

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. 274 of 2006 ()

AGAINST THE JUDGMENT IN SC 443/2005 of ADDL. DISTRICT &
SESSIONS COURT, VADAKARA.

APPELLANT(S)/ACCUSED:

BALAN, S/O. KORUMBAN,
PADINJAREKKATTIL, EDACHERI AMSOM, KACHERI DESOM.

BY ADVS.SRI.V.V.NANDAGOPAL NAMBIAR
SRI.T.P.PRADEEP

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY STATE PROSECUTOR
HIGH COURT OF KERALA (CR.NO.171/03 OF
EDACHARI POLICE STATION).

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. 274 of 2006

Dated this the 8th day of September, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Sections 55(a) and 8(2) of the Abkari Act. He was found guilty of the offence punishable under Section 8 (2) of the Act. He was therefore convicted and sentenced to suffer rigorous imprisonment for one and half years and to pay fine of Rs.1,00,000/–, in default, to undergo rigorous imprisonment for six months.

2. The prosecution case is that P.W.1, the Additional Sub Inspector of Police, Edachery and P.W.2 Police Constable had got reliable information that illicit arrack was being possessed and sold by a person, and they reached the house of the accused at 6 p.m. on 14.6.2003 and conducted search. P.W.1 is alleged to have found a plastic can containing 4 litres of illicit arrack. After having convinced that the article

is arrack, the accused was arrested and Ext.P1 search list was prepared by P.W.1. Samples were taken and all formalities were complied with. After collecting two samples, they were sealed. P.W.1 along with accused and the articles returned to the police station and registered crime as per Ext.P4 FIR. Investigation was done by P.W.6, Assistant Sub Inspector of Police. He had prepared Ext.P9 scene mahazar. Final report was submitted by the Sub Inspector of Police.

3. Cognizance of the offence was taken by JFCM, Vadakara, Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Vadakara and it made over the case to Additional District and Sessions Court, Vadakara.

4. The latter court, on appearance of the accused and on receipt of records, framed charges for the offences punishable under Sections 55(a) and 8(2) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had P.Ws.1 to 6 examined

and had Exts.P1 to P9 marked. M.Os. 1 and 2 were identified and marked. 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. 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.

5. Accepting the evidence of P.Ws. 1 and 2 and discarding the fact that independent witness, P.W.3 was declared hostile, the trial court found that the offence has been duly proved.

6. The contention raised before the court below was that P.W.6 is only an Assistant Sub Inspector of Police who was incompetent to conduct investigation and therefore the entire investigation is invalid and no proceedings will lie on the basis of such an investigation. The trial court got over the said contention by saying that the officer who laid charge has

verified the records and that officer was Sub Inspector who was competent to investigate, and to take action under the Abkari Act. Accordingly the accused was found guilty and conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

7. Learned counsel for the appellant raised only one point for consideration. Learned counsel pointed out that P.W.6 is only an Assistant Sub Inspector, Edachery Police Station and he is not an authorised officer as per the provisions of the Abkari Act. As per the notification, only a Sub Inspector or above rank are empowered to take action under the Abkari Act. Learned counsel appearing for the appellant contended that the observation of the court below that even though investigation has been conducted by an incompetent officer, there is clear evidence of the fact that the records were verified by a competent officer and final report was filed by a competent officer. Learned counsel went on to point out that the finding lacks legal backing and in view of

the decision reported in Haridas v. State of Kerala (2015 (1) K.L.T. 958) where an identical question was considered this Court had occasion to hold that investigation conducted by an incompetent officer cannot be relied on and the trial court had no jurisdiction to take cognizance in view of the investigation done by a competent officer.

8. In the said decision, it is observed 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.”

9. Even assuming that offence is proved, the above infirmities stare at the face of the prosecution. The fact is that the records have been verified by the competent officer cannot legalize the incompetent investigation and no cognizance can be taken on the basis of such defective investigation. Following the principle laid down in the above decision, it is clear that the conviction and sentence awarded against the petitioner are illegal.

In the result, this appeal is allowed, the conviction and sentence passed by the court below are set aside and the accused is acquitted of the charges levelled against him and

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he is set at liberty. His bail bond shall stand cancelled and he is set at liberty.

sb.

P. BHAVADASAN,
JUDGE