

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 20TH DAY OF NOVEMBER 2015/29TH KARTHIKA, 1937

CRL.A.No. 1366 of 2006 ()

AGAINST THE JUDGMENT IN SC 271/2005 of ADDITIONAL SESSIONS
COURT (ADHOC-I), ERNAKULAM.

APPELLANT(S)/ACCUSED NO.1:

JOSSY, AGED 37 YEARS,S/O.RAINOLD,
NARIYAMPARAMBIL VEEDU, THEVAKKAL, EDATHALA,
ALUVA, ERNAKULAM DISTRICT.

BY ADVS.SRI.T.D.ROBIN
SRI.R.ANUP
SRI.V.DIPU

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
20-11-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 1366 of 2006

Dated this the 20th day of November, 2015.

JUDGMENT

Though prosecuted for the offence punishable under Section 55(a) of the Abkari Act, after trial, the first accused was found guilty of the offence under Section 63 of the Abkari Act. He suffered a heavy sentence of rigorous imprisonment for one year and fine of Rs.5,000/- with a default clause. Set off as per law was allowed. Second accused was acquitted of all the charges.

2. The incident in this case is alleged to have occurred on 8.5.2001. P.Ws. 6 and 7, among whom P.W.7 was the Sub Inspector of Kalamassery police station, were engaged in law and order duty in connection with election. While they reached by-pass junction, they received reliable information that two youngsters were engaged in sale of liquor nearby. Soon the police party reached Edappally by-pass junction and

reached near TVS Tyre and Motor Service Station, they happened to see two persons taking to their heels. Though one could escape, first accused was apprehended. It is alleged that he had a bag with him. The bag was seized and opened and it was found to contain 10 bottles of Batch No.005, each containing 375 ml., another bottle with label No. 004 having the capacity of 375 ml and one bottle manufactured by Johar company having the capacity of 375 ml were found. The bag contained a total number of 12 bottles. It is an admitted fact that all the bottles contained the seal of Kerala State Beverages Corporation. P.W.7 took one bottle out of the 10 bottles and the other two bottles were taken as sample and they were sealed and labelled. He says that he and the witnesses affixed their signature on the label and that is marked as Ext.P6. After having seized the article, he returned to the station with the accused and the contraband article and registered a case as per Ext.P7 FIR. He conducted investigation in the case, prepared Ext.P8 property list, and made requisition for

sending the sample for chemical examination. Though forwarding note was prepared by the then additional Sub Inspector one Geroge, since he is no more, it was proved through P.W.7. The chemical analysis report obtained is marked as Ext.P10. Investigation was completed and final report was laid before court.

3. The court, before which final report was laid took cognizance of the offence. Finding that the offence is one exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Ernakulam under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court (Adhoc-I), Ernakulam for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence 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 7 examined and had

Exts.P1 to P11 marked. M.Os. 1 and 2 were got identified and marked. After the close of the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. wherein they denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. They examined D.W.1.

5. The court below, greatly impressed by the evidence furnished by P.Ws. 6 and 7 and prompt production of the accused before court, found the first accused guilty and the second accused was acquitted.

6. Assailing the conviction of the first accused, learned counsel appearing for the appellant contended that the court below has not considered the matter in the proper perspective and thus committed error in convicting the accused. Two crucial grounds urged for assailing the conviction are (i) no specimen seal is produced along with the

forwarding note, and (ii) there is considerable delay in producing the article before court. In support of the first contention, learned counsel relied on the decisions reported in Krishnan v. State (2015(2) K.L.T. SN 8) and Majeedkutty v. Excise Inspector (2015 (1) K.L.T. 624). In support of the second contention, learned counsel relied on the decisions reported in Ramankutty v. Excise Inspector, Chelannur Range (2013(3) KHC 308) and Appukuttan v. State of Kerala (2013(2) K.L.T. SN 109). Learned counsel pointed out that apart from the above infirmities, there are inconsistencies and contradictions in the evidence of P.Ws. 6 and 7 which would make their evidence open to serious doubt. At any rate, according to the learned counsel, the conviction cannot stand.

7. Learned Public Prosecutor on the other hand tried to support the conviction on the ground that the documents speak for themselves and the evidence of P.Ws. 6 and 7 are cogent and convincing enough and there is nothing to doubt the version of the prosecution. At any rate, the

learned Public Prosecutor pointed out that the court below which had the occasion to watch the demeanor of the witnesses and to examine the matter in detail found the evidence sufficient to hold the accused guilty and unless the finding is shown to be perverse, interference is not called for.

8. Even assuming for argument sake one believes the evidence of P.Ws. 6 and 7 regarding detection, two legal points raised by the learned counsel for the appellant have to be considered.

9. According to P.Ws. 6 and 7, while they were on patrol duty in connection with the election, they happened to get reliable information about the two persons having involved in sale of liquor. When they tried to apprehend them, one of them escaped and the first accused alone could be intercepted. They speak about the seizure of the article and identification of the contents, sample sealing, preparation of contemporaneous document etc. Of course, there is no material as of now to show that there was any ill-will for these

officers against the first accused.

10. But, that is not enough in law. This Court had occasion to consider the consequence of the delay in producing the seized article before court. A Division Bench of this Court considered the word 'forthwith' and held that it does not mean immediate. The Division Bench had occasion to observe that the seized articles should be produced within a reasonable time and if it was not so done, the prosecution owes an obligation to offer an explanation for the delay. This aspect has been considered in the decision reported in *Ramankutty v. Excise Inspector, Chelannur Range* (2013(3) KHC 308) wherein it was held that in the absence of satisfactory explanation, even a day's delay is fatal to the prosecution.

11. In the decision reported in *Appukuttan v. State of Kerala* (2013(2) K.L.T. SN 109) it was held that the production of the property before court without unreasonable delay is a necessary requirement of law. A slight delay in

producing the property before court by itself is not fatal to the prosecution, if the delay is satisfactorily explained.

12. In the case on hand, the detection was on 8.5.2001. Ext.P8 is the property list. It is seen that seized articles were produced in court only on 15.6.2001, i.e., there is a delay of 38 days in producing the article before court. P.W.7 had stated that he was engaged in election duty, an explanation which is too brittle to accept. It is trite that it is not necessary for him to personally produce the articles before court and he could have sent it through anyone of his officers for prompt production of the articles before court.

13. However, the court below goes on to hold that no prejudice is seen caused to the accused by the delay in production of the article before court. The court below observes that all the seals were intact and therefore there is no indication of tampering. This finding of the court below may not be fully correct. When one refers to the evidence of P.W.7, who says that except the three bottles, none else was sealed

by him. The observation of the court below cannot be technically correct. Probably, the lower court was carried away by the label of KSBC. Further, one has to notice that P.W.7 did not affix his seal on the balance contraband article except on the samples. Therefore, it could not be said that there is guarantee that the article produced are the articles seized from the possession of the accused because of the long delay.

14. Again, it is by now well settled that it is for the prosecution to indicate the specimen of the seal which they claimed to have been used for sealing the sample. In fact, the forwarding note contains a column for the same, and this Court on several occasions had reminded the department that affixture of specimen seal is absolutely necessary to ensure that the sample sent for examination is the sample taken from the contraband seized from the possession of the accused.

15. 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.”

16. In the decision reported in *Majeedkutty v. Excise Inspector* (2015 (1) K.L.T. 624), it was 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.”

17. In the case on hand, no sample seal is affixed in the forwarding note. Therefore, this Court has no opportunity to verify the same. In that case, it is not possible to find that the sample sent for chemical analysis is the sample taken from the contraband article seized from the possession of the accused. At any rate, it has been held that a reasonable doubt is created in the mind of the court. If that be so, the benefit should go to 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

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