

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

CRL.A.No. 1776 of 2006 ()

**AGAINST THE JUDGMENT IN SC 132/2005 of ADDITIONAL SESSIONS COURT
(ADHOC-I), ERNAKULAM DATED 16-08-2006**

IN CP 96/2004 OF JUDICIAL FIRST CLASS MAGISTRATE, PERUMBAVOOR

APPELLANT(S)/ACCUSED::

**SAJEEV, S/O. NARAYANAN,
MUNDAKKAL HOUSE, KADAPPARA, MALAYATTOOR
ERNAKULAM.**

BY ADV. SRI.K.R.VINOD

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA,
REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1776 of 2006

Dated this the 18th day of November, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 8(1) and (2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for a period of six months and to pay a fine of ₹1 lakh with a default clause of six months. Set off as per law was allowed.

2. The incident in this case occurred on 27.08.2002. At the relevant time, PW1 was working as the Preventive Officer of Excise Circle Office, Aluva. On the date of incident, as usual, he set out for patrol duty. While he was proceeding through the mud road leading to the Forest Quarters in Kadappara Village, he happened to see the accused coming along the road carrying a plastic can. He stopped the vehicle near the accused and asked about the contents of the can. No satisfactory reply was given. The

can was found to have a capacity of 5 litre. The can was seized and the contents were examined. On verification of the contents, it was revealed that the content was arrack. The arrest memo was prepared and the accused was arrested. From the can, a sample of 200ml in a bottle having a capacity of 375ml was taken and both the sample and the balance contraband article were sealed and labelled. The label contained the signature of the accused, witnesses and PW1. PW1 then had the accused, records and the seized articles produced before the Circle Inspector, Aluva. PW3 was the Excise Inspector at the relevant time. The accused, articles seized and the records were produced before him by PW1. On the basis of Ext.P1 mahazar, he, as per Ext.P4 occurrence report registered Crime No. 58/2002. He prepared Ext.P5 property list and also prepared the forwarding note namely, Ext.P6. The accused and the article were produced before court promptly. His successor-in-office had conducted further investigation of the case. PW4,

who succeeded PW3 recorded statement of witnesses. PW5, the successor officer of PW4 verified the records, obtained 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, Ernakulam under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, (Adhoc-I), Ernakulam 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 8(1) and (2) 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 5 examined and had Exts.P1 to P7 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. He denied having committed any act which would constitute an offence.

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 was considerably influenced by the evidence furnished by PW1, who spoke meticulously about the detection supported by the mahazar which had prepared as Ext.P1 and when it was pointed out before court that the accused, the articles and the documents were produced before court, the court felt no doubt about the prosecution case and found the accused guilty. Conviction and sentence followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant contended that when the witness was in the box, it was realized that in MO1, which was alleged to contain the balance contraband article, there was no liquid and therefore, it was contended that it was not the article which was seized. It was then contended that only one of the independent witnesses had been examined and he did not support the prosecution case. Under those circumstances, the learned counsel for the appellant pointed out that the other independent witness ought to have been examined or at least one of the Officers, who had accompanied PW1, should have been examined to ensure the detection. To base the conviction solely on the basis of the testimony of PW1 would be extremely dangerous. Finally, the learned counsel for the appellant contended that there is a serious flaw in the prosecution and that is, Ext.P6, the forwarding note does not contain the sample seal and if that be so, it could not be said that the

sample sent for chemical examination is the sample taken from the contraband seized from the possession of the accused. Moreover, PW3 has stated that the sample seal was not produced before court. That further fortifies the fact that the court had no opportunity to compare the seal before it was sent for chemical examination. In such cases, the prosecution cannot rely on the analysis of sample though it is a vital aspect. For the above proposition, the learned counsel relied on the decision 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).

10. The learned Public Prosecutor on pointed out that the evidence of PW1 is sufficient to show that the offence has been committed. The contention regarding empty can at the time of evidence, the learned Public Prosecutor pointed out that PW1 has specifically stated that the label affixed at the time of detection is still there on the can and if

that be so, the mere fact that contents are seen emptied, does not mean that the contraband was not seized from the possession of the accused. Regarding the non-examination of other independent witness and other Officers, learned Public Prosecutor pointed out that when the court felt that the evidence of PW1 is sufficient taken along with contemporaneous document, it is not necessary that further evidence should be adduced. The attempt should be to see that the witness who spoken about the incident is speaking the truth and if that evidence is found to be convincing and cogent, nothing more remains to be considered. As far as the non-furnishing specimen seal is concerned, the learned Public Prosecutor pointed out that PW1 in his evidence has stated that he has affixed the seal and that alone is sufficient. It was therefore contended that there is no merit in any of the contentions raised by the learned counsel for the appellant.

11. As regards the first of three contentions namely the empty can, non examination of the other independent witness and also the non-examination of other officers who had accompanied PW1, the contention raised by the learned counsel for the appellant may have substance. The evidence of PW1 narrates in detail what had transpired at the spot and how the offence was detected which is evident by Ext.P1 mahazar prepared by him. Further, he had produced the accused, the articles before PW3, who registered crime and had the accused produced promptly before the Magistrate. Therefore, if the evidence of PW1 was found to be convincing enough by the court below, there is no reason to look for corroborative evidence. There is no rule of law that the evidence furnished by the Excise Officer cannot be believed. There is nothing to show that PW1 had any axe to grind against the accused or that he was falsely implicated. Therefore the seizure is true.

12. But that is not the end of matter. The consequence of non furnishing of sample seal in the forwarding note was considered in the decisions relied on by the learned counsel for the appellant.

13. 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.”

14. 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.”

15. 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.”

16. Ext.P6 is the forwarding note in the case on hand. In the column where the specimen seal to be affixed is left blank. One may recall here the evidence of PW3. He says in his evidence that he had never produced the sample seal before court. If that be so, the principle laid down in the above decisions applies with all force to the fact of the case.

There is no guarantee as it laid down in the above decisions that the sample which reached the chemical laboratory is the sample taken from the contraband article seized from the possession of the accused. If that be so, the accused is entitled to the benefit of doubt.

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. If any amount has been deposited by the appellant, the same shall be refunded to the appellant on proper application being made.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge