

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 17TH DAY OF DECEMBER 2015/26TH AGRAHAYANA, 1937

CRL.A.No. 1281 of 2006

AGAINST THE JUDGMENT IN SC 514/2001 of ADDL.SESIONS COURT FOR
TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 06.05.2006

APPELLANT/ACCUSED:

MUTHUSWAMY, S/O.RAMU,
PULAYANVILA VEEDU, AYINKAMOM DESOM, PARASSALA VILLAGE,
NEYYATTINKARA TALUK.

BY ADV. SRI.BLAZE K.JOSE

RESPONDENT/COMPLAINANT:

THE STATE OF KERALA,
REPRESENTED BY THE EXCISE INSPECTOR
AMARAVILA EXCISE RANGE,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY SMT. S. HYMA, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
17-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.1281 OF 2006

Dated this the 17th day of December, 2015.

J U D G M E N T

The accused who was found guilty of the offence punishable under Section 58 of Abkari Act was 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 prosecution case is that on the date of incident i.e. on 11.07.1997, PWs 3 and 4 along with other officers went for patrol duty and when they reached in front of A.S Tailors, they happened to see the accused coming along the road carrying a can of 10 litre capacity. Seeing the Excise Officials, he became jittery and that created a suspicion in the mind of officers who intercepted him and seized the can from him. The can was found to contain 4 litres of liquid and on examination it was turned out to be arrack. The accused was arrested from the place. The articles seized were sealed, and label containing the signature of

CW1, accused and independent witnesses was affixed. The accused and the contraband articles along with the documents were produced before PW5 who registered Crime No.99/1997 as per Ext.P3 occurrence report. PW5 would say that he had the accused and articles produced before court. Ext.P5 is the property list by which the properties were produced before court. PW5 claims to have given a requisition to the court to take sample and sent it for chemical analysis. The chemical analysis report received is Ext.P6. Sample was taken by PW6, an employee of the court where the articles were produced. According to PW6, as per the orders issued by the Judicial First Class Magistrate Court concerned, she took sample of the contraband articles.

3. Subsequent investigation was taken over by PW7 who recorded the statement of witnesses, completed the investigation 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. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 7 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. 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 examined DWs 1 and 2 and had Exts.D1 to D3 (b) marked.

8. The court below, presumably impressed by the evidence of PWs 3 and 4 taken along with Ext.P1 mahazar and also prompt production of article and accused before court, found in favour of the prosecution. Result was that the conviction and sentence

followed.

9. Learned counsel appearing for the appellant, assailing the conviction, pointed out that this appeal will have to succeed on a very short ground. Learned counsel invited the attention of this Court to the decisions in **Majeedkutty** vs. **Excise Inspector** (2015 (1) KLT 624) and in **Krishnan** vs. **State** (2015 (2) KLT SN 8) wherein this Court had held that production of forwarding note containing specimen of sample seal is a must in the case of present nature. Learned counsel pointed out that in the case on hand, forwarding note is not seen marked and the prosecution need to find out whether sample seal was provided or not. Accordingly, it is contended that the conviction cannot stand.

10. Learned Public Prosecutor, on the other hand, contended that the oral evidence is sufficient to show that contraband was possessed by the accused. It is identified by smell and taste. Merely because forwarding note has not been prepared or there is no material to show that sample seal was provided or not, the accused cannot be acquitted.

11. After having heard the learned counsel on both sides and also after having perused the records, it is extremely difficult to agree with the learned Public Prosecutor. As rightly pointed out by the learned counsel for the appellant, in the absence of forwarding note and specimen of sample seal, it becomes difficult to accept the authenticity of the sample sent for chemical analysis. 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.”

12. 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.”

13. In the above decisions, the Court had considered the significance and importance of producing the forwarding note and the necessity to have the specimen seal affixed on the forwarding note. It is quite evident from the forwarding note also that specimen of sample seal is to be provided. Probably, that is the only guarantee the court has to ensure that the sample which reached the laboratory is the sample taken from the contraband seized from the possession of accused. Whatever that be, in the case on hand, there is no such forwarding note. So there is no question of considering whether there is any sample seal.

14. For the above reasons, this Court is unable to accept the finding of the court below and that needs to be interfered with.

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

// True Copy //

P.A to Judge.