

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA,
1937

CRL.A.No. 1495 of 2006

AGAINST THE JUDGMENT IN SC 1279/2000 of ADDL. SESSIONS COURT,
FAST TRACK-III, THIRUVANANTHAPURAM.

APPELLANT(S)/ACCUSED:

ARAVINDAKSHAN, S/O.KESAVAN,
KANUVAYAL KATTAALIL VEEDU,
VAMANAPURAM VILLAGE,
NEDUMANGADU TALUK.

BY ADV. SRI.LATHEESH SEBASTIAN

RESPONDENT(S)/STATE:

STATE OF KERALA, REPRESENTED BY
THE DIRECTOR OF PUBLIC PROSECUTIONS,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 1495 of 2006

Dated this the 16th day of December, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Sections 8(1) and (2) of the Abkari Act. He was found guilty. Accordingly, he was convicted and sentenced to undergo simple imprisonment for one year and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for three months.

2. The incident which gave rise to this case occurred on 1.7.1998. On that day Excise Inspector of Vamanapuram Excise Range one Vijayakumar, along with P.W.1 and others were on patrol duty. On their way, they found the accused standing with a can having capacity of 5 litres. The can was seized and examined. By taste and smell it was identified as arrack. Arrest memo was prepared and the accused was arrested. The detecting officer, who is no more,

prepared Ext.P2 mahazar. The can seized was sealed and labelled. The label contained the signature of accused, the detecting officer and witnesses. Then with the article, the accused and the documents returned to the station and crime was registered.

3. P.W.5 took over investigation. He recorded statements of witnesses, obtained Ext.P5 chemical examination report, completed investigation and laid charge before court.

4. The court, before which final report was laid took cognizance of the offence. Finding that the case is one exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Thiruvananthapuram. The said court made over the case to Additional Sessions Court, Fast Track III, Thiruvananthapuram for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused, framed charge for the offences

under Sections 8 (1) and (2) 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 5 examined and had Exts.P1 to P5 marked. M.O. 1 was got identified and marked. After the close of the 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. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. Ext.D1 was marked on the defence side.

6. Accepting the evidence of P.Ws. 1 and 2 and also impressed by the fact that Ext.P2 mahazar contains all the necessary details and nothing more is required held that the prosecution has established the case beyond reasonable doubt. Conviction and sentence as already mentioned followed.

7. Learned counsel appearing for the appellant contended that the court below has not adverted to the real facts in the case. It is pointed out that there was no evidence as to who had taken the sample and sent for analysis and therefore Ext.P5 is of no use. It is then pointed out that the forwarding note, which is an essential document and part of the records is not produced and marked and there is no evidence of specimen sample seal said to have been affixed on the sample. These vital aspects have been omitted to be noticed by the court below.

8. Learned Public Prosecutor tried to support the finding of the court below on the basis of the evidence furnished by P.Ws. 1 and 2. It was also contended that the evidence of P.Ws. 1 and 2 is convincing enough and there is no reason why this court should interfere with the finding of the court below. According to the learned Public Prosecutor, the appeal is only to be dismissed.

9. If one is to go by the evidence of P.Ws.1 and 2, it is evident that they had occasion to come across the accused carrying a plastic can which contained arrack. The Excise Inspector, who actually detected the offence, is no more.

10. In the case on hand, it is clear from Ext.P2 that no sampling was done at the spot and so as the evidence given by P.Ws. 1 and 2. As to who had filed the requisition for taking the sample is also not revealed from the records.

11. There is nothing to show that the sample was taken by any of the Excise Officers. Necessarily, it must have been taken from the court, and for that requisition might have been given. If that be so, the thondi clerk, who acted under the orders of the Magistrate ought to have been examined and that has not been done in the case on hand. Therefore, there is no evidence to show as to who had taken the sample and from where it was taken. There is absence of seal affixed on the sample. Then there is no proper sampling as is known to law.

12. In the decision reported in Joseph v State of Kerala (2009(4) KHC 537), it was observed 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) 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.”

14. A reading of the above decisions leave one in no doubt regarding the importance of the forwarding note and providing of specimen sample seal. The decisions also shows that forwarding note is an important item of evidence which will lead to the conclusion regarding the authenticity of the sample sent for chemical examination. When there is no seal

found in the forwarding note, then the presumption is that the original also may not contain the seal. Whatever that be, in the light of the above decisions, it cannot be said that when the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. The court below has to advert to the above aspects that has considerable significance and importance in the facts and circumstances of the case. Mere fact that P.Ws.1 and 2 had given parrot-like version does not lead to a conclusion that the prosecution has succeeded in establishing the case against the accused. One may look at the other items of evidence. The evidence adduced is far less than what is expected from the prosecution. It is difficult to understand how the conviction can be sustained on the basis of such brittle evidence.

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.

Sd/-
P. BHAVADASAN,
JUDGE

sb.

//True copy//

P.S. To Judge