

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

CRL.A.No. 345 of 2006

AGAINST THE JUDGMENT IN SC 218/2004 of ADDL.DISTRICT AND
SESSIONS COURT FAST TRACK (ADHOC-I), KOZHIKODE DATED 19-01-2006

APPELLANT/ACCUSED:

KUMARAN, S/O.CHEKKUTTY,
KANNIPPOYIL, KOTHANKAL, ATHOLI,
KOZHIKODE DISTRICT.

BY ADV. SRI.SANTHARAM.P

RESPONDENT/COMPLAINANT:

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

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
07-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.345 OF 2006

Dated this the 7th day of December, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Sections 8(1) and (2) of Abkari Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for six months. Set off as per law was allowed.

2. The facts fall within a very narrow compass. PW1 was working as Preventive Officer attached to Excise Enforcement and Anti Narcotic Special Squad, Kozhikode. On 13.06.2002, he along with PW2 set out for patrol duty and while they were patrolling near Kothankal bus stop, they stopped their vehicle and began to walk and when they passed the shop belonging to one Sreedharan, they happened to see the accused coming along with a can of 5 litre capacity. He was intercepted and the can was seized. The can was full of some sort of liquid. By taste and

smell, it was identified that the liquid was arrack. Ext.P1 is the arrest memo. Sample was taken in a bottle having a capacity of 180 ml and that was sealed and labeled. The label contained the signature of accused, PW1 and the witnesses. He then prepared Ext.P2 seizure mahazar. Then they went to the office and entrusted the accused and contraband articles to PW5 who registered crime as per Ext.P4 occurrence report. The accused was produced before court along with property list, Ext.P5 and forwarding note, Ext.P6 on 14.06.2002.

3. PW6 took over investigation. He recorded the statement of witnesses, obtained chemical analysis report, Ext.P7, completed the investigation and laid charge before court.

4. The court before which final report was laid took cognizance of the offence and on noticing that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Kozhikode which made over the case to Additional District and Sessions Court Fast Track (Adhoc-I), Kozhikode for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the

offence under Sections 8(1) and (2) of Abkari Act, to which, accused pleaded not guilty and claimed to be tried.

5. The prosecution, therefore, had PWs 1 to 6 examined and Exts.P1 to P7 marked. M.O.1 was got identified and marked.

6. After the close of the prosecution evidence, 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.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He did not adduce any evidence.

8. Possibly, feeling that the evidence of PWs 1 and 2 are above board taken along with Ext.P2 mahazar and also impressed by the fact that the accused and the documents were promptly produced before court, court below came to the conclusion that the offence has been made out. The conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant raised only one point for

consideration. Learned counsel pointed out that even going by the evidence of PW1, accused, documents and the articles seized were handed over to PW5 who claims to be in charge of the station at the relevant time. According to the learned counsel, PW5 was only an Assistant Excise Inspector not empowered under Section 5A of the Abkari Act and cannot act in terms of the provisions of Sections 40 to 53 of the Abkari Act. Attention was also drawn to the fact that the occurrence report seems to have been produced on 13.06.2002 which would indicate that the remand application was filed on the same day and the accused was also produced on the same day. PW5 was incompetent to act in such a way in view of the provisions of the Act. This alone is sufficient to vitiate the conviction and sentence, it is contended.

10. Learned Public Prosecutor, on the other hand, contended that all what PW5 has done is simply register a crime and that has not caused any prejudice to the accused and the investigation is done by a competent officer and therefore the appellant can have no grievance.

11. It is by now well settled that as per the notification in 1967, Assistant Excise Inspector was not competent to exercise the powers under Sections 40 to 53 of Abkari Act. Section 40 reads as follows:

"40. Procedure on arrest and seizure.-

(1)(a) Any Officer arresting a person under Section 31, Section 34 or Section 35 shall inform him of the grounds for such arrest.

(b) Where an Abkari Officer arrests without warrant any person other than a person suspected of, or accused of, any non-bailable offence under this Act, such Officer shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

(2) Every person arrested under Section 30 shall be produced before, and the article seized under that section shall be forwarded to, without unnecessary delay, the Magistrate or the Commissioner, as the case may be, by whom the warrant was issued.

(3) Every person arrested under Section 31 or Section 34 or Section 35 shall be produced before, and article seized under section 34 shall be forwarded to, without unnecessary delay,-

(a) to the Officer in charge of the nearest Police Station; or

(b) to the Officer empowered under section 5A, or to the Abkari Inspector.

(4) The authority or Officer before whom any person is produced under sub section (2) or sub section (3) shall, take expeditious steps as provided in section 41.

(5) The authority of Officer to whom any article is forward under sub-section (2) or sub section (3) shall, with all convenient despatch, take necessary steps in accordance with law for disposal of such article". (emphasis supplied)

12. A reading of the above provision leaves one in no doubt that when a person is arrested and articles seized, he along with the articles shall be produced before an officer empowered under Section 5A of Abkari Act.

13. At the risk of repetition, one may notice that at the relevant time, Assistant Excise Inspector was not notified under the Act. That means he was incompetent to receive the accused and the contraband articles. Further, one may have a look at Section 41(2) of Abkari Act also. If the officer concerned before whom the accused and the articles are produced is incompetent to grant bail, it is mandatory on his part to produce the accused before the Magistrate concerned. It goes without saying that in

order to exercise that powers, he must be an empowered officer. In the case on hand, it is seen that the occurrence report reached the court on 13.06.2002 and in all probability, remand application must have also been filed on the same day. The table accompanying the judgment shows that the accused was remanded to custody on 13.06.2002. That means, PW5 has acted in accordance with Sections 40(3)(b) and 41(2) for which he was not empowered at the relevant time. On that ground, the conviction is vitiated.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below for the offence under Sections 8(1) and (2) of Abkari Act are set aside and it is held that the accused is not guilty of the offence. He stands acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

// True Copy //

P.A to Judge.