

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 8TH DAY OF DECEMBER 2015/17TH AGRAHAYANA, 1937

CRL.A.No. 138 of 2006 ()

AGAINST THE JUDGMENT IN SC 1058/2000 of ADDL. SESSIONS COURT FAST TRACK
(ADHOC)-II, TRIVANDRUM DATED 28-12-2005

AGAINST THE ORDER/JUDGMENT IN CP 122/2000 of JUDICIAL FIRST CLASS MAGISTRATE
COURT-I,NEDUMANGAD

APPELLANT/ACCUSED:

RETNAMMA, D/O.CHELLAMMA,
PARAYAR KONATHU PUTHEN VEEDU, KOKKOTTELA
KOTTAKKAKOM MURI, ARYANAD VILLAGE.

BY ADVS.SRI.T.A.UNNIKRISHNAN
SRI.K.SATHEESH KUMAR

RESPONDENT/COMPLAINANT:

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

R BY PUBLIC PROSECUTOR SMT.LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-12-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AV

P.BHAVADASAN, J.

Crl.Appeal No.138 of 2006

Dated this the 8th day of December, 2015

JUDGMENT

Having faced prosecution for the offences punishable under Sections 58, 55(a), (g) and (h) of the Abkari Act, the accused, after trial, was found guilty of the offences punishable under Sections 55 (b) and (g) of the Act. She was convicted and sentenced to suffer rigorous imprisonment for a period of 2½ years each and to pay a fine of ₹1,00,000/- each, with a default clause of simple imprisonment for a further period of three months each.

2. The prosecution story reads thus :

On 23.03.2000, PW3, the Assistant Sub Inspector of Police attached to Aryanadu Police Station, who was in charge in the absence of the Sub Inspector in the Station, received reliable information by about 12'O Clock in the noon that one Retnamma Velayudhan is engaged in distillation of liquor in her house. They left the station and reached the house of Retnamma. Retnamma then emptied two pots and dropped one pot. She used wash to douse the fire in the burner. A can was found nearby which contained some liquid. By taste and smell, they identified the article as arrack. The materials used for distillation, the can and the contraband article were seized and Ext.P1 mahazar was prepared. The accused was arrested with the aid of a Woman Police Constable.

Thereafter, he returned to the station along with the accused, the contraband article and the documents, and registered crime as per Ext.P2 F.I.R. He thereafter entrusted the accused, the articles and the documents to the S.I. PW5 conducted investigation of the case. He would say that, on the night of 23.03.2000 when he came to the station, the accused, the contraband articles and documents were produced before him and he in turn had the accused produced before the learned Magistrate. Ext.P3 is the property list. Ext.P4 is the copy of forwarding note. The chemical analysis report is Ext.P5. He completed the investigation and laid charge before the court.

3. The court, before which the 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, Thiruvananthapuram under Section 209 Cr.P.C., after following the necessary procedures. The Sessions Court, Thiruvananthapuram made over the case to the Additional Sessions Court, Fast Track Court (Adhoc) No.II for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused, framed charge for the offences already made mention of, to which the accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs.1 to 5 examined and Exts.P1 to P5 marked. MOs.1 to 6 were identified and marked.

6. After the close of the prosecution evidence the accused was

questioned under Section 313 of Cr.P.C. She denied all the incriminating materials brought out in evidence and maintained that she is innocent. Finding that the accused could not be acquitted under Section 232 of Cr.P.C., she was asked to enter on her defence. She chose to adduce no evidence.

7. On appreciation of the evidence of PWs.2, 3 and 4 taken along with Ext.P1 mahazar, the court below found that the prosecution has succeeded in establishing the guilt of the accused and relying on the chemical analysis report Ext.P5, reached the conclusion that the offence has been committed by the accused and therefore, conviction and sentence followed.

8. Assailing the conviction and sentence, the learned counsel appearing for the appellant contended that this appeal will have to succeed on a short ground. It is an indisputable fact that, the detection of the offence was done by PW3, who was only an Asst. Sub Inspector of Police at the relevant time. The Asst. Sub Inspector of Police did not have the power of an Abkari officer at that time, since he was not an authorised officer as required under Section 5A. If the search, seizure, etc. are done by an incompetent officer that holds a defect which paves ground for the acquittal of the accused. For the above proposition, the learned counsel relied on the decision reported in ***Subash v. State of Kerala [2008 (2) KHC 703] & Joy v. State of Kerala [2010 (3) KLT 20]***. The learned counsel

contended that, the principle laid down in the above decisions squarely applies to the facts of this case also.

9. The learned Public Prosecutor did not dispute the fact that PW3, the detecting officer was only an Assistant Sub Inspector at the relevant time. The powers under Section 40 to 50 could be exercised only by those officers who were notified under the Abkari Act. As on the relevant date, the notification that governed the field was one which was issued in 1967. As per that notification, only a person of the rank of Sub Inspector of Police or above were the designated officers. If that be so, on the date of detection of the offences in this case, PW3 was an incompetent and unauthorised person to detect the offence.

10. In the decision reported in ***Subash v. State of Kerala [2008 (2) KHC 703]***, it was held 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.”

11. The above decision leads to a conclusion that the act committed by an incompetent officer cannot be taken note of as he is not entitled to do so as per the provisions of the Act. If that be so, the detection of the offence in this case by PW3, fall within the ambit of the decisions referred to above. There is no reason as to why the principle laid down in the above decisions cannot be applied to the facts of the present case. Being an incompetent officer, all his actions are invalid in law and prosecution based on such proceedings cannot survive.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the charges levelled against her. She stands acquitted of the offences. Her bail bond shall stand cancelled and she is set at liberty.

Sd/-
P.BHAVADASAN, JUDGE

AV

/True Copy/

P.A to Judge