

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

CRL.A.No. 1494 of 2006 ()

**AGAINST THE JUDGMENT IN SC 104/2006 of ADDITIONAL SESSIONS COURT (ADHOC)
FAST TRACK-I, THRISSUR DATED 13-07-2006**

IN CP 222/2005 OF JUDICIAL FIRST CLASS MAGISTRATE- I, CHALAKUDY

APPELLANT(S)/ACCUSED:

**NAIJU, S/O.POULOSE, NANGINI HOUSE,
KUNDUKUZHIPADAM, KUTTICHIRA.**

**BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SMT.P.MAYA**

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1494 of 2006

Dated this the 15th day of December, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 58 of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of three months. Set off as per law was allowed.

2. The prosecution case as could be discerned from the evidence of PW2 is that on 15.11.2004, while he was functioning as the Sub Inspector of Police, Vellikulangara, he as usual had set out for routine patrol duty along with PW1 and others. When they reached the telephone junction box at Kamalakkatti, they happened to see the accused going on motor bike. They had him intercepted and the motor bike brought to a halt. PW2 find a can hanging on the rear

portion of the motor bike. The can was opened and the contents were examined. He realized that 10 litres of can contained arrack. The accused was arrested. Two samples of 180ml each were taken. Both the samples and the can were sealed. Ext.P1 is the mahazar prepared by PW2. PW2 then returned to the Police Station along with the accused and the seized articles and as per Ext.P2 FIR, registered crime against the accused. Next day, the accused, the articles seized and the documents were produced before court. He himself conducted investigation in the case and prepared Ext.P3. He recorded statements of witnesses, he sent a requisition to the court seeking to have the sample taken and forwarded for chemical analysis. PW5, successor-in-office of PW2 received the Chemical Analysis Report, completed investigation and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the

case to Sessions Court, Thrissur under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court (Adhoc), Fast Track-I, Thrissur, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 58 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 3 examined and had Exts.P1 to P4 marked. MO1 was got identified and marked.

6. After the close of prosecution evidence, the 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 he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence.

He chose to adduce no evidence.

8. The court below, impressed by the evidence of PWs 1 and 2, found that their evidence is sufficient to come to the conclusion that the offence has been made out. Accordingly, conviction and sentence followed.

9. The learned counsel appearing for the appellant assailing the conviction and sentence pointed out that this appeal will have to succeed on a very short ground. The learned counsel emphasizes that it is by now well settled that it is absolutely necessary for the prosecution to produce or mark the forwarding note which should also contain the sample of the specimen seal and in the absence of that document, the prosecution cannot succeed. For the above proposition, the learned counsel relied on the decisions reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624) and **Krishnan v. State** (2015 (2) KLT SN 8). Apart from that, the learned counsel pointed out that no independent

witnesses have been examined and practically no investigation has been done at all.

10. The learned Public Prosecutor tried to salvage the situation by relying on the evidence of PWs 1 and 2 along with Ext.P1 mahazar.

11. Even assuming that what PWs 1 and 2 say are true, the fact remains that no forwarding note is seen produced or is seen marked among the documents produced by the prosecution.

12. In the decision reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), it was held as follows:

“18. Yet another infirmity in the prosecution case is that there is no request forwarding note either produced or marked to indicate that a request was made to the Magistrate to send the sample bottle to the chemical examiner for analysis. P.W.6 who conducted the investigation, has no case that he had made any such request or had filed any forwarding note. Likewise, P.W.1 also has no case that he had made a request to the Magistrate to send the sample bottle to the chemical examiner.

Ext.P4 certificate of chemical analysis dated 24.11.1997 is relied on by the prosecution to show that the sample bottle was duly despatched to the chemical examiner for analysis. In the absence of any forwarding note or requisition, it is not explained as to how the Magistrate forwarded a sample bottle to the chemical examiner as per his covering letter dated 19.8.1997 referred to in Ext.P4 certificate. Even the office copy of the covering letter has not been produced. The thondi section clerk who was the custodian of the properties before the Magistrate, was not examined to prove matters such as the date of receipt of the property before the Magistrate, the condition in which those properties were received in court including the fact whether a sample bottle was received and if so, whether the seals if any on such bottle were in tact, the date of despatch of the sample to the chemical examiner and the nature of the custody of the sample bottle until then. The prosecution can succeed in securing a conviction against the appellant only if it is shown that the sample which was subjected to chemical analysis as evidenced by Ext.P4 certificate was the very same sample which was drawn from the bulk quantity of contraband liquor allegedly held by

the accused and which after change of hands, eventually reached the hands of the chemical examiner.”

13. In the decision reported in **Krishnan v. 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 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.”

14. In the decision reported in **Majeedkutty v. Excise Inspector** (2015 (1) KLT 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.

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.”

15. In the light of the above decisions, it is unnecessary for this Court to debate upon the significance and importance of the forwarding note. Suffice to say that in the absence of forwarding note containing the specimen sample seal, the court cannot be sure about the authenticity of the sample sent for chemical analysis.

16. In the case on hand, though PW2 says that he has sent a requisition to court, that is not seen marked and there is nothing to show that specimen sample seal is produced before court. Therefore, the court had no occasion to compare with the seals.

17. If the principle laid down in the above decisions applies with all force to the facts of the present case, conviction and sentence cannot stand.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set

aside and the accused stands acquitted of all 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