

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

CRL.A.No. 35 of 2006 (A)

AGAINST THE JUDGMENT IN SC 487/2001 of ADDL.DISTRICT &
SESSIONS COURT, FAST TRACK (ADHOC), MAVELIKKARA.

APPELLANT(S)/ACCUSED:

RAGHAVAN, AGED 47 YEARS,
S/O. KOCHUKUNJU, JIJY BHAVAN, VETTIYAR MURI,
VETTIYAR, MAVELIKKARA.

BY ADV. SRI.S.PRAKASH

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
08-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

Crl. Appeal No.35 of 2006

Dated this the 8th day of September, 2015.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 8(1), 8(2), 55(a) and 55(g) of the Kerala Abkari Act. He was found guilty on all counts. He was therefore convicted and sentenced to undergo rigorous imprisonment for a period of three years and to pay fine of Rs.1,00,000/- with default sentence of rigorous imprisonment for a further period of one year. The sentence was directed to run concurrently. Set off as per law was allowed.

2. The prosecution case is that on 9.10.2000 at about 12.30 p.m. while P.Ws. 1 and 2 along with others were on patrol duty, they received reliable information regarding the sale of illicit arrack by a person called Raghavan on the eastern side of his house. P.W.1 claims to have reached the

place of occurrence and found the accused with a bottle in his hand. He was intercepted and the bottle was seized. The content was tasted and was found to be illicit arrack. Ext.P1 seizure mahazar was prepared and from the bottle 150 ml. each was taken in two bottles, sealed it and label was affixed on the bottles. The samples were numbered as S1 and S2. He then inspected the vicinity and found a black can containing yellow colour liquid nearby. On examination, it was found to be wash used for making illicit arrack. Samples of the same were taken in two bottles of 750 ml. each and numbered as S3 and S4. On that also seal was affixed. The accused was arrested and Ext.P2 is the arrest memo. He along with the accused and the articles returned to the police station and registered Crime No.177 of 2000 for offences punishable under Sections 8(1), 8(2), 55(a) and 55(g) of the Kerala Abkari Act. Ext.P4 is the FIR. He forwarded the articles seized to the court as per Ext.P6 property list. Investigation was

taken over by the Additional Sub Inspector of Police, Mavelikkara Police Station, P.W.6, who claims to have done it on instructions from the Sub Inspector. He verified the property and records. He took statements of witnesses. He obtained chemical analysis report, namely, Ext.P8 in which it is certified that the samples contain ethyl alcohol. He completed the investigation and laid charge before court.

3. JFCM Court, Mavelikara, before which the final report was laid, took cognizance of the offence and finding that the offences are exclusively triable by a court of Sessions, committed the case to Sessions Court, Alappuzha. The said court made over the case to District and Sessions Court (Ad hoc) Fast Track, Mavelikara for trial and disposal. On receipt of records and on appearance of the accused, the court framed charges for the offences punishable under Sections 8(1), 8(2), 55(a) and 55(g) of the Kerala Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried.

4. The prosecution examined P.Ws.1 to 6 and had Exts. P1 to P8 marked. M.Os. 1 to 4 were identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 of Criminal Procedure Code. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined D.W.1 and marked Ext.D1.

5. The trial court on appreciation of the evidence in the case found the evidence of P.Ws.1 and 2 to be convincing enough to come to the conclusion that the incident had taken place as alleged by the prosecution. Relying on the chemical analysis report, the court below came to the conclusion that the contraband article contains ethyl alcohol. On that basis, the accused was found guilty and convicted and sentenced

him as already mentioned. The said conviction and sentence are assailed in this appeal.

6. Apart from assailing the conviction and sentence on facts and evidence, learned counsel for the appellant raised a question of law for consideration before this Court. P.W.6, according to the learned counsel, is the Additional Sub Inspector attached to Mavelikkara Police Station who had no jurisdiction over Kurathikad Police Station. Learned counsel went on to point out that P.W.6 admits this fact. But he did say that he had conducted the investigation on direction from the Circle Inspector. Learned counsel went on to point out that apart from the fact that no such authorization is seen produced, even if the authorization is produced, it cannot clothe P.W.6 of the authority to do so as the authorised officer can exercise his jurisdiction only within the territorial jurisdiction of his station. For the above proposition, learned counsel relied on the decision reported in Saji @ Kochumon v.

State of Kerala (2010 (3) K.L.T. 471). According to him, the whole proceedings are vitiated and the conviction and sentence cannot stand on the ground that final report had been laid by an incompetent officer.

7. Learned Public Prosecutor tried to support the conviction and sentence by pointing out that major portion of the detection and investigation was over when P.W.6 took over investigation. Only a portion of the investigation had been done by P.W.6 and that is not very material in the case on hand. Therefore, it is contended that it could not be said that the seizure etc were without jurisdiction and only the investigation done by P.W.6 may be said to be tainted. That is not sufficient to upset the conviction and sentence.

8. One wishes one could agree with the learned Public Prosecutor. The Abkari Act defines an Abkari Officer and also deals with the powers of such officer. Such officers are to be appointed by notification and it is significant to

notice that the officer so appointed by notification specifies the territorial limits which they could act under the Act. Even accepting the whole prosecution case, though P.W.6 had seized the contraband articles as alleged by the prosecution, the question remains whether the investigation done by P.W.6 and his filing final report, consequent upon which cognizance was taken by the court below are justified in law. This Court need not trouble itself when the issue is no longer *res integra* in view of the decision cited by the learned counsel for the appellant and also in the light of the decisions reported in *Haridas v. State of Kerala* (2015 (1) K.L.T. 958), and *Narayanankutty v. State of Kerala* (2015(2) K.L.T. SN 18).

9. It needs to be noticed that the detention in this case was on 9.10.2000 and at the relevant time, the S.R.O. that governs the field was S.R.O. 321/1996. This S.R.O. came up for consideration in the decision reported in *Saji @ Kochumon v. State of Kerala* (2010 (3) K.L.T. 471). An

identical situation as in the case on hand was considered in the said decision also. There also the final report was laid by an incompetent officer. The question is whether that by itself is sufficient to vitiate the proceedings and the trial. Therein this Court held as follows:

“5. Sub-section (2) of S.50 of Kerala Abkari Act provides that as soon as investigation into the offence under the Act is completed, the Abkari Officer shall forward to a Magistrate, empowered to take cognizance of the offence on a police report, a report in accordance with sub-s.(2) of S.173 of Code of Criminal Procedure. Abkari Officer is defined under S.3(2), means Commissioner of Excise or any officer or other person lawfully appointed or invested with powers under S.4 or 5. S.4 provide that Government may appoint an officer to control the administration of abkari department by notification in the gazette. Under clause (d) of S.4 Government may by notification in the gazette appoint officers to perform the acts and duties mentioned in Ss.40 to 53 (inclusive) of the Act. S.5 provides that Government may from time to time make rules prescribing the powers and duties under the Act to be exercised and performed by the Abkari Officers of the several classes and regulating the delegation by the Government or by Commissioner of Excise, of any powers conferred by the Act or exercise in respect of

Abkari revenue in any law for the time being in force. S.R.O..321/1996 was issued in exercise of the powers conferred by S.4 of the Act by the State Government. Under the S.R.O. Government of Kerala thereby appointed “all police officers on and above the rank of Sub Inspector of Police in charge of law and order and working in the general executive branch of the police department” to be Abkari Officers under the respective jurisdiction for the purpose of Ss.31 to 35, 38 and 40 to 53 and 59 of the Act and to exercise all the powers and discharge of all the duties conferred in Abkari Officer in the sections aforesaid. Therefore, by notification issued by the Government in exercise of the power provided under S.4, a Sub Inspector of Police in charge of law and order and working in the general executive branch of police department is appointed as Abkari Officer, within his respective jurisdiction to exercise the powers provided thereunder. The respective jurisdiction could only be the jurisdiction of that Sub Inspector. It can only be within the territorial limits of his police station. Therefore, Sub Inspector of Police, Edathwa is the Abkari Officer empowered by the Government to exercise the powers under Ss.31 to 35, 38 and 40 to 53 and 59 of Act. Therefore, the officer who is competent to file a final report as provided under S.50 is only the Abkari Officer namely, Sub Inspector of Police, Edathwa or an officer superior to him.

6.

7. The Division Bench of this court in Varkey v. State of Kerala (1993 (1) KLT 72) following the earlier Division Bench

decision in Prabhakaran v. Excise Circle Inspector (1992 (2) KLT 860) held that when the Excise Inspector who filed the complaint has no authority to file the complaint, court has no jurisdiction to take cognizance or frame charge or try the accused and “the trial which followed the said charge must be treated as non est, because it was done without jurisdiction. The Full Bench of this court in Abdul Rehman v. State of Kerala (1995 (1) KLT 234 (F.B.)) upheld the decision. A later Division Bench in Subash v. State of Kerala (2008 (2) KLT 1047) held that when the Magistrate has no jurisdiction to take cognizance of the case on a report filed by a person other than an Abkari Officer as defined under S.50 of the Abkari Act, there is total lack of jurisdiction for taking cognizance of an offence if cognizance is taken on a final report not submitted by an Abkari Officer and it is not an irregularity covered by Chapter XXXV of Code of Criminal Procedure but a total illegality and therefore, the cognizance taken, trial conducted and the conviction and sentence are all illegal. It is followed by a learned Single Judge in Subrahmaniyan v. State of Kerala (2010 (2) KLT 470). In view of the legal position, it can only be found that cognizance taken on the final report submitted by PW7 the Sub Inspector of Police, Veeyapuram who has no authority to file a final report in the case and the cognizance taken, charge framed and the trial and consequent conviction and sentence awarded against the petitioner are illegal and non est. Hence it can only be set aside.”

10. Again, the issue came up for consideration before this Court in the decision reported in Haridas v. State of Kerala (2015 (1) K.L.T. 958), wherein it was held as follows:

“6. P.W.5 deposed before the court that he had conducted the investigation of the case as directed by the Assistant Excise Commissioner, Pathanamthitta. The Assistant Excise Commissioner had no authority to empower P.W.5 to conduct the investigation of the case. Such power must be conferred on P.W.5 by a notification issued by the Government of Kerala under S.4 of the Abkari Act. In the absence of such a notification, the investigation conducted by P.W.5 cannot be accepted to be a legal one even if it was done as directed by the Assistant Excise Commissioner, Pathanamthitta.

7. Since the investigation of the case had been conducted by an incompetent officer, the court below had no jurisdiction to take cognizance of the offence alleged in the complaint filed based on such investigation. Consequently, the court below could not have framed charge against the appellant as it was without jurisdiction. The trial which followed after framing the charge must be treated as non est in the eye

of law as it was done without jurisdiction . As the trial was conducted without jurisdiction by the court below, it cannot end either in conviction or in acquittal. Therefore, the conviction and sentence passed by the court below against the appellant are liable to be set aside. He is entitled to be discharged in this case.”

11. If any further authority is required in the matter, it is furnished by the decision in Narayanankutty v. State of Kerala (2015(2) K.L.T. SN 18), wherein it was held as follows:

“In the light of the provisions of S.R.O. No. 321 of 1996 as interpreted by this Court in this ruling (2010(3) K.L.T. 471), a Sub Inspector of Police authorised to act as Abkari Officer can exercise his jurisdiction only, within the territorial limits of his police station. Therefore, P.W.6, the Sub Inspector of Police, Hemambika Nagar Police Station, had exceeded the limits of his jurisdiction by investigating the case on hand which was within the territorial limits of Kongad Police Station.”

12. All the above decisions conclusively hold that investigation done by an incompetent officer and the final

report laid by him cannot be taken note of. The decisions went on to hold that the officer appointed under the Act as per the notification referred to above can act only within the territorial limits prescribed under the Act and when the statute creates a prohibition, the authority cannot clothe the officer with power to go outside his jurisdiction with regard to investigation and final report.

13. Therefore, it is to be held that the entire proceedings is vitiated and the trial is also vitiated.

In the result, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and the accused shall stand acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

sb.

P. BHAVADASAN,
JUDGE