

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 7TH DAY OF OCTOBER 2015/15TH ASWINA, 1937

CRL.A.No. 209 of 2006 ()

**AGAINST THE JUDGMENT IN SC 478/2001 of ADDITIONAL SESSIONS COURT FAST
TRACK (ADHOC)-II, TRIVANDRUM DATED 17-01-2006**

IN CP 245/2000 OF JUDICIAL FIRST CLASS MAGISTRATE-I,NEDUMANGADU

APPELLANT(S)/ACCUSED::

**BABU, S/O. APPU,
G.G. VILASOM VEEDU, PALUVALLY, PALODE VILLAGE.**

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

RESPONDENT(S)/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 209 of 2006

Dated this the 07th day of October, 2015

J U D G M E N T

The accused, who was prosecuted for the offences punishable under Sections 58(8) and 55 (a) and (h) of the Abkari Act, was found guilty. He was convicted and sentenced to suffer rigorous imprisonment for a period of one year and to pay a fine of ₹1 lakh with a default clause of three months.

2. On 22.10.2000 while PW4, the Assistant Sub Inspector of Police attached to Palode Police Station along with PW3 and other officers had gone on patrol duty at about 11.30 a.m., he received information about the accused vending in illicit liquor. When they reached the place of occurrence, they saw the accused standing there with a plastic bag in his hand. The plastic bag was seized and it was found to contain two bottles having a capacity of 750 ml and 150 ml containing some liquid. By taste and

smell, it was recognized as arrack. PW4 prepared Ext.P1 mahazar. He returned to the Police Station along with the accused and the seized articles and registered crime as per Ext.P2 FIR. PW5 took over investigation. He says that the accused was produced before court. The property list by which property was forwarded is Ext.P3. The forwarding note prepared by him for sending the samples for chemical analysis is Ext.P4 and the report so received is Ext.P5. He recorded statement 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 on finding that the offences are exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Thiruvananthapuram. The said court made over the case to Additional Sessions Court, Fast Track (Adhoc)-II, Thiruvananthapuram for trial and disposal.

4. The latter court on appearance of the accused and receipt of records framed charges for the offences already made mention of, to which 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. MOs 1 to 3 were got identified and marked.

5. After the close of the 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.

6. On 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.

7. Mainly based on the evidence furnished by PWs 1 to 4, the court below came to the conclusion that the offences have been made out and found the accused guilty. Conviction and sentence as already mentioned followed.

8. The learned counsel for the appellant assailing the conviction and sentence pointed out that the conviction cannot stand for more than one reason. The most significant aspect, according learned counsel, is that an incompetent officer had detected an offence contrary to stipulation under the Act and that itself is sufficient to vitiate the proceedings. Admittedly, PW4 was only an Assistant Sub Inspector of Police, Palode who had no authority to seize the articles as per provisions of the Abkari Act. Further, it is pointed out that neither PW4 nor PW3 speak about any samples have been taken from the spot. PW5, the Investigating Officer simply says that sample was taken and sent for chemical analysis. From which place the sample was taken and where it was sealed or labelled etc., are not spoken to by any of the official witnesses, namely, PWs 3, 4 and 5. To crown it all, the learned counsel pointed out that sample was produced one month after the detection. There is no explanation for the delay. These infirmities, according

to the learned counsel for the appellant, are sufficient to vitiate the order of the court below.

9. The learned Public Prosecutor pointed out that in the light of the evidence furnished by PWs 1 to 4 taken along with Ext.P1 mahazar, there can be little doubt that the article was seized from the possession of the accused and the court below was therefore justified in coming to the conclusion that the offences have been made out. In short the contentions is that no grounds are made out to interfere with the conviction and sentence passed by the court below.

10. It is not in dispute that PW4 was the then Assistant Sub Inspector of Police attached to Palode Police Station. He claims that he was in charge of the Police Station at the relevant time. No documents are seen produced by PW4 to show that he was the Station House Officer. Going by the provisions of Abkari Act, only an officer of the rank of Sub Inspector and above alone are competent to detect, investigate and file charge before court. It is no doubt true

that PW5 says that he had gone outside the station in the morning and PW4 was in charge and PW5 returned only by 2.00 p.m.. Even assuming it to be so, since there is a notification which specifies the officers who can detect and investigate and delegation of powers cannot be accepted. If that be so, the learned counsel for the appellant is justified in his submission that the detection is bad.

11. In the decision reported in **Sabu v. State of Kerala** (2007 (4) KLT 169), it was held as follows:

“9. Yet another point to be considered is regarding the contention of the learned counsel appearing for the appellant that PW.3 being an Assistant Sub Inspector of Police during the relevant time was not an authorized officer to detect or investigate the offence under the provisions of the Abkari Act. As per S.4 of the Abkari Act the Government of Kerala is empowered to authorize an officer of the State to detect or investigate an offence contemplated under the provisions of the Abkari Act. Sub-s.(2) of S.3 of the Abkari Act defines an Abkari Officer as follows:

“Abkari Officer:- 'Abkari Officer' means the Commissioner of Excise or any officer or other person lawfully appointed or invested with powers under Ss. 4 or 5.”

10. The Government of Kerala had notified that all police officers above the rank of Sub Inspector of Police is empowered to discharge all the duties conferred on an Abkari Officer. In this context, learned counsel for the appellant brought to the notice of this Court G.O.(P)No.69/967TD dated 29.3.1996 (S.R.O. No.321/96). The said notification reads as follows:

“In exercise of the powers conferred by S.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 Ss. 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.”

11. In the light of the above provisions, this Court is of the view that the learned counsel appearing for the appellant was

justified in taking the contention that PW.3 was not empowered to detect or investigate the offence. If so, the evidence of PW.3 corroborated by the evidence of PWs.4 and 5 would not prove any case against the appellant. PW.3 had not stated before the Court below that he was in charge of the police station and hence he was empowered to investigate the crime. Even if he was empowered as per the provisions of S.2(o) Cr.P.C., he cannot exercise the power conferred on an Abkari Officer. On this score also, the judgment of the Trial Court has to be set aside.”

12. The same issue was considered in the decision reported in **Subash v. State of Kerala** (2008 (2) KLT 1047).

13. In the light of the above decisions and the principles laid down therein, PW4 was incompetent to detect the offence and to take further proceedings in the matter though PW5 conducted the investigation and laid final charge, the initial steps taken by PW4 can have no legal sanction.

14. Apart from the above fact, it is surprising to note that PWs 3 and 4 do not speak about taking sample from the place of detection nor do they say that any one of them had taken a sample from any place. PW2, the Investigating Officer is also silent regarding the time and place from where the sample was taken and there is no evidence to show that sample was taken properly and it was labelled and sealed as is required under law. One fact becomes clear from Ext.P3, which is the property list produced before court. From the property list, it is seen that the samples were not produced on the day on which the property was submitted before court. As there is no evidence regarding the proper sampling, it could not be said that even if the article is seized from the possession of the accused is a contraband article. To crown it all is the delay in filing the forwarding note. It was filed on 10.11.2000 while the detection is on 22.10.2000. No reasonable explanation is offered for the delay in sending the forwarding note. This Court had

occasion to consider such a situation in the decision reported in **Ramankutty v. Excise Inspector, Chelannur Range** (2013 (3) KHC 308). In the said decision, it was held that unexplained delay in such cases is fatal to the prosecution. In the light of the above infirmities in detection, sampling and production before the court, it is unnecessary to go into other facts of the case. On the basis of the above decisions and principles laid down therein, this appeal is only to be allowed.

In the result, 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 him and he is acquitted of all the charges. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge