

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 7TH DAY OF SEPTEMBER 2015/16TH BHADRA, 1937

CRL.A.No. 121 of 2006 ()

**AGAINST THE JUDGMENT IN SC 308/2004 of ADDITIONAL SESSIONS COURT, FAST
TRACK - III, TRIVANDRUM DATED 21-12-2005**

**AGAINST THE ORDER IN CP 6/2003 OF JUDICIAL FIRST CLASS MAGISTRATE -II,
TRIVANDRUM**

APPELLANT(S)/ACCUSED 1 & 3:

- 1. SHIBU, S/O.JAYARAJAN,
PUTHIYIDATHANVILA VEEDU, VAZHAPPANA, KIZHAKKUMKARA
KULIUMURI MURI, ATTIPRA VILLAGE.**
- 2. RATHEESH BABU, S/O.SURESH,
CHANDRAMANGALAM VEEDU, SOUTH OF KULATHOOR MARKET
ATTIPRA VILLAGE.**

BY ADV. SRI.M.SREEKUMAR

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 121 of 2006

Dated this the 07th day of September, 2015

J U D G M E N T

Four persons were sought to be prosecuted for the offences punishable under Sections 55(a) and 55(g) of the Abkari Act. Among them, the second accused absconded and the trial against him could not proceed. The 4th accused was found not guilty of the charges levelled against him and was therefore acquitted. Accused Nos. 1 and 3 were found guilty of the offences alleged against them and they were directed to undergo simple imprisonment for a period of one year and to pay a fine of ₹ 1 lakh each with a default clause of three months. Set off as per law was allowed.

2. The incident is alleged to have taken place on 21.10.2002. While PW3 along with his colleagues were conducting patrol duty, they received reliable information that in the property of one Krishnan Nair, four persons were engaged in manufacture of illicit arrack. They reached the

spot and found four persons there. Seeing the Police, one of them ran away and PW3 and party intercepted the other three persons. A tank of 500 litre capacity containing 400 litre of wash was unearthed and about 20 mts away from that tank, another tank of the same capacity containing 400 litre of wash was also unearthed. Samples were taken from the tank and balance quantity was destroyed. Materials for manufacturing illicit arrack were also seized. The investigating officer prepared mahazar and sent the samples for chemical examination. After returning to the Police Station, PW3 prepared Ext.P2 FIR, Ext.P3 property list and Ext.P4 forwarding note. Exts.P5 and P7 are the arrest memo. PW4 conducted investigation. Ext.P9 chemical analysis report was obtained which disclosed that the samples contained ethyl alcohol. After completing investigation, charge was laid before court.

3. Cognizance of the offence was taken by the Judicial First Class Magistrate Court - II. Thiruvananthapuram, who on

finding that the offences are exclusively triable by a Court of Sessions, committed the case to Sessions Court, Thiruvananthapuram under Section 209 of Cr.P.C. The said court made over the case to Additional Sessions Court (Fast Track - III), Thiruvananthapuram for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused, framed charges for the offences punishable under Sections 55(a) and 55(g) of the Abkari Act, to which the accused pleaded not guilty and claimed to be tried. The prosecution therefore examined PWs 1 to 4 and had Exts. P1 to P10 marked. MOs 1 and 3 were got identified and marked.

5. After the close of prosecution evidence, the accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent.

6. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. They chose to adduce no evidence.

7. The court below, on analysis of evidence, came to the conclusion that the offences had been established as against the first and the third accused and therefore, convicted and sentenced them as already mentioned. The 4th accused, as stated above, was acquitted. The said conviction and sentence are assailed in this appeal.

8. The learned counsel appearing for the appellants contended that this appeal will have to be succeeded on a very short ground. Staying clear of the facts of the case, PW4, who laid the final report, is incompetent to do so as he is not an officer authorized by the Abkari Act to lay final report. The learned counsel relied on the definition of Abkari Officer as contained in Section 3(2) of the Abkari Act and also placed considerable reliance on Sections 4 and 5 of Abkari Act. Reliance was also placed on Section 70 of the

Abkari Act. The learned counsel brought to the notice of this Court to the notification issued under the Act as S.R.O.No.321/1996 and highlighting that PW4 was incompetent to lay the final report and if that be so, cognizance taken on such a report is invalid and the whole trial is vitiated. For the above principle the learned counsel relied on the decision reported in **Subash v. State of Kerala** (2008 (2) KLT 1047), **Sasidharan v. State of Kerala**(2012 (2) KLT 392), **Subrahmaniyan v. State of Kerala** (2010 (2) KLT 470).

9. It is not necessary to go into the facts of the case for the simple reason that the appellants will have to succeed on the ground urged as above.

10. Section 3(2) of the Abkari Act defines an Abkari Officer as follows:

“(2) **Abkari Officer**:--“Abkari Officer” means the Commissioner of Excise or any officer or other person lawfully appointed or invested with powers under Sections 4 and 5.”

11. Sections 4 and 5 of the Abkari Act read as follows:

“4. The Government may, by notification in the Gazette:--

(a) **The Government may appoint an officer to control the administration of the Abkari Department:-** Appoint an officer, who shall be styled the Commissioner of Excise and who shall, subject to the general control of the Government have Control of the administration of the Abkari Department and of the collection of the Abkari Revenue or of both;

(b) **May appoint any person other than the Commissioner to perform all or any of his duties:--** Appoint any person other than the Commissioner of Excise to exercise all or any of the powers and to perform all or any of the duties of the Commissioner of Excise, subject to the control of the Government.

(c) **May withdraw Abkari powers from commissioner or other officer appointed under clause (a) or clause (b):-** Withdraw from the Commissioner or other officer appointed under clause (a) or clause (b) any or all of his powers in respect of the Abkari Revenue;

(d) **May appoint officer to take action under Sections 40 to 53:-** Appoint officers to perform the acts and duties mentioned in Sections

40 to 53 inclusive of this Act;

(e) And subordinate officers:- Appoint subordinate officers of such classes and with such designations, powers and duties under this Act as the Government may think fit.

(f) May appoint any Officer of Government or persons to act as above:- Order that all or any of the powers and duties assigned to any officer under clauses (d) and (e) of this section shall be exercised and performed by any Officer of Government or any person.

(g) Delegate to any Abkari Officer all or any of their powers under this Act;

5. The Government may, from time to time, make rules:- (1) Prescribing the powers and duties under this Act to be exercised and performed by Abkari Officers of the several classes; and

(2) regulating the delegation by the Government or by the Commissioner of Excise of any powers conferred by this Act or exercised in respect of Abkari Revenue under any law for the time being in force.”

12. Section 70 of the Abkari Act reads as follows:

“70. The conferring of powers and making of appointments:--All notification and orders conferring powers, imposing duties and making appointments under this Act may

respectively refer to the persons concerned specially by name or in virtue of their office or to classes of officials generally by their official titles, and all courts shall take judicial notice thereof.”

13. From a reading of the above provisions, it becomes evident that only persons who are notified under the Act can perform the functions under the Act. It is felt appropriate to refer to the relevant notification in this context. S.R.O.No.321/1996 reads as follows:

“S.R.O.No.321/1996.- In exercise of the powers conferred by section 4 of the Abkari Act, I of 1077 the Government of Kerala hereby appoint all police officers of 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 and all Revenue Officers of and above the rank of Deputy Collectors to be Abkari Officers under their respective Jurisdiction for the purposes of Sections 31, 32, 33, 34, 35, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 59 of the Act and to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers, in the sections aforesaid.”

14. The above notification was in force at the relevant time i.e. at the time of detection of the offence in 2002.

15. One may now refer to the evidence of PW4. He deposed that he was the Assistant Sub Inspector of Police at Thumba Police Station and he said that it was he who had filed final report before court. That means, it was the Assistant Sub Inspector of Police who had filed the final report.

16. The question as to whether the Assistant Sub Inspector or Assistant Excise Officers could discharge the functions of Akbari Officers was considered in the decisions referred to above. Of particular significance is the decision reported in **Subash v. State of Kerala** (2008 (2) KLT 1047). In the said decision, the question as to whether cognizance could be taken on the final report laid by the Assistant Sub Inspector was considered. It was answered as follows:

“6. Hence while dealing with abkari offence, the special provisions made in the

Abkari Act should be strictly followed. Learned Government Pleader cited decision of a Division Bench of this Court in *Hassan v. State of Kerala*, 1989 (2) KLT 58 wherein it was held that investigation by Assistant Sub Inspector of Police will not vitiate the trial. It was also stated that there was a notification by the Government empowering the Assistant Sub Inspector to exercise all powers of the Sub Inspector. The above notification is published in 1973 as G.O. MS 217/73. Coupled with S.13(2) of the Interpretation and General Clauses Act, the Assistant Sub Inspector in this case be specifically authorized to do the act of Sub Inspector. But there is no such notification issued under the Abkari Act. None of the provisions in the Abkari Act gives power to any authority to issue such notification. Even Cr.P.C. does not contain any such provision conferring on the Government power to issue notification conferring power of an officer to any other inferior officer under S.36, when only a Superior Officer is to exercise power of the officer in charge of a police station. The Allahabad High Court in *Ram Pargas v. Emperor*, AIR 1948 All. 129, while interpreting S.19 of the General Clauses Act held as follows:-

“The subordinate entering into the real functions of his superior by authority of law is one thing, but the subordinate using the powers vested in the superior without a legal sanction or delegated of authority by the superior is quite another. The section protects the former but not the latter incident.

S.7 of the Extradition Act conferred the power of issuing a warrant for extradition proceedings on the political agent, but when a warrant for extradition was issued not by the political agent but by another officer subordinate to the political agent, and there was no provision in the Act for delegation of powers by the political agent to any other functionary working under him, it was held by the High Court of Allahabad that the warrant thus issued by an officer other than the political agent was illegal.”

Further when it specifically states that Abkari Officer must be a police officer above the rank of Sub Inspector and that a police officer below the rank of Sub Inspector of Police cannot be termed as the Abkari Officer. Apart from the above, the learned Public Prosecutor was not able to produce the notification mentioned in *Hassan's* case. Further, we also note that in *Hassan's* case a Divisions Bench of this Court was considering the question regarding Edible Oil Seeds, Edible Oils, Vanaspati and Baby Food Dealers Licensing Order, 1975. There, Sub Inspector was authorized to conduct search and investigation. But there was no provision like filing of a report before the Court by an officer below the rank of S.I. of Police. Irregularity in investigation is considered under S.527 as held by the Apex Court in *H.N. Rishbud and Inder*

Singh v. State of Delhi, AIR 1955 SC 196. Irregularity in investigation is different from lack of power to initiate prosecution. S.50 of the Abkari Act says that as soon as the investigation into the offences under this Act is completed, the Abkari Officer shall forward to the 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, 1973. The Assistant Sub Inspector in this case was not even holding charge of Sub Inspector or officiating as Sub Inspector at the time of filing the report. Therefore S.13(2) of the Interpretation and General Clauses Act, 1125 also will not enable the Asst. Sub Inspector of Police as an officer of the rank of Sub Inspector of Police, not below the rank of Sub Inspector of Police mentioned in the Statute. It was also contended by learned counsel for the appellant that power to conduct investigation and power to prosecute are different powers as held in *Raj Kumar Karwal v. Union of India and Others* ((1990) 2 SCC 409). Mere illegality or irregularity of investigation will not vitiate the trial. It is a well settled principle that a defect or illegality in investigation however serious has no direct bearing on the competence or procedure

relating to cognizance or trial. But that is different from taking cognizance of the offence on the basis of a report by an officer not authorized under law. The Magistrate has no power to take out cognizance of the case on the report of an officer other than an Abkari Officer and it will go to the root of the matter. In this connection we refer to paragraph 22 page 300 in *A.R. Antulay's* case (Supra). In this connection, we also refer to the decision of the Apex Court in *H.N. Rishbud and Inder Singh v. State of Delhi* (supra). Learned counsel also referred to the decision in *Varkey v. State of Kerala* (1993 (1) KLT 72). In that case, since the Excise Inspector who filed the complaint having no authority to file such complaint, a Division Bench of this Court held that the trial was vitiated. A Full Bench of this Court in *State of Kerala v. V.P. Enadeen* (1971 KLT 19 = AIR 1971 Ker. 193) held that a Magistrate has no jurisdiction to take cognizance of an offence upon a complaint filed by a person not authorized to institute prosecution under S.28 (1) of Prevention of Food Adulteration Act and the Magistrate cannot either acquit or convict the accused as he cannot take cognizance of the offence on the report filed by a person not authorized to institute prosecution. In para.3 of

the above decision it is held as follows:

“3. We might at the outset observe that, although the learned Magistrate called it an acquittal, what he actually did was to discharge the accused from the case and not acquit him. If, as he thought, the complainant was not a person authorized to institute a prosecution under S.20(1) of the Act, the Magistrate had no jurisdiction to take cognizance of the case. He could no more acquit than he could convict. But, however, that might be, since the learned Magistrate purported to acquit the accused, we should think that S.417 of the Criminal Procedure Code is attracted. The question is, however, only academic since even if S.417 is not attracted because there is no acquittal. S.439 would, and, *ex hypothesi*, the bar in sub-s.(4) thereof against the conversion of a finding of acquittal into one of conviction would not apply.”

7. In *Vikraman v. State of Kerala* (2007 (1) KLT 1010) it was held that the mere fact that Assistant Sub Inspector conducted later part of investigation and laid charge will not vitiate the trial. We are of the opinion that on the plain reading of S.50 of the Abkari Act, the Magistrate has no jurisdiction to take cognizance of the case as the report was filed by a person other than an Abkari Officer. Hence, *Vikraman's* case cannot be acceptable as an authoritative decision that despite the mandate in S.50 Magistrate can take cognizance on a report filed by a person other than an Abkari officer. In this connection we also refer to S.199(1) and S.461(d) of Cr.P.C. An officer other than an Abkari Officer as defined

in the Act cannot file a report even if investigation is conducted by an Abkari Officer. When a report by a specifically empowered officer is a condition precedent for taking cognizance of an offence, trial on a report by Assistant Sub Inspector of Police is void. In this connection we refer to the following decisions:- *Harikrishna v. State of Haryana* (1974 CrL L.J. 112), *M/s. Lachman Singh and brothers and Another v. The Labour and Enforcement Officer (Central) and Another* (1986 (3) Crime 17 A.P.). Lack of total jurisdiction for taking cognizance of an offence other than specially empowered officer is not an irregularity covered under Chapter XXXV of Cr.P.C. According to the counsel for the appellant, it is an irregularity also vitiating the proceedings in view of S.461 (k) of Cr.P.C. Here there is a total illegality in taking cognizance as the report filed by an officer who is not empowered to do so. Even when the minimum fine to be imposed for the offence charged is Rs.1,00,000/- and punishment is a very hardship, we cannot understand why Sub Inspector or investigating officer specifically authorized as Abkari Officer was not able to file report. Hence, we are of the view that since the report was filed not by an Abkari officer, the cognizance of offence taken

by the Magistrate was illegal and the Magistrate ought to have discharged the accused. Hence, the entire proceedings from taking cognizance trial and sentence etc. are illegal”

17. The issue as to the competency of Assistant Excise Inspector could exercise the function was considered in the decision reported in **Sasidharan v. State of Kerala**(2012 (2) KLT 392) wherein, it was held as follows:

“17. But it is argued by the learned counsel for the appellant that as per S.70 of the Act, all notification and orders conferring powers, imposing duties and making appointments under the Act may respectively refer to the persons concerned specially by name or in virtue of their office or to classes of officials generally by the official titles. It is argued since as per the notification in S.R.O. No. 234/1967 it was specifically mentioned that the acts and duties mentioned in Sections 40 to 53 of the Act are to be performed by the officer not below the rank of Excise Inspector and since PW2 was only an Assistant Excise Inspector, the arrest of the accused, the seizure of the articles and sampling of the

articles done by him were without jurisdiction. Since the illegality annexed to the main parts i.e., the arrest, seizure and sampling, that will go to the root of the matter and hence the cognizance taken and the trial conducted based on such a report are vitiated. Though as per S.R.O. No.234/1967, Preventive Officers were invested with the powers to be exercised under Sections 31, 32, 35, 38, 39, 53 and 59, since the preventive officers are officers specifically named as per the aforesaid notification, the arrest of the accused and seizure of the articles and the production of the accused and property before the Magistrate by the Assistant Excise Inspector who's not a named or notified officer, are without jurisdiction as has been held by this Court in *Subrahmaniyan v State of Kerala* (2010 (2) KLT 470).

18. Smt. Jasmine, the learned Public Prosecutor submits that the contention that even thereafter no notification was issued authorising and empowering the Assistant Excise Inspector to perform the duties under the Act cannot be countenanced in view of the subsequent notification- S.R.O. No.361/2009 dated 8.5.2009 as per which the Assistant Excise Inspector of the Range were empowered

to exercise all the powers and to perform all the duties of the Excise Inspectors subject to the control of the Excise Inspector. It was further made clear that all officers of the Excise Department not below the rank of Assistant Excise Inspector were empowered to perform the acts and duties mentioned in Sections 40 to 53 (both inclusive) of the Act. They were also empowered to exercise the duties under Sections 31, 32, 34, 35, 38, 39 and 53 of the Act and to exercise all the powers conferred and to perform all the duties assigned on Abkari Officers under the sections aforesaid. But that notification cannot come to the rescue of the prosecution in this case since this notification S.R.O. No. 361/2009 came into force only with effect from 8.5.2009 whereas the offence in this case was detected on 19.6.2001. The incident in the case on hand took place long prior to the aforesaid notification. Hence, following the decision in *Subrahmaniyan's* case, it has to be held that PW2, the Assistant Excise Inspector was not empowered under the Act as it stood then, to perform the duties under the aforestated provisions. Therefore, only on this ground, this Criminal Appeal is allowed. But it is made clear that on and after 8.5.2009, the arrest of the

accused, seizure of contraband, sampling, sealing and production of the accused and properties before Court, done by the Assistant Excise Inspector, would be well within his powers.”

18. It will not be out of place to refer to the decision reported in **Subrahmaniyan v. State of Kerala** (2010 (2) KLT 470) wherein, it was held as follows:

“In view of Ss.3(2) and 3(6), there must be officers termed as “Abkari Officers” and “Abkari Inspectors” and especially, in view of S.4(d), officers shall be appointed to perform the acts and duties mentioned in Ss.40 to 53 inclusive of the Abkari Act. Going by various provisions of the Act, it can be seen that wide powers are given to “Abkari Officers” and “Abkari Inspectors”. Besides that, S.50 is more particular that, only “report of Abkari Officer” gives jurisdiction to a competent Magistrate and only on such report, the Magistrate can take cognizance. In the present case, PW1 who was working as an Assistant Excise Inspector was not given powers under the above provisions to effect seizure and investigation. He was also not competent due to absence of conferment of powers under S.50, to file

“Report” or complaint. In the present case, the above provisions, and other materials referred to above would show that PW1 who was working as “Assistant Excise Inspector” was not a competent and authorised officer as contemplated by the provisions of the Abkari Act, especially, S.4 (d) and S.70 of the Act and therefore, the seizure and arrest made by PW1 was without authorization and jurisdiction.”

19. Further in all these decisions, it was held that though the trial had been completed and sentence had been ordered, for the want of jurisdiction to file final report and conduct investigation etc., their convictions are to set aside and acquitted. But, in **Subash's** case (supra), the decision rendered by a Division Bench of this Court had occasion to observe as follows:-

“8. Learned Government Pleader submitted that there are may other similar cases where actually report was filed by the Assistant Sub Inspector of Police and trial has not yet commenced. In such cases, Magistrate can discharge the accused and return the defective report and defects can be cured and

Abkari Officer as defined in the Act can file report according to law.”

20. Admittedly, in the case on hand, the final report has been laid by the Assistant Sub Inspector of Police, who is incompetent to do so. If that be so, such a report is *non est* and cognizance could not have been taken on such a report.

21. The next question that arises for consideration is whether the procedure that is made mention of in **Subash's** case (*supra*) needs to be followed. The incident is of the year 2002 and we are in 2015. 13 years have elapsed. Now to observe that the report may be returned on a memo filed by the incompetent officer seems to be unwarranted and unjustified. Much time has passed after the incident.

For the above reasons, this appeal is allowed. Conviction and sentence imposed by the court below on accused Nos. 1 and 3 for the offences punishable under Sections 55(a) and 55 (g) are set aside and they are acquitted of the charges levelled against them. If they have

paid the fine amount, the same shall be refunded to them.

Sd/-
P.BHAVADASAN
JUDGE

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//True copy//

P.A. to Judge