

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA,
1937

CRL.A.No. 2385 of 2006

AGAINST THE JUDGMENT IN SC 805/2003 of ADDITIONAL SESSIONS
COURT (ADHOC)-II, KOLLAM.

APPELLANT(S):

GEETHA, S/O. KOMALA AMMA,
MUNDAPPALLIL KIZHAKKATHIL, MANAPPALLY, THEKKU MURI,
PAVUMBA VILLAGE, KARUNAGAPPALLY TALUK, KOLLAM.

BY ADVS. SRI. K.SIJU
SRI.S.SUDHEESHKAR

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
EXCISE INSPECTOR, KARUNAGAPPALLY EXCISE RANGE,
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
10-12-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 2385 of 2006

Dated this the 10th day of December, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Sections 8(1) of the Abkari Act and she was found guilty. She was therefore 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 year.

2. The incident which gave rise to this case occurred on 6.4.2000. On that day, P.W.1 was functioning as the Preventive Officer at Karunagappally Excise Range and P.W.4 was working as the Guard. According to them, under the leadership of P.W.1, a team had gone on patrol duty and when they reached near the house of one Nandan situated at Thannikkara junction, they happened to see the accused coming along the road with a big–shopper. She was intercepted and the big–shopper was seized and examined. It was found to contain 25 plastic

covers, each with 150 ml liquid in it. Two of them were opened and by taste and smell, it was identified as arrack. The witnesses were also convinced about the same. The contents of the packets which were opened were transferred into a bottle having capacity of 375 ml. That bottle was sealed and since there is no women police constable was in the team, the accused was not arrested. Ext.P1 mahazar was prepared. P.W.1 would say that the articles and the records were entrusted to the officer concerned.

3. P.W.5 was the Assistant Excise Inspector of Karunagappally Excise Range and he is in charge of the office where the articles were entrusted by P.W.1. On that day, the Excise Inspector was on leave and P.W.5 was in charge of the Excise Inspector. According to him, on getting the articles etc., since there was no time on that day, the crime was registered only on the next day as per Ext.P2 occurrence report. On 7.4.2000 the property list and forwarding note were produced before the court. The property list is marked as Ext.P3 and the chemical analysis

report received is marked as Ext.P4. Investigation was completed and final report was laid.

4. The court, before which final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Kollam as per Section 209 Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, (Adhock) II, Kollam for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused, framed charge for the offences punishable under Section 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 P4 marked. M.Os. 1 to 3 were got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C., wherein she denied all the incriminating circumstances brought out in evidence against her and

maintained that she is innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., she was asked to enter on her defence. She however, chose to adduce no evidence.

7. The court below, greatly impressed by the evidence of P.Ws. 1 and 4 and the fact that the documents and the articles were produced on the very next day of the incident found that there were sufficient materials to show that the prosecution version is true and correct. Accordingly, the accused was found guilty and conviction and sentence as already mentioned followed.

8. Learned counsel appearing for the appellant assailed the conviction mainly on two grounds. Learned counsel pointed out that going by the entries in Ext.P1, the articles seized and the documents prepared by P.Ws. 1 and 4 were received by the Excise Guard of the Range Office, who is an incompetent officer to receive those documents going by the definition of Abkari officer as per the provisions of the Act. It is also pointed out that as per

Section 40 of the Abkari Act, production of the articles and the documents has to be to an Abkari Officer under the Act. A reading of Ext.P1 and the evidence of P.W.5 would clearly show that the records and articles were entrusted to a Guard who does not fall in any of the categories of the officers made mention of in Section 40 of the Act. The very receiving of the articles and the documents is illegal. Added to this, according to the learned counsel, is the non-furnishing of sample seal and the non-production of the forwarding note. So, there is no possibility for the court to ascertain the nature of seal said to have been affixed on the sample. The non-production of the forwarding note is fatal. For the above purpose, learned counsel relied on the decision reported in *Joseph v State of Kerala* (2009(4) KHC 537). Hence learned counsel prays for an acquittal.

9. Learned Public Prosecutor as usual tried to place heavy reliance on the evidence of P.Ws. 1 and 4 and the production of the articles and documents before the court on the very next day of seizure and contended that

there is absolutely no room for any manipulation. It is also contended that P.Ws. 1 and 4 had given a true version of the incident which was weighed with the court below. In short, the contention is that the conviction need not be interfered with.

10. The mere fact that some article has been seized from the possession of the accused by itself is not sufficient as is seen from a number of decisions on the subject. Even assuming for argument sake that the evidence furnished by P.Ws. 1 and 4 is totally acceptable, all that is available before this Court is that they had seized certain contraband articles from the possession of the accused and had taken samples for sending it for chemical analysis. Section 40(3)(b) of the Act stipulates that any person arrested under Sections 31, 34 or 35 along with the articles seized and the documents should be produced before an officer empowered under Section 5A of the Act or to an Abkari Inspector. It is therefore clear as to who are the persons competent to receive the thondi articles as well

as the accused when presented before office. It admits of no delegation of power. In the case on hand, on going through the endorsement on Ext.P1 it is very clear that the articles and the documents were entrusted to the Excise Guard. If any further confirmation is required in this regard, it is furnished by P.W.5 in his cross-examination. In cross-examination, he has stated that he had authorized the Guard to receive the documents and the articles. One cannot understand as to how he can do it when the statute is very clear. Whatever that be, it is quite clear that the documents and the articles were not received by P.W.5 at all. Added to the above is the fact that no forwarding note is seen marked in the case. Forwarding note has necessarily to contain specimen of the seal and that alone is the guarantee for the court to find that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. That it is so is clear from the decision reported in *Joseph v State of Kerala* (2009(4) KHC 537). In the said decision, 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.”

The above decision gives the importance and significance of marking of the forwarding note and also of the sample seal in the forwarding note. In the absence of such a specimen seal being provided in the forwarding note, this Court has occasion to hold that there is no guarantee for the sample sent for chemical analysis. One should also notice that the form of forwarding note contains the space for providing sample seal. That also indicates that that is a mandatory requirement. One could have taken some solace if the mahazar prepared by P.W.1 had contained the sample seal. That is also not available. The result is that the act of P.Ws. 1, 4 and P.W.5 falls to the statutory requirements and the

principles laid down in the decision referred to above. If that be so, the conviction and sentence cannot be sustained.

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 her. Her bail bond shall stand cancelled and she is set at liberty.

P. BHAVADASAN,
JUDGE

sb.