

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 31ST DAY OF AUGUST 2015/9TH BHADRA, 1937

CRL.A.No. 1669 of 2004 ()

AGAINST THE ORDER/JUDGMENT IN SC 27/2003 of ADDL.DISTRICT & SESSIONS
COURT (ADHOC)-II, KOZHIKODE DATED 04-10-2004

APPELLANT/ACCUSED:

EUGEN, S/O. GEORGE,
NAGAR KODAM KETTIYA KONIL, PULLUVILA P.O.
PUTHIYATHURA, THIRUVANANTHAPURAM.

BY ADV. SRI.SUNNY MATHEW

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR: SMT T.Y.LALIZA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17.07.2015, THE
COURT ON 31.08.2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl.A. No. 1669 of 2004

Dated this the 31st day of August, 2015

JUDGMENT

This appeal is against the judgment, conviction and sentence in S.C.No.27/2003 dated 4/10/2004 of the Additional District and Sessions Judge Fast Track (Adhoc II) Kozhikode, by which the appellant was convicted for offences punishable under section 55 (a) of Abkari Act.

2. The case of the prosecution was that on 15/5/2001 at about 10.10.a.m., while PW1, who was the Additional Sub Inspector of Payyoli Police Station, along with PW4, the principal S.I. of the same police station, and party were conducting regular checking of the vehicles proceeding along the National Highway, a bus was intercepted and the accused alighted through the rear door. He was carrying two bags on each arm. On getting suspicious, he was intercepted and a search was conducted. It revealed that each bag contained 24 bottles containing 375ml of IMFL. After the initial formalities and preparation of the seizure mahazar, arrest memo and

search memo, the accused was arrested. He was taken to the police station and the crime was registered. PW4 took over the investigation and after completion of the investigation, laid the charge for offences punishable under Section 55 (a) of the Abkari Act and Rule 9 of the Foreign Liquor Rules. The accused appeared before the Sessions Court and pleaded not guilty. Thereupon, the prosecution led oral evidences of PW1 to PW5 and Exts.P1 to P9 were marked. MO1 and MO2 series were identified. There was no defence evidence. The court below, on an appreciation of the available inputs, found the accused guilty, convicted and sentenced to undergo three years rigorous imprisonment and to pay a fine of Rupees One Lakh and in default, to undergo Simple Imprisonment for six months. No separate sentence was awarded for offence punishable under Rule 9 of the Foreign Liquor Rules.

3. Aggrieved by the conviction and sentence, the accused has preferred this appeal. Heard and examined the records.

4. The learned public prosecutor essentially relied on the oral testimonies of PW1 and PW2, coupled with the

contemporaneous documents marked as Exts.P2, P3 and P4, to sustain the finding of guilt rendered by the court below. PW1 is the detecting officer, who was the Addl. S.I. and PW2 was the police constable attached to the same police station. PW5 was the conductor of the bus in which the accused was allegedly travelling, at the time of the incident. He turned hostile and did not support the prosecution case in any manner, except admitting his signature on Ext.P4.

5. PW1 in his evidence deposed that on the date of the incident, he got a secret information that IMFL was being transported. He along with PW4, the principal S.I., was conducting a regular checking of the vehicles that were proceeding along the road. They stopped a bus from which the accused alighted, through the rear door. He was carrying MO2 series of bags. He was intercepted and from each bag, 24 bottles containing 375 ml. IMFL each were recovered. He deposed that from each bag, one bottle was taken as sample, sealed and affixed labels bearing the signatures of PW1, PW2, the accused and that of the independent witness. Ext.P2 arrest memo was prepared at the time of his arrest. According to the

police, wireless information was passed on to the police station where the house of the accused was situated. Ext.P3 was the search memo. Ext.P4 was the seizure mahazar in relation to the process of interception, search and other details.

6. After the preparation of the contemporaneous documents, the accused was taken to the police station and Ext.P1 FIR was registered. He was produced before the Magistrate on the same day at about 4.55 p.m. The contraband articles were produced before the court on 18/5/2011 along with Ext.P5 property list. Ext.P6 was the remand report and Ext.P7 is scene mahazar. PW3 witnessed the preparation of Ext.P7 scene mahazar. From the nature of the evidence tendered, the scene mahazar has no much relevance.

7. Ext.P8 is the copy of the forwarding note by which samples were forwarded to the chemical analysis lab for chemical analysis. Ext.P9 is the chemical analysis report which shows that contraband articles contained alcohol.

8. PW2, the police constable, also supported the version of PW1 broadly and on main facts. He also deposed in tandem with the version spoken by PW1. No substantial or material

contradiction or omission were brought out in the course of cross examination.

9. Even though the general allegation against the accused may appear to be established, the learned counsel for the accused vehemently attacked the prosecution case. It was contended that as per the prosecution case, PW1, PW2, PW4 and yet another constable alone were available at the spot. They were allegedly checking the vehicles. The evidence also indicate that when the bus came, police stopped the bus. At that time, the accused got down through the rear door and PW1 and PW2 proceeded to intercept the accused. It was brought out in evidence of PW1 that at that time another person alighted through the front door. He was also carrying bags with same number of bottles and were intercepted by PW4 and the other police constables. It appears that simultaneously two persons were apprehended and two crimes were registered. However, this fact is not seen described in any of the contemporaneous document or in the FIR, but was brought out only in the course of cross examination. It may appear to be strange that two accused were arrested simultaneously and the entire process of

search, sampling and preparation of the contemporaneous documents were completed simultaneously at the spot but not even referred in the contemporaneous documents. The learned counsel for the appellant contended that this is highly unbelievable.

10. PW1 and PW2 stated in their evidence that after the seizure, the sample was sealed and labeled. According to them, the label contained the signatures of PW1, PW2, the witnesses and that of the accused. None of the contemporaneous documents bear the seal which was affixed. Ext.P8 forwarding note contains the sample seal affixed. However, in the absence of any corresponding seal on the contemporaneous documents, it is doubtful whether the seal affixed at the time of sealing of the sample was the same, as seen on Ext.P8 forwarding note and stated to be received without any tampering at the chemical analysts lab, as evident from Ext.P9. In other words, the link that samples which were sealed at the time of search and seizure, were the same as seen in the forwarding note and which was received in the same condition as evidenced by Ext.P9 chemical analysis report is the link evidence which is missing.

In **Rajamma v. State of Kerala** (2014 (1) KLT 506) the Court, while dealing with a slightly different occasion, held that no evidentiary value can be attributed to the 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.

11. In a slightly different scenario, this Court in **Krishnan v. State** (2015 (2) KLT SN8) observed that a specific space is provided in the forwarding note for affixing the sample seal and no such seal was affixed on the forwarding note. Hence, it was held that it can be presumed that the link evidence was absent. In the case at hand, the seal was allegedly affixed at the time of seizure. There is no evidence to show that the seal affixed at the time of search was the same as that on the forwarding note, which was prepared much later. Hence, the recital in Ext.A9, that the sample was received in the same condition without any tampering and corresponding with the seal affixed on the forwarding note, only substantiate the factual situation after the sample reached the court and not prior to

that.

12. It is also seen that the accused was arrested on 15/5/2001. He was produced on the same day before the Magistrate. However, the contraband was produced before the court on 18/5/2015 only. PW1 admitted that the contraband was produced in the court only on 18/5/2015. There is no explanation as to why such a delay had occurred. The only explanation given by PW1 was that it was because of the law and order duties. This is not a valid explanation at all. This has to be noted in the background that PW4 took over the investigation on 15/5/2001. According to him, he did not receive the contraband items. PW1 also has not stated that he handed over the contraband to him nor that he was in custody of the items. Hence, the identity of the person who was in possession of the contraband during intergum is not recorded. In **Ravi v. State of Kerala** (2011 (3) KLT 353), this Court had held that though law does not prescribe that the contraband should be produced forthwith before the court, that does not mean that it can be produced at any time. It is held that the investigating agency has a duty to produce it at the earliest available

opportunity, if not, to give cogent reason for the delay. In **Narayani Vs. Excise Inspector (2002(3) KLT 725)**, it was held that in the absence of evidence to prove that the residue and sample were kept in proper custody, tampering cannot be ruled out. This court in **Ramankutty v. The Excise Inspector (2013 (3) KLJ 434)** held that non- disclosure of the custodian of the contraband will make even a single day's delay in producing the contraband fatal to the prosecution case.

13. The specific case of the prosecution is that the IMFL that was recovered from the accused was meant for sale in Pondichery, thereby implying that there was illegal import. However, Ext.P4 only refers to possession of the contraband item for the purpose of sale. In Ext.P1 FIR also, the allegation is not in relation to the import, but in relation to possession for sale. There is no evidence to show that any attempt was made to find out whether the accused was in possession of any bill. However, the charge framed by the court was for illegal import, regarding which no evidence is seen collected by the prosecution. Even at the time of evidence, PW1 mainly harped on the entries on the labels of the IMFL bottles. In **Tippu Mohammed v. State of**

Kerala and Another (2015 (1) KHC SN 4), this Court had held that the prosecution has to let in some evidence, at least by the oral assertions of the investigating officer, regarding the alleged import, apart from mere reliance on the entries on the labels.

14. An appreciation of the above facts show that the conviction cannot be safely sustained on the basis of the above shaky evidence. Since the prosecution failed to establish the guilt of the accused beyond reasonable doubt, the accused is entitled for acquittal. Conviction is liable to be set aside.

In the result, the appeal is allowed and the conviction and sentence passed by the court below are set aside. The accused is acquitted. The bail bond executed by him shall stand discharged.

Sd/-

SUNIL THOMAS
Judge

dpk