

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

SATURDAY, THE 21ST DAY OF NOVEMBER 2015/30TH KARTHIKA, 1937

CRL.A.No. 25 of 2006 (C)

**AGAINST THE JUDGMENT IN SC 413/2000 of ADDITIONAL DISTRICT & SESSIONS
COURT (ADHOC) I, KOLLAM DATED 31-12-2005**

APPELLANT(S)/ACCUSED.:

**PRAKASH, S/O.SOMAN,
VIJAYA BHAVAN, KAITHAKKUZHI CHERI
ADICHANALLOOR VILLAGE.**

BY ADV. SRI.C.RAJENDRAN

RESPONDENT(S)/COMPLAINANT.:

**STATE OF KERALA, REPRESENTED BY THE
S.I.OF POLICE, CHATHANOR POLICE STATION
(CRIME NO. 98/99)THROUGH THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 25 of 2006

Dated this the 21st day of November, 2015

J U D G M E N T

The accused faced prosecution for the offences punishable under Sections 55(a) & (i) of the Abkari Act. He was found guilty. Consequently he was convicted and sentenced to suffer rigorous imprisonment for a period of three years and to pay a fine of ₹1 lakh with a default clause.

2. The incident in this case occurred on 01.05.1999. On that day PW5, who was then the Assistant Sub Inspector of Police attached to Chathannoor Police Station, along with his team of officers went on patrol duty at 4.00 p.m.. When they reached near Konnakkode Madannada, they got information that one Prakash was vending in illicit liquor. When they reached the Temple compound, they found a person trying to run away from the compound with a white can. He was followed and intercepted. The can was seized

and it had a capacity of two litres. It was found to contain some sort of a liquid. By taste and smell, it was identified as arrack. The accused was arrested on the spot. 200ml of contraband article was taken as sample. The sample so taken and also the balance contraband article were sealed and labelled at the place of incident itself and the Ext.P1 mahazar was prepared. He returned to the Station and registered crime No. 98/1999 as per Ext.P3 FIR. Subsequent investigation was conducted by PW4. The accused, who was arrested by PW5, was produced before the court by PW4 and he prepared the list of property namely, Ext.P4. The Chemical Analysis Report Ext.P5 was also obtained by him. He recorded statements of witnesses, 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, Kollam under Section 209 of Cr.P.C.

after following the necessary procedures. The said court made over the case to Additional District & Sessions Court (Adhoc) - I, Kollam, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Sections 55(a) & (i) 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 P5 marked. M.O.1 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.

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 considerably influenced by the evidence of PWs 3 and 5, who spoke about the detection, sampling etc., taken along with contemporaneous mahazar Ext.P1 and also the fact that accused was produced promptly before the court, formed the opinion that the prosecution has established the case beyond reasonable doubt and convicted and sentenced the accused as already mentioned.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant contended that several technical aspects have been overlooked by the court below which have a material bearing on the issue involved in the case. First of all, according the learned counsel for the appellant, the Detecting Officer was not competent to detect the offence going by the provisions of the Act and notification issued by the Government. If that be so, according to the learned counsel, all proceedings are *non-est* and cognizance could not have been taken on such a

incompetent proceedings. For the above propositions, the learned counsel relied on the decisions reported in **Unni v. State of Kerala** (2009 (2) KHC 661). It was then pointed out that it is significant to notice that the arrest memo is not seen produced and there is no reason given why it is not so done. Further, the learned counsel pointed out that there is no forwarding note also produced by the prosecution to show that the specimen seal that is claimed to have been affixed on the sample is sent for chemical examination. For the proposition that failure to produce the forwarding note is fatal, 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). Added to this, the learned counsel points out that there is a delay of six days in producing the articles before court. The learned counsel pointed out that may be the court below was carried away by the statements made by PWs 3 and 5. But that alone

may not be sufficient to convict the accused in the light of the above infirmities pointed out.

10. The learned Public Prosecutor tried in vein to support the finding of the court below. It was pointed out that there is no reason to disbelieve PWs 3 and 5 and the detection is proved. Other aspects are technical aspects which need not be given undue significance in the case. It is therefore contended that no grounds are made out to interfere with the conviction and sentence passed by the court below.

11. After having heard the learned counsel for the appellant and the learned Public Prosecutor and after having perused the records, it is extremely difficult to accept the contentions raised by the learned Public Prosecutor. It is no doubt true that PWs 3 and 5 do speak about detection of the offence. Among them, PW5 is the Assistant Sub Inspector of Police at the relevant time and PW3 was Police Constable who had accompanied PW5. They do speak about having

intercepted the accused and seized the can from him and also seized the contraband article. They also speak about the sampling done by PW5. It is true that PWs 3 and 5 do say about the preparation of Ext.P1 mahazar also. It is PW5 who had registered the crime.

12. However, the definition of Abkari Officer contained in the Act has a specific connotation. The 'Abkari Officer' is an officer notified by the Government and they can exercise the powers only within the territory specified therein the notification. As per the notification in force at the relevant time, only Officers of and above the rank of a Sub Inspector are empowered to detect, investigate and lay final charge before court.

13. In the decision reported in **Unni v. State of Kerala** (2009 (2) KHC 661), it was held as follows:

“To prove the guilt of the accused for the possession of the contraband, that is, five litres of arrack in a jerry can, as alleged, the prosecution relied entirely on the evidence of

two Police officers connected with the detection and seizure of the contraband, who were examined as PWs 1 and 2. PW 1, Asst. S.I. Of Police, who detected the crime and seized the contraband, had no authority to do so, is the attack raised by the learned counsel for the accused, relying on the notification of SRO No. 321/1996 and also the decision rendered by this Court in Sabu v. State of Kerala, 2007 (3) KHC 753: 2007 (4) KLT 169. If it was a case of accidental detection without prior information, then it could be stated that any police officer was expected to prevent the commission of any offence and taking the offender into custody. But this was a case, even according to the prosecution, PW 1, the Asst. S.I. of Police received prior information of sale of illicit arrack in the residential building of the accused. He proceeded to that spot, pursuant to that information indicated that he went there to have a raid of the building, and, search the place. When a raid over the residential building for detection of Abkari offence is involved, necessarily and inevitably the mandate covered by S.31 of the Act applies with full force. There is nothing in evidence to show that PW1 complied with the formalities for conducting search over the residential

building of the accused. Immediately on getting information, he rushed to the spot and reaching there, found the accused with a jerry can beside the courtyard of his building, seized the contraband into custody and arrested him, is the prosecution case. As per S.4 of the Abkari Act, the Government had authorised only certain Officers of the State to detect or investigate the offences contemplated under the Abkari Act. The Asst. S.I. of Police, as per the notification issued by the Government, is not authorised nor empowered to detect or investigate the abkari offences. Having regard to the fact that PW 1 went over to the residential building of the accused pursuant to information that sale of illicit arrack was conducted there, prima facie, indicating that he went over to proceed with a search of that building, that too, without complying with the formalities, it follows that whatever acts performed by him pursuant to reaching the spot could not be taken as having been done with the sanction of law. No doubt, illegality or irregularity in a search will not by itself vitiate the evidence collected by the search and there is no bar in relying upon the evidence collected in such search to inculcate the accused. But in the given case, what has come out is that the

prosecution at a later stage had developed a case that at the relevant time, PW 1, the Asst. S.I. of Police was in charge of the police station, and as such he was competent to detect a crime and seize the contraband. PW 1 has no such case when he was examined before the Court. So much so, the assertion of PW 4 that PW 1 at the relevant time was in charge of the S.I. of police since that officer was on leave cannot be given much value. So, there is much force in the submission of the learned counsel for the accused that PW 1 was not an authorised officer competent to detect and investigate an offence under the Abkari Act, and as such the detection made by him was unauthorised. The accused in the given facts is entitled to the benefit of doubt since PW 1 was not empowered to detect and investigate the crime. So much so, it has to be concluded that the conviction and sentence imposed against the accused are liable to be set aside, and I do so. The accused is found not guilty and acquitted of the offence under S. 55 (a) of the Abkari Act. Fine amount, if any, remitted by the accused shall be refunded to him. Appeal is allowed."

14. Any doubt in that regard is dispelled by the above decisions. The decisions have gone on to hold that any act committed by such incompetent officers is *non-est* in law and no valid proceedings can lie on the basis of such invalid acts.

15. Yet another flaw for the prosecution is the non furnishing of the forwarding note which is also significant in the case in the light of the decisions referred to by the learned counsel for the appellant. It is unnecessary to refer to that aspect because the appellant is entitled to succeed on the first point itself. So is the case with the delay which is unexplained.

16. In the light of the fact that the detection and registration of crime is done by an incompetent officer and in the light of the principle laid down in the above decisions, the conviction and sentence cannot stand.

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.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge