

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. 307 of 2006 ()

**AGAINST THE JUDGMENT IN SC 292/2003 of ADDITIONAL SESSIONS COURT
(ADHOC)-I, KALPETTA DATED 31-01-2006**

APPELLANT(S)/ACCUSED:

**BHASKARAN, S/O.SANKU,
MEENANGADI, WYNAD DISTRICT.**

**BY ADVS.SRI.V.RAJENDRAN
SRI.P.SAMSUDIN**

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA, REPRESENTED BY THE SUB
INSPECTOR OF POLICE, KENICHIRA
THROUGH 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:**

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P.BHAVADASAN, J.

Crl.A. No. 307 of 2006

Dated this the 07th day of September, 2015

J U D G M E N T

The accused in this case was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty and therefore convicted for the said offence. He was sentenced to undergo rigorous imprisonment for one year and to pay a fine of ₹ 1 lakh with a default clause of three months. Set off as per law was allowed.

2. The prosecution case in short is that on 30.12.2001 at about 4.15 p.m., the accused was found in possession of 20 packets of Karnataka arrack having 100 ml each on a public road. He was apprehended by PW1, who was a Head Constable working in State Special Branch. According to the prosecution case, he received reliable information about a person dealing in illicit arrack in the waiting shed. He proceeded to the spot and identified the person from whom the contraband articles were seized. He

claims to have immediately contacted the Kenichira Police Station from where investigation kit was provided for him. He took samples in two 375ml bottles. The accused was arrested as per Ext.P1 arrest memo and prepared Ext.P2 seizure mahazar. Accused and the contraband articles were taken to the Kenichira Police Station, where PW5, the head constable was in charge at the relevant time. It is claimed by the prosecution that at the relevant time, the sub Inspector of Police was on law and order duty. PW5 received the contraband articles and the accused and registered crime as per Ext.P5 FIR. Later on, PW6, the Sub Inspector of Police, who returned to Kenichira Police Station, took over investigation. He claimed to have gone to the place of occurrence and prepared Ext.P4 scene mahazar. He claims to have taken statements of witnesses. He prepared the property list and had the contraband articles sent for chemical analysis and Ext.P8 report was received. After investigation, final report was laid.

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 Session, committed the case to Sessions Court, Kalpetta under Section 209 of the Cr.P.C.. The case was made over to the Additional Sessions Court (Adhoc-I), Kalpetta. The said court, on appearance of the accused and on receipt of records, framed charges for the offence punishable under Section 55(a) of the Abkari Act to which the accused pleaded not guilty and claimed to be tried. The prosecution therefore had examined PWs 1 to 6 and had Exts. P1 to P8 marked. Mos 1 to 3 were got identified and marked.

4. After the close of 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 the accused 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. On an appreciation of the evidence, the court below came to the conclusion that the offence has been made out and therefore, convicted and sentenced him as already mentioned.

6. Assailing the said conviction and sentence, the learned counsel appearing for the appellant contended that the appeal will have to be allowed on a short ground. The search, seizure and detection of the offence by an incompetent officer has caused considerable prejudice to the accused. PW1, who was attached to special branch, claims to have received information about the carrying of contraband article by the accused. The learned counsel pointed out that there was nothing which prevented the said person from informing the Police Station concerned about the matter, instead of proceeding himself to the spot as he was only an Head constable not authorized by the Act to do so. True, the learned counsel pointed out that PW6

ultimately filed the final report and conducted a portion of the investigation. According to the learned counsel, as far as Abkari cases are concerned, the search, seizure and arrest concludes a major portion of the investigation and if that is vitiated, the whole trial will be vitiated. The learned counsel relied on the definition of Abkari Officer in the Abkari Act and also Section 70 of the Abkari Act in support of his case. The learned counsel also relied on the decision reported in **Subash v. State of Kerala** (2008 (2) KLT 1047), for the proposition that such a trial is vitiated.

7. There seems to be considerable force in the above submission made by the learned counsel for the appellant. The lower court got over the contention by pointing out that PW6 was out of station at the relevant time and PW5, who was the Head Constable, was in charge. PW1 had produced accused and the articles before him and that was sufficient in law to comply with the requirements under the provisions of the Act.

8. It is difficult to accept the above finding of the court below. Assuming PW1, on receiving information about a person carrying contraband article, being only a head constable and not an Officer authorized under the Abkari Act, nothing prevented him from informing the Police Station concerned about that fact. Instead, he proceeded to the spot on his own volition and conducted search and seizure and also arrested the accused.

9. By virtue of the notification i.e. S.R.O.321/1996, only officers above the rank of Sub Inspector are competent to perform these functions. Even assuming for argument sake, one is to borrow provisions of the Cr.P.C. and to accept the argument that in the absence of a Sub Inspector of Police, any senior Police Officer takes charge of the Station House Officer then also, it was incumbent on the part of PW1 to have informed the Police Station concerned about the information received by him. It was not an accidental detention, but it was an act done in prior intimation.

10. As rightly pointed out by the learned counsel for the appellant, in such cases, a good part of the investigation gets completed by search, seizure and arrest of the accused and it is only formal things remain to be done by the Investigating Officer.

11. Even though, the prosecution, in the case on hand, has alleged that PW1 had produced the accused and the articles before the Kenicheri Police Station, at the relevant time the Sub Inspector was not in station and therefore, the Head Constable received all the materials, there is nothing produced by the prosecution in evidence to show that PW6, who is the Sub Inspector of Police, was not available in the Police Station at the relevant time. The obligation to prove that PW6 was not available and therefore, assuming for the argument sake, Head Constable was in charge of the Police Station, it was for the prosecution to establish the said fact. It is doubtful whether when that would save the prosecution because, the notification stipulates that only the officers

above the rank of Sub Inspector can be the Abkari Officers for the purpose of the Act. In fact, this issue was considered in the decision reported in **Subash v. State of Kerala** (2008 (2) KLT 1047). In that case, the final report was laid by an Assistant Sub Inspector. Here, assuming that final report was laid by a competent officer, the major portion of the investigation was conducted by an incompetent officer. Further, there is considerable delay in producing the contraband articles to the court also. That increases the agony of the prosecution.

12. Of course, if it could be found that the search and seizure alone does not cause considerable prejudice to the accused, the evidence so collected need not be eschewed. But in the case on hand, as already stated unlike in ordinary cases, search, seizure and arrest of the accused completes a major portion of the investigation in which case, the act of an incompetent officer thus caused prejudice to the accused concerned.

13. One must recollect here that there is absolutely no evidence adduced by the prosecution to show that at the time of detection of the offence, the Police Officer in charge of the Police Station was not available. There is nothing to show that PW1 had attempted to inform the Police Station concerned about the information received by him. As already stated, it was not an accidental detection.

14. In the above facts and circumstances of the case, the only option available is to set aside the conviction and sentence.

For the above reasons, this appeal is allowed. The conviction and sentence are set aside and the accused stands acquitted of the charges levelled against him. If he has paid the fine amount, the same shall be refunded to him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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