

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

CRL.A.No. 1467 of 2006

AGAINST THE JUDGMENT IN SC 449/2004 of ADDITIONAL DISTRICT &
SESSIONS COURT (FAST TRACK COURT-I), THIRUVANANTHAPURAM
DATED 07-07-2006

APPELLANT/ACCUSED::

NESAMONY NADAR, S/O.KOCHUKRISHNAN NADAR,
CHARUVILAPUTHEN VEEDU, POOVATHOOR,
VAMANAPURAM VILLAGE.

BY ADVS.SRI.T.H.ABDUL AZEEZ
SRI.T.B.HOOD
SMT.M.ISHA
SRI.P.ANOOP

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE SUB INSPECTOR OF POLICE
VENJARAMOODU, THROUGH PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SMT. S.HYMA, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
07-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.1467 OF 2006

Dated this the 7th day of December, 2015.

J U D G M E N T

The accused was put in dock for the offence under Section 55(a) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for six months. Set off as per law was allowed.

2. Incident which gave rise to the case occurred on 12.06.2002. PW2, at that point of time, was the Sub Inspector of Police, Venjaramoodu Police Station and PW3 was Police Constable at the same station. On that day, PWs 2 and 3 along with other officers had set out for patrol duty and when they reached Vellumannadi junction, they received reliable information that sale of illicit liquor is going on near the shop of Nesamony Nadar. When they reached the place, they found a bunk shop on the eastern side and near that two persons were seen standing.

One of them was holding a can in one hand and a glass on the other. Seeing the Police, one of them took to his heels and the other after placing the bottle and glass at the back of the shop came towards the front side of the shop and he was apprehended by the Police Officials and on examination of the contents of the can, it was turned out to be arrack. It was sealed and labeled and the label contained the signature of PW2, accused and the witnesses. The glass and the bottle were seized. Ext.P1 is the mahazar prepared by him. They returned to the station and registered crime as per Ext.P2 First Information Report. They seized 750 ml of contraband article. PW2 then had the accused produced before court and also the articles seized. He prepared the forwarding note requesting the court to take sample from the contraband produced before court and sent it for chemical analysis. Ext.P3 is the report received by him. He recorded the statement of witnesses, completed the investigation and laid charge before court.

3. 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 District and Sessions Court (Fast Track-I), Thiruvananthapuram for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence under Section 55(a) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

4. The prosecution therefore had PWs 1 to 3 examined and Exts.P1 to P3 marked. M.O.s I and II were got identified and marked.

5. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him and claimed that he is innocent and has been falsely implicated.

6. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He chose to examine DW1.

7. The court below, accepting the evidence of PWs 2 and 3

and also the recital in Ext.P1 found it sufficient to hold the accused guilty and went on to convict and sentence him as already mentioned.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that the conviction suffers from several infirmities. There is no evidence of any property list having been produced before court and the court is not in the know of what are the properties produced before court. The arrest memo is also not produced before court, according to the learned counsel. Further, the records would indicate that sampling was done from court in which case, according to learned counsel, the thondi Clerk who took the sample has to be examined. That is also not done. Finally, the prosecution has not shown that the forwarding note with a specimen of sample seal was produced before court. Relying on the decision in **Majeedkutty vs. Excise Inspector** (2015 (1) KLT 624), it is contended that absence of forwarding note is fatal to the prosecution.

9. Learned Public Prosecutor, on the other hand, contended

that the evidence of PWs 2 and 3 taken along with Ext.P1 mahazar which was drawn up with all the essential details and also the prompt production of accused before court are sufficient to show that there has been seizure as claimed by the prosecution. Once that is established, it is immaterial if any technical aspect might not have been complied with. If those aspects would not cause any prejudice to the accused, the conviction cannot interfere.

10. There is no arrest memo produced in this case. No reason is also given for the same. True that by itself is not sufficient to hold in favour of the accused. It needs to be noticed that sample was taken from court. In such case, it is elementary that the thondi Clerk who was assigned with the duty of collecting sample needs to be examined to ensure that sampling was properly done. No thondi Clerk is examined in this case and there is no evidence to show as to when, where and who had taken sample and which is the seal that is affixed on the sample which the chemical analysis report says tallied with the sample seal provided. As of now, there is little material to show that

sample was taken from the contraband seized from the possession of accused.

11. The above facts and circumstances leads to a doubt whether sample sent for chemical analysis is the sample taken from the contraband seized from the possession of accused. The absence of forwarding note and non examination of thondi Clerk etc. are serious facts which affect the conviction of the accused. At the risk of repetition, one may also say that there is no guarantee that the sample which reached the laboratory is the sample taken by the employee of the court as per the orders of the Magistrate.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Section 55(a) 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