

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 16TH DAY OF NOVEMBER 2015/25TH KARTHIKA, 1937

CRL.A.No. 1120 of 2006

AGAINST THE JUDGMENT IN SC 1255/2004 of ADDL. SESSIONS COURT
(ADHOC-I), THALASSERY DATED 06.05.2006

APPELLANT/ACCUSED:

A.V.ALI, S/O.ABOOBACKER, 47 YEARS,
BEEDI WORKER, KATTUKANDI PUTHIYAPURAYIL VEETIL,
NEAR:MANIKKAKAVU, KANNUR AMSOM, THANA DESOM,
KANNUR TALUK, KANNUR DIST.

BY ADVS.SRI.K.C.SANTHOSHKUMAR
SMT.K.K.CHANDRALEKHA

RESPONDENT/COMPLAINANT:

STATE,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 1120 of 2006

Dated this the 16th day of November, 2015.

JUDGMENT

The accused in this case was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty and therefore, convicted and sentenced to undergo simple imprisonment for two months and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for one month. Set off as per law was allowed.

2. The incident in this case is said to have occurred on 10.5.2002. On that day, P.W.1, the Excise Inspector attached to Kannur Excise Range, along with his colleague officers were examining the vehicles that were passing through the National Highway. They were waiting near Edakkat Panchayat office. At about 7.20 a.m., they happened to see a vehicle bearing Reg. No. KL 13 C 5054 Imperial Bus coming from Thalasserry going towards Kannur passing by. They had the bus stopped and conducted search. They found a person

sitting in the rear seat of the bus holding a bag between his legs. The bag was seized and the contents were examined. The bag contained 70 bottles of 180 ml liquid. 20 of them had the label Diamond Cup XXX rum, and 50 of them were labelled as Diamond Cup fine brandy. P.W.1 opened a bottle from each of the two batches of the contraband article and by taste and smell, he had arrived at the conclusion that it was IMFL. Those bottles were sealed and P.W.1 affixed the labels containing the signatures of the accused, witnesses and himself on those two bottles. He prepared Ext.P1 mahazar and had the accused arrested as per Ext.P2 arrest memo. He returned to the station and registered crime as per Ext.P3 occurrence report. He had the forwarding note prepared and sent it to the court.

3. Further investigation was done by P.W.3. As per the orders of the Excise Commissioner, he obtained the site plan. He recorded statements of witnesses, completed investigation and handed over the file to the Range Inspector.

4. P.W.5 obtained chemical analysis report, namely, Ext.P6, verified the records of the investigation conducted by P.W.3, completed investigation and laid charge before court.

5. The court, before which final report was laid took cognizance of the offence. Finding that the offences is one exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thalasserry under Section 209 Cr.P.C. after following the necessary procedures. That court made over the case to Additional Sessions Court (Adhoc-I), Thalasserry 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 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 P6 marked. M.Os. I to IV were 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 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.

7. The court below, impressed by the evidence of P.W.1 and also the chemical analysis report and also the prompt production of the articles before court, found that the offence has been established against the accused and found him guilty. Conviction and sentence as already mentioned followed.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant pointed out that admittedly the articles were seized from a passenger bus. The only allegation attributed to the petitioner is that he was holding the bag. P.W.2, the independent witness, turned hostile and it is significant to notice, according to the learned counsel, that even though P.W.1 claimed that he had a team of

officers, none of the other officers have been examined to prove the seizure. Learned counsel emphasized that P.W.1 does not speak about having taken sample of the article, except that he sealed the bottle which he opened to identify the contraband article. That may not be sufficient in law. Learned counsel then pointed out that in the forwarding note, namely, Ext.P4, there is no intimation of the sample seal which was used for sealing the sample which was sent for chemical analysis. Learned counsel relied on the decisions reported in *Krishnan v. State* (2015(2) K.L.T. SN 8) and *Joseph v State of Kerala* (2009(4) KHC 537) and it is pointed out that that lacuna is fatal to the prosecution. There is no guarantee for the court that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. Accordingly, it is contended that conviction and sentence cannot stand.

9. Learned Public Prosecutor on the other hand contended that the seizure spoken to by P.W.1 is convincing

enough and there is no suggestion to P.W.1 that he had any axe to grind against the accused. There is no rule that the evidence of P.W.1 needs to be corroborated before accepting the same. If evidence of P.W.1 is found to be convincing and cogent enough, there is no reason to reject the same though there is no corroborative evidence.

10. Evidence of P.W.1 would show that the bag was seized from the accused who was sitting in the rear portion of the bus. Ext.P1 gives a narration of what had transpired at the place of occurrence. Of course, it certainly corroborates the version given by P.W.1. But, in law, that may not be sufficient. Prosecution has to clearly establish that the contraband article seized is IMFL. For that, reliance is placed on the chemical analysis report. Here, the contention of the learned counsel appearing for the appellant needs to be taken note of. P.W.1 does not say that he had taken sample from each of the bottles which he had opened to identify the nature of liquid contained in the bottle. His evidence is to the effect that he

simply sealed and labelled those items and the signature of the accused, witnesses and himself were affixed on the labels. Significantly enough, he does not disclose the nature of the seal used by him, nor does the mahazar specify the specimen seal used by him.

11. Then one may look at the forwarding note prepared by P.W.1. Unfortunately for the prosecution, that also does not contain the specimen of the seal in the label affixed on the sample said to have been made by P.W.1.

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 decision reported in Joseph v State of Kerala (2009(4) KHC 537), it was observed 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.”

14. It is by now well settled that unless there is some indication in the mahazar or in the forwarding note regarding the nature of seal used by the officer concerned, it may not be possible to draw the conclusion that the sample which reached the laboratory is the sample taken from the contraband article seized from the possession of the accused. This vital link is essential for a successful prosecution and that is conspicuously absent in the case on hand. It could not said that the sample analysed in the laboratory is the sample taken from the contraband article seized from the possession of the accused.

15. If that be so, as rightly pointed out by the learned counsel for the appellant, the conviction cannot stand.

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. If he has deposited any amount in pursuance to the order of this Court, the same shall be refunded to him on his making proper application.

P. BHAVADASAN,
JUDGE

sb.