

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

CRL.A.No. 825 of 2007 ()

**AGAINST THE JUDGMENT IN SC 273/2005 of ADDITIONAL SESSIONS COURT FAST
TRACK (ADHOC)-II, ALAPPUZHA DATED 10-05-2007**

APPELLANT(S)/ACCUSED:

**SADANANDAN, S/O.RAMAN,
PUTHENPURAYIL PADEETTATHIL, WARD NO.V
KUMARAPURAM PANCHAYATH, THAMALLACKAL THEKKUM MURI
KUMARAPURAM VILLAGE, ALAPPUZHA.**

**BY ADVS.SRI.S.SANAL KUMAR
SMT.BHAVANA VELAYUDHAN**

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl. A. No. 825 of 2007

Dated this the 01st day of October, 2015

J U D G M E N T

The accused in this case was prosecuted for the offence punishable under Section 8(1) and (2) of the Abkari Act and was found guilty of the same. He was convicted and sentenced to suffer simple imprisonment for one year and to pay a fine of ₹ 1 lakh with a default clause of simple imprisonment for a period of two months. Set off as per law was allowed.

2. According to the prosecution, the incident occurred on 23.02.2004 at about 7.30 p.m.. PW2 along with PW1 had gone on routine patrol duty as usual on the date of incident and when they reached near a house by name 'Sunilalayam', they received reliable information that a person was vending in illicit arrack in the property situated on the western side of 'Sunilalayam'. PW1 claims to have proceeded to the spot and found the accused sitting on the

south-western side of the property and holding a can having a capacity of 1½ litres. When the accused tried to escape seeing Police Party, he was successfully apprehended and the contents of the can was examined. The contents turned out to be arrack. A sample was taken by PW2 and the sample as well as the balance contraband articles were sealed and labelled in accordance with law and the accused was arrested. On the sample and the balance quantity, labels containing the signature of the accused, PW2 and the witnesses were affixed. PW2 claims to have prepared Ext.P1 mahazar on the spot. He also says that he prepared arrest memo and custody memo and a inspection memo also. They are marked as Exts. P2 to P4. PW2 seems to have returned to the Police Station along with the contraband articles and the accused and registered crime as per Ext.P5 FIR. Intimation of the arrest was duly given to the son of the accused. He prepared property list which is Ext.P7. He completed investigation and laid charge before court. He

had obtained the chemical analysis report which is Ext.P8.

3. The court before which the final report was laid took cognizance of the offence. Finding that the offence is exclusively triable by a Court of Sessions, the Judicial First Class Magistrate Court concerned committed the case to Sessions Court, Alappuzha under Section 209 Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track-II, Alappuzha, for trial and disposal.

4. The latter court, on receipt of records and appearance of accused before the said court, framed charges for the offences punishable under Sections 55(a) and 8(1) and (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 4 examined and had Ext.P1 to P8 marked. MO1 was got identified and marked.

6. After the close of prosecution evidence, the accused was questioned Section 313 Cr.P.C.. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. In addition to saying so, he also added that he has been falsely implicated in the case. According to him, in the morning on the date of incident, there was a quarrel between a toddy shop owner and himself and on a complaint filed by the toddy shop owner, he was called to the Police Station and the case was foisted on him. He claimed that the was innocent.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. The accused examined DWs 1 and 2.

8. On appreciation of the evidence in the case, the trial court came to the conclusion that the evidence of PWs 1 and 2 taken along with Ext.P1 are sufficient to come to the conclusion that the prosecution has established the case

beyond reasonable doubt. It found that the story put forward by the accused through the evidence of DWs 1 and 2 to be unacceptable and unreliable. Accordingly, the accused was found guilty. Conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence the learned counsel for the appellant contended that the prosecution case rests on the evidence of the official witnesses, namely, PWs 1 and 2 and their evidence is not corroborated from independent sources, which is absolutely essential in the cases of such nature. It is also contended relying on the evidence of PW2 that it is not clear as to from which place the accused was arrested. To be more precise, according to the learned counsel, a reading of the suggestion made by prosecution to PW3 who turned hostile would indicate that he was arrested from his property whereas, the records show otherwise. Finally, the learned counsel contended that PW2 does not even speak about having prepared a

forwarding note and filed it before court. The learned counsel emphasize that, that assumes significance in the light of the fact that a forwarding note is supposed to contain a sample seal which is an essential ingredient to establish prosecution case. Relying on the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8), the learned counsel contended that the absence of sample seal on forwarding note is fatal to the prosecution and that is sufficient for an acquittal.

10. The learned Public Prosecutor on the other hand sought to sustain the conviction and sentence on the basis of the evidence furnished by PWs 1 and 2. The learned Public Prosecutor contended that the evidence of PWs 1 and 2 stand sufficiently corroborated by the contents of Ext.P1, the mahazar, which is a contemporaneous document. The mere fact that PW2 has not spoken anything about the forwarding note by itself cannot be a ground to acquit the accused, especially, when Ext.P8, forensic report shows that

the seals were found intact. At any rate, according to the learned Public Prosecutor, the court below has chosen to accept the evidence of PW2 and the contemporaneous document Ext.P1 and has arrived at the conclusion that the offence has been made out. As long as it is not shown that the appreciation of the evidence is perverse or contrary to the materials on record, interference at the appellate stage is not warranted.

11. As rightly pointed out by the learned Public Prosecutor, if the view taken by the lower court is a possible and plausible view, then interference by the appellate court may not be justified, even if a different view is possible. Of course, the benefit of doubt should always go to the accused. But the doubt should be a reasonable one and not a fanciful one.

12. Bearing the above principle in mind, an attempt shall now be made to appreciate the evidence in this case to see whether the prosecution has established the case

beyond reasonable doubt.

13. As rightly pointed out by the learned counsel for the appellant, the prosecution case rests solely on the evidence of PWs 1 and 2, the official witnesses, who were on patrol duty and who claimed to have come across information regarding the sale of illicit liquor by the accused. PW2 says that he was the Sub Inspector of the Harippad Police Station at the relevant time and while he was on patrol duty, he came to know that in the property known as Puthenpurayil house situated on the western side of Sunilalayam, the accused is carrying on sale of illicit liquor. When he along with his team of officers reached the place, it is stated that the accused tried to escape which was effectively prevented. He was found to carry a plastic bottle containing some liquid. When the contents of the bottle was examined, it turned out to be arrack. PW2 says about sampling and its labelling and also about the sealing and labelling of the balance quantity. He speaks about having

arrested the accused and also prepared Ext.P1 mahazar at the spot. He identified MO1 in court. He also speaks about the preparation of arrest memo, custody memo etc., and also says that the arrest of the accused was duly intimated to his son. After having returned to the Station, he registered crime as per Ext.P5 FIR. He prepared Ext.P7 list and produced the accused and the articles seized by him the next day before court. He also says that he recorded statement of witnesses, completed investigation and laid charge before court.

14. The evidence of PW2 gets considerable support from the evidence of PW1, who is another officer who had accompanied PW2 while on patrol duty. One could say that there is uniform version regarding the incident as between PWs 1 and 2.

15. Ext.P1 is the mahazar which is said to have been prepared by PW2 at the time of detection. It also contains all the details spoken to by PWs 1 and 2.

16. Taken by themselves, the evidence of PW2 and PW1 taken along with the contents of Ext.P1, the lower court found their evidence to be sufficient.

17. One has here to appreciate the defence case also. The defence has a case that in the morning on the date of incident, there was a quarrel between the accused and the toddy shop owner based on which a complaint was given by the toddy shop owner to the Police. The accused was summoned to the Police Station and then the accused was falsely implicated in the case. This suggestion is put to PW2 who stoutly denied the same.

18. However, one fact remains to be noticed. PW3, according to the prosecution, was a attesting witness to Ext.P1 mahazar. Though he admitted his signature, he turned hostile to the prosecution. When questions were put in nature of cross examination, a suggestion was made to him that the accused was arrested in front of his house. This suggestion demolishes the case of prosecution as spoken to

PW2 and as contained in Ext.P1 that the accused was arrested from his own compound. It shows that there is considerable inconsistency regarding the place from where the accused was arrested.

19. Apart from the above fact, PW2 does not speak about having drawn up the forwarding note and filed it before court. The significance of the forwarding note is that it should contain the sample seal which the chemical examiner could verify with the seal forwarded along with the sample. The consequences of not affixing the sample seal to the forwarding note was considered in the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8) wherein, 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.”

20. It therefore cannot be disputed that the forwarding note is a vital document as far as the defence is concerned. Apart from the fact that the record do not show that any forwarding note has been forwarded to the court. PW2 in his

evidence also does not say about having prepared the forwarding note and sent it to the court. This Court is not omitting to note the fact that the chemical analysis report Ext.P8 does say about the similarity between the seal found on the bottle and sample seal forwarded. But that may not be sufficient in view of the requirement of law that forwarding note shall contain sample seal.

21. For the above reasons, this Court is unable to accept the finding of the court below that prosecution has established the case beyond reasonable doubt against the accused.

22. Apart from the fact that there is considerable inconsistency regarding the place from where the accused was arrested. The story put forward by the defence is also probabilized. This is further fortified by the fact that PW2 does not speak about preparation of forwarding note and its presentation before the court along with the records produced before court. It is significant to notice that the

final report produced before court and among the list of documents also do not contain any mention about the forwarding note. That means, no forwarding note has ever been prepared by the Investigating Officer which should prove fatal in the case on hand.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the prosecution has failed to establish the case beyond reasonable doubt against the accused. 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

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P.A. to Judge