

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

CRL.A.No. 1224 of 2007

AGAINST THE JUDGMENT IN SC 494/2006 of IIIRD ADDITIONAL
SESSIONS COURT (ADHOC), FAST TRACK COURT NO.I, THRISSUR

APPELLANT(S)/2ND ACCUSED:

SANTHOSH, S/O. VELAYUDHAN,
PODIYADA HOUSE, VAKAD DESOM, ELAVALLY VILLAGE.

BY ADV. SRI.P.K.RAVISANKAR

RESPONDENT(S)/STATE:

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

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
14-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 1224 of 2007

Dated this the 14th day of October, 2015.

JUDGMENT

Two persons were prosecuted for the offence punishable under Section 58 of the Abkari Act. Among them, the first accused was acquitted and the second accused alone was found guilty. He was convicted and sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/–, in default, to undergo simple imprisonment for one month.

2. The prosecution case is that on 15.5.2015 P.W.3 while functioning as Sub Inspector of Police, Guruvayoor Police Station, had gone on routine patrol duty along with other officers on that day also. When they reached in front of the house of Kundukulam Jose, they happened to see two persons coming along the road on a motor bike. They were asked to

stop by P.W.3. The first accused was riding the vehicle and the second accused was the pillion rider. The prosecution allegation is that the second accused had a plastic bag with him which was seized and on examination it was found to contain a can containing some liquid. The liquid in the can was identified as arrack. P.W.3 arrested the accused and took a sample of 180 ml. in a bottle having the capacity of 375 ml. and sealed the same. The balance arrack in the can was also sealed and labelled. P.W.3 prepared Ext.P1 mahazar which contained the signature of P.W.3, one independent witness and other police officers. P.W. 3 returned to the police station along with the contraband article, the accused and the documents and he registered crime as per Ext.P5 FIR. He kept the materials in his custody till 16.5.2005 and produced before court. He prepared Ext.P6 scene mahazar and had taken the statements of witnesses. He claims to have prepared forwarding note and sent to court, based on which

articles were sent for chemical examination and report was obtained. His successor-in-office, namely, P.W.2 laid charge 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, Thrissur. The said court made over the case to IIIrd Additional Sessions Court (Adhoc)Fast Track-I, Thrissur 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 58 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 4 examined and had Exts.P1 to P6 marked. After the close of the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances

brought out in evidence against them and maintained that they were innocent. They also stated that they had participated in an agitation against an abkari contractor in the area and it is at his behest they have been falsely implicated. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. They chose to adduce no evidence.

5. On appreciation of the evidence, the court below found that there are no materials against the first accused and acquitted him. The second accused was found guilty and conviction and sentence as already mentioned followed.

6. Assailing the conviction and sentence, learned counsel for the appellant contended that first of all the investigation conducted by P.W.3 causes serious prejudice to him. It is also contended that even though the articles were produced only on 16.5.2005, the property list has not been produced and marked. Therefore, there is no guarantee that

the articles produced before court were the articles alleged to have been seized from the possession of the accused. Apart from the above aspect, learned counsel for the appellant pointed out that the forwarding note is also not produced and marked in this case. According to the learned counsel, the forwarding note contains sample seal so that the court can compare the seal with the seal affixed on the samples collected for sending chemical examination. In support of the contention that absence of forwarding note is fatal to the prosecution, learned counsel relied on the decision reported in *Krishnan v. State* (2015(2) K.L.T. SN8). As regards the alternative contention, learned counsel pointed out that even assuming that whatever prosecution says have been established, still Section 58 of the Abkari Act is not attracted. Mens rea is necessary for attracting Section 58 of the Act and it is neither alleged nor pleaded in the case. It is therefore contended that the said conviction cannot stand.

7. Learned Public Prosecutor pointed out that P.W.3 who detected the offence had conducted the investigation also. In such cases on detection, major portion of investigation is over and only routine matters remain thereafter, and no prejudice will be caused to the accused by the detecting officer investigating the case. The evidence of P.Ws.3 and 4 gets corroboration from each other and their evidence gets support from Ext.P1. True the independent witness turned hostile. But he has admitted his signature in Ext.P1. It is the above facts which weighed with the court below and there is nothing wrong in the finding arrived at by the court below. It is also pointed out that no interference is called for.

8. Detection and seizure of the contraband article remain confined to the testimony of P.Ws.3 and 4. Among them, P.W.3 was the Sub Inspector and P.W.4 was along with

P.W.3 on the date of incident. They speak in terms of the prosecution case and their version is consistent and uniform regarding the incident. In spite of strenuous cross-examination, nothing could be brought out to discard their version. True the independent witnesses turned hostile. But that does not mean that evidence given by the police officers cannot be accepted. If the evidence of the police officers is without blemish and inspires confidence in the mind of the court, that is sufficient to draw a conclusion. Corroboration is not a rule of law.

9. In the case on hand, admittedly, the evidence of P.Ws. 3 and 4 and Ext.P1, the contemporaneous document, give all the details. Therefore, the detection and seizure stands established.

10. The next question that arises for consideration is whether there is anything to prove the claim made by the prosecution that the articles were produced before the court

on 16.5.2005. To show that the articles were produced on a particular date, the only item of evidence is the property list. It is only through the property list that one can ascertain as to when the property was produced. No such document is seen produced in the case on hand. Therefore, there is no merit in the contention that the articles produced before court are the articles seized from the possession of the second accused.

11. Even though P.W.3 had stated that he had sent the forwarding note, it is not seen marked or produced in the case. Forwarding note is of some significance. It should contain the sample seal of the officer concerned which contained in the label affixed on the sample collected for sending for chemical examination. Then only the court can compare the seal in the forwarding note with the seal affixed on the sample collected for sending for chemical examination. In the absence of the forwarding note, no comparison can be made by the court.

12. In the decision relied on by the learned counsel for the appellant, i.e. 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.”

It is not necessary to highlight the importance of forwarding note in a case under the Abkari Act. The above decision is self explanatory. This Court has held that non-production of forwarding note is fatal to the prosecution. If that be so, the conviction cannot stand.

13. In the light of the above finding, it is not necessary for this Court to consider whether even if there is mens rea, Section 58 of the N.I.Act is attracted or not.

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

sb.