



2023/KER/68681

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MRS. JUSTICE SOPHY THOMAS
TUESDAY, THE 7TH DAY OF NOVEMBER 2023 / 16TH KARTHIKA, 1945
CRL.REV.PET NO. 1287 OF 2014
CRA 152/2012 OF ADDITIONAL DISTRICT & SESSIONS JUDGE (AD HOC)
COURT-I, PATHANAMTHITTA
SC 79/2011 OF ASSISTANT SESSIONS JUDGE, THIRUVALLA

REVISION PETITIONER/APPELLANT/ACCUSED:

SHIJO DAS, S/O.DAS,

BY ADV SRI.M.T.SURESHKUMAR

RESPONDENT/RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, 682031.

BY SRI.M.C ASHI, PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 01.11.2023, THE COURT ON 07.11.2023 PASSED THE
FOLLOWING:

**"CR"****ORDER**

This revision is at the instance of the 1st accused in SC No.79 of 2011 on the file of Assistant Sessions Judge, Thiruvalla, assailing the judgment in Crl.Appeal No.152 of 2012 on the file of Additional District and Sessions Judge (Ad hoc) Court-I, Pathanamthitta, which upheld his conviction and sentence under Sections 8(1) and 8(2) of the Abkari Act.

2. Prosecution case is that, on 01.07.2007, at about 8.25 a.m, the revision petitioner was found carrying a 5 litre black can containing 4.5 litres of illicit arrack, and the 2nd accused was found following him. PW1, the preventive officer, and excise party detected the offence. On seeing the excise party, the 2nd accused ran away, and so, he could not be arrested. PW1 arrested the revision petitioner, seized the contraband and prepared arrest memo, seizure mahazar etc. PW3 registered the crime, investigated the case and laid charge against the revision petitioner and the 2nd accused under Sections 8(1) and (2) of the Abkari Act. The 2nd accused was absconding and so, his case was split up and re-filed by the trial court.

3. The trial court framed charge against the revision petitioner under Section 8(1) and 8(2) of the Abkari Act. He



pleaded not guilty and claimed to be tried. PWs 1 to 4 were examined, Exts.P1 to P9 were marked and M.O 1 was identified from the side of the prosecution. During 313 examination, the revision petitioner denied all the incriminating materials brought on record. DW1 was examined from his side.

4. On analysing the facts and evidence and also on hearing the rival contentions from either side, the trial court found the revision petitioner guilty under Sections 8(1) and 8(2) of the Abkari Act, and he was convicted and sentenced to undergo rigorous imprisonment for three years and fine of Rs.1 lakh and in default, to undergo simple imprisonment for six months.

5. Against the conviction and sentence imposed by the trial court, the revision petitioner preferred CrI.Appeal No.152 of 2012, and the appellate court, on re-appreciating the facts and evidence, dismissed the appeal, upholding the conviction and sentence, against which this revision has been preferred.

6. Now this Court is called upon to verify the legality, propriety and correctness of the decision rendered by the courts below.

7. Heard learned counsel for the revision petitioner and learned Public Prosecutor.



8. Learned counsel for the revision petitioner is canvassing her arguments mainly based on the technical laches committed by the detecting officer as well as the investigating officer. First of all, learned counsel for the revision petitioner pointed out that, in Ext.P1 seizure mahazar, no sample seal was affixed, and if at all it is affixed, the nature of that seal is not mentioned anywhere.

9. Learned Public Prosecutor would say that, in the mahazar, the sample seal is affixed. But, on verification of the seizure mahazar, it could be seen that, a seal-like impression is found inside the writings and so, the abbreviation found in the seal is not legible. There was no difficulty for the detecting officer to affix the sample seal in the vacant space available beneath the mahazar. The detecting officer was Sri.P.R Retnakaran. Normally, the specimen seal would be made of the abbreviated form of the name of the detecting officer. Here, the detecting officer is Sri.P.R Retnakaran. So, normally, his specimen seal would have been 'P.R.' or 'P.R.R.'. But, the specimen seal found inside the writings in the mahazar starts with the letter 'R' and the remaining letters are not legible. Normally, the nature of the specimen seal affixed, will find a place in the mahazar itself, and that also is absent in Ext.P1 mahazar. Since the specimen seal is not properly



affixed, and the nature of seal is not mentioned in the mahazar, we have to take it as a case of no seal affixed in the mahazar. In the mahazar, the Excise Inspector has not affixed his signature towards his designation seal. That also casts serious doubt regarding the genuineness of the seizure mahazar.

10. In the forwarding note, towards column No.10, the space for sample seal is provided. But, no sample seal is affixed there. But, it is mentioned towards column No.10 that sample of specimen seal is attached separately. But, no such attachment or its copy is found along with copy of the forwarding note. So also, one may not understand what was the specimen seal impressed on the sample bottle, which was sent for chemical analysis. When there is a specific space provided in the forwarding note for affixing the sample seal, and that space is sufficient for affixing the same, the detecting officer was bound to affix it in the space provided, and if it was not done, it should have been explained with sufficient reason. Here, no explanation is forthcoming from PW1 as to why the sample seal was not affixed in the space provided in the forwarding note. Though it was stated in the forwarding note that, the sample of specimen seal was attached separately, copy of no such attachment is there along with copy of the forwarding note.



So, without proper explanation for not affixing the sample seal in the space provided in the forwarding note, it is as good as non affixture of the sample seal in the forwarding note.

11. Absence of proper impression of specimen seal in the mahazar and absence of sample seal in the forwarding note etc. are circumstances to doubt the identity of the sample seized and the sample sent for chemical analysis. Prosecution is duty bound to prove that there was tamper proof despatch of the sample, to show that the sample taken from the contraband seized from the accused, was the sample which reached the hands of the chemical examiner. Since prosecution failed to prove the same, we cannot say that the link evidence was established.

12. In **Sasidharan v. State of Kerala [2007 (1) KLT 720]**, this Court held that, *the prosecution has a duty to prove that it was the sample taken from the contraband liquor seized from the accused which had reached the hands of the chemical examiner in a foolproof condition. Unless the link evidence of actual sampling and sending the same in a sealed packet to the chemical examiner with a specimen seal sent separately for tamper proof despatch, the prosecution cannot be held to have brought home the offence alleged.*



13. In the case on hand, since copy of the specimen seal alleged to have been separately attached was not seen along with copy of the forwarding note, the trial court also did not get the opportunity to verify the specimen seal. As already stated, the specimen seal found inside the writings in the mahazar was not legible, and its nature also was not mentioned in the mahazar.

14. In **Bhaskaran v. State of Kerala [2020 (5) KLT Online 1057]**, this Court held that *'the detecting officer, who has drawn the sample, has to give evidence as to the nature of the seal affixed on the bottle containing the sample. The nature of the seal used shall be mentioned in the seizure mahazar. The specimen of the seal shall be produced in the court. The specimen of the seal shall be provided in the seizure mahazar and also in the forwarding note so as to enable the court to satisfy the genuineness of the sample produced in the court'*.

15. In Ext.P6 forwarding note, the space for writing the name of Excise Guard with whom the sample was sent for chemical analysis, is kept vacant. Along with the forwarding note, copy of the covering letter is not seen produced in order to verify, the date of despatch. Ext.P7, the chemical analysis report, shows that, one Mr.Prasanna Kumar, Excise Guard, brought the sample for analysis



to the chemical examiner's lab. But, the Excise Guard who took the sample to the lab or the thondi clerk who despatched the sample and entrusted the same with the Excise Guard, were not examined by the prosecution.

16. In **Kumaran P. v. State of Kerala and another [2016 (5) KHC 632 : 2016 (4) KLT 718]**, this Court held that *'when the space meant for writing the name of Excise Guard/Preventive Officer with whom sample was sent, is remaining vacant in the forwarding note, the prosecution has to examine the Thondy Clerk of the Court or Excise Guard concerned, to prove tamper proof despatch of the sample to the laboratory. Absence of such examination, enures to the benefit of the accused'*.

17. The decision **Kumaran P [2016 (5) KHC 632]** squarely applies to the case on hand, as the thondi clerk or the Excise Guard were not examined to prove the link evidence as to the sample despatched by the thondi clerk, reached the chemical examiner. As far as the specimen seal is concerned, though Ext.P7 chemical analysis report says that, the seals on the bottle were intact and found tallied with the sample seal provided, we do not know which was the sample seal provided. So, no sanctity could be attached to that statement.



18. To sum up, the absence of specimen seal in the mahazar and forwarding note, non-mentioning of the name of the Excise Guard in the forwarding note, non-examination of the thondi clerk who despatched the sample or the Excise Guard who took the sample to the lab etc. are serious laches which are fatal to the prosecution case. So, it has to be held that, prosecution failed to prove its case beyond any shadow of doubt, and so, the revision petitioner is liable to be acquitted of the offences alleged under Sections 8(1) and 8(2) of the Abkari Act.

In the result, the revision petition is allowed, setting aside the conviction and sentence imposed by the courts below. The revision petitioner is found not guilty of the offences under Sections 8(1) and 8(2) of the Abkari Act, and he is acquitted under Section 235(1) of Cr.P.C. His bail bond is cancelled and he is set at liberty forthwith.

Sd/-

**SOPHY THOMAS
JUDGE**

smp