably, it could be said that the detention is proved. But the evidence of P.Ws. 2 and 3, who are the detecting officers, clearly show that no sample was taken at the spot. Ext.P6 is the property list. That does not indicate that the can in which the contraband article was carried by the accused is seen sealed though stated so by P.W.3. Therefore, there is no evidence as far as this aspect is concerned.

11. Of course, P.W.3 would say that he had sent a forwarding note to the court. But he does not say that he had requested the court to take sample and sent for chemical examination.

12. Going by Ext.P6, the entire quantity as noticed by the detecting officers were produced before court. That means the sample must have been taken from the court. If that be so, the thondi Clerk who had taken the sample as per

the orders of the Magistrate should have been examined. For reasons best known to the prosecution, the thondi clerk was not examined. Added to the above aspect is that there is no sample seal provided in the forwarding note. 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.”

It could not be said in the light of the absence of sample seal that the sample which reached the laboratory is the sample taken from the contraband article seized from the possession of the accused. In fact, the authenticity of the sample sent for chemical analysis will depend upon the availability of sample seal. Since there is no evidence regarding sampling, and in the light of the absence of production of the forwarding note with sample seal, necessarily the conviction and sentence will have to be interfered with. In other words, there is no guarantee that the sample analysed is the sample taken from the contraband seized from the possession of the accused.

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.