

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

CRL.A.No. 424 of 2006 ()

**AGAINST THE JUDGMENT IN SC 635/2000 of ADDITIONAL SESSIONS COURT FAST
TRACK (ADHOC)-II, TRIVANDRUM**

APPELLANT(S)/ACCUSED:

**GANGADHARAN, S/O.SANKARAN,
ANU BHAVAN, NEAR VADAPPARA I.T.I., KOTTAKKAKOM MURI
ARYANAD VILLAGE.**

**BY ADVS.SRI.SUMAN CHAKRAVARTHY
SRI.SANDEEP T.GEORGE**

RESPONDENT(S):

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

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.BHAVADASAN, J.

Crl.A. No. 424 of 2006

Dated this the 09th day of October, 2015

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 55 (a) and (b) and 58 (8) of the Abkari Act. After trial, the accused was found guilty of the offence punishable under Section 55(a) of the Abkari Act. He was therefore convicted and sentenced to suffer rigorous imprisonment for 1½ years and to pay a fine of ₹1 lakh with a default clause of 3 months.

2. The prosecution case in brief is that in 1999 while PW4 was functioning as the Circle Inspector of Police, on 26.09.1999 at about 5.00 p.m., he along with PW6 had gone on patrol duty. On the way, they received reliable information that in a compound near the ITI, illicit liquor was being sold. They went to the place and found the accused standing in a compound under a coconut tree and vending in illicit liquor. They approached him, intercepted him and on

verification of the contents of the can, which was kept near the accused, they were convinced that it was arrack. He was arrested and sample was taken from the can. The sample was sealed and the label was affixed containing the signature of the accused, PW4 and the witnesses. They also seized the glass and seized the currency notes from the accused. Ext.P1 mahazar was prepared. PW4 then returned to the station and handed over the records, the accused and the articles to the Station House Officer. The said report is Ext.P2. PW5 received the articles and the accused and registered crime as per Ext.P3 FIR. PW6 took over investigation. He drew up the property list, namely, Ext.P4 and also prepared the forwarding note. He sent the samples for chemical examination. Ext.P5 is the chemical analysis report. Statements of witnesses were taken, investigation was completed and charge was laid before court by the Sub Inspector of Police.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Thiruvananthapuram under Section 209 of Cr.P.C. after following the necessary procedure. 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 receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Sections 55(a) and (b) and 58(8) of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 7 examined and had Exts.P1 to P5 marked. MOs 1 to 3 series was got identified and marked.

6. 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 was innocent. He says that he was running a bunk shop near a temple and a Police officer had bought articles on credit from his shop. When the money was asked for, that annoyed the officer and therefore he was falsely implicated.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He examined DW1 in his defence.

8. The court below, finding that the evidence of PWs 3 and 4 to be convincing enough taken along with the contemporaneous documents and prompt production of the articles before court, found that the prosecution had succeeded in establishing the case against the accused. The infirmity pointed out regarding the investigation done by the Assistant Sub Inspector of Police was got over by the lower court by pointing out that at the relevant time, the SI, who is the Station House Officer was on leave and further, the final

charge was laid by the competent officer. Finding the accused guilty, conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, the learned counsel for the appellant contended that this appeal will have to be succeeded on a very short ground. The investigation conducted by PW6, the Assistant Sub Inspector of Police is vitiated in law since he was not a competent officer as per the notification issued under the Abkari Act. The mere fact that the detection was made by the Circle Inspector of Police and that by the said person, a good part of the investigation was over and also the fact that the final report might have been laid by the Sub Inspector of Police does not cure the infirmity of an incompetent officer having investigated the case and taken steps in that regard. For the said proposition, the learned counsel relied on the decision reported in **Unni v. State of Kerala** (2009 (2) KHC 661). Reliance was also placed on the decision reported in

Sabu v. State of Kerala (2007 (4) KLT 169).

10. The learned Public Prosecutor on the other hand contended that it is true that PW6 is alleged to have conducted a portion of the investigation. But as rightly noticed by the lower court, by the detection of the offence and production of articles and the accused before the Station House Officer, a good part of the investigation is completed and after all, the final report is laid by a competent officer and that cures the infirmity in the investigation. The evidence of PWs 3 and 4 are sufficient to show that the offence has been committed by the accused. The court below has considered the matter in considerable detail and has come to the conclusion that the offence has been made out. There are no grounds to interfere with the said finding.

11. PW4 at the relevant time was working as the Circle Inspector of Police at Aryanaad Police Station. On 26.09.1999, he along with his team of officers including PW3

had gone on patrol duty. On the way, they received reliable information that the accused was engaged in vending in illicit liquor and therefore they went to the spot. Both these witnesses, namely, PWs 3 and 4 say that they happened to see the accused standing in his compound beneath a coconut and selling liquor. A can near him was seized and on examination of the contents, it turned out to be arrack. PW4 says about having taken sample from the can. After arresting the accused and preparing the mahazar, PW4 says that he returned to the Police Station and entrusted the accused, documents and the articles to the Station House Officer. PW5 claims to have received those articles and registered crime. Investigation in this case was done by PW6, who was only an Assistant Sub Inspector of Police.

12. Going by the notification issued under the Act which was in force at the relevant time, only Officers of and above the rank of a Sub Inspector are empowered to detect, investigate and lay final charge before court. In the case on

hand, PW6 has a case that the Station house Officer, the SI was on leave and he was in charge of the same. Therefore, it is contended that there is no infirmity in the investigation. This aspect was specifically considered in the decision reported in **Unni v. State of Kerala** (2009 (2) KHC 661) wherein, it was contended that the Station House Officer is entitled to take such proceedings as are necessary in the case and when the Sub Inspector is on leave and the Assistant Sub Inspector is in charge as the Station House Officer, he is fully empowered to take steps under the Act. This Court refused to accept the said plea and observed as follows:

“To prove the guilt of the accused for the possession of the contraband, that is, five litres of arrack in a jerry can, as alleged, the prosecution relied entirely on the evidence of two Police officers connected with the detection and seizure of the contraband, who were examined as PWs 1 and 2. PW 1, Asst. S.I. Of Police, who detected the crime and seized the contraband, had no authority to do

so, is the attack raised by the learned counsel for the accused, relying on the notification of SRO No. 321/1996 and also the decision rendered by this Court in Sabu v. State of Kerala, 2007 (3) KHC 753: 2007 (4) KLT 169. If it was a case of accidental detection without prior information, then it could be stated that any police officer was expected to prevent the commission of any offence and taking the offender into custody. But this was a case, even according to the prosecution, PW 1, the Asst. S.I. of Police received prior information of sale of illicit arrack in the residential building of the accused. He proceeded to that spot, pursuant to that information indicated that he went there to have a raid of the building, and, search the place. When a raid over the residential building for detection of Abkari offence is involved, necessarily and inevitably the mandate covered by S.31 of the Act applies with full force. There is nothing in evidence to show that PW1 complied with the formalities for conducting search over the residential building of the accused. Immediately on getting information, he rushed to the spot and reaching there, found the accused with a jerry can beside the courtyard of his building, seized the contraband into

custody and arrested him, is the prosecution case. As per S.4 of the Abkari Act, the Government had authorised only certain Officers of the State to detect or investigate the offences contemplated under the Abkari Act. The Asst. S.I. of Police, as per the notification issued by the Government, is not authorised nor empowered to detect or investigate the abkari offences. Having regard to the fact that PW 1 went over to the residential building of the accused pursuant to information that sale of illicit arrack was conducted there, prima facie, indicating that he went over to proceed with a search of that building, that too, without complying with the formalities, it follows that whatever acts performed by him pursuant to reaching the spot could not be taken as having been done with the sanction of law. No doubt, illegality or irregularity in a search will not by itself vitiate the evidence collected by the search and there is no bar in relying upon the evidence collected in such search to inculcate the accused. But in the given case, what has come out is that the prosecution at a later stage had developed a case that at the relevant time, PW 1, the Asst. S.I. of Police was in charge of the police station, and as such he was competent to

detect a crime and seize the contraband. PW 1 has no such case when he was examined before the Court. So much so, the assertion of PW 4 that PW 1 at the relevant time was in charge of the S.I. of police since that officer was on leave cannot be given much value. So, there is much force in the submission of the learned counsel for the accused that PW 1 was not an authorised officer competent to detect and investigate an offence under the Abkari Act, and as such the detection made by him was unauthorised. The accused in the given facts is entitled to the benefit of doubt since PW 1 was not empowered to detect and investigate the crime. So much so, it has to be concluded that the conviction and sentence imposed against the accused are liable to be set aside, and I do so. The accused is found not guilty and acquitted of the offence under S. 55 (a) of the Abkari Act. Fine amount, if any, remitted by the accused shall be refunded to him. Appeal is allowed.”

13. There is no reason as to why the principle laid down in the said decision shall not be followed in the case on hand also. Further, the sample alleged to have been taken by PW4 is not seen produced before court properly

and the property is seen produced before court on 28.09.1999. The endorsement in the property list shows that sample was sought to be drawn from the contraband produced before court.

14. It must at once be noticed that PW4 has no case that he had sealed and labelled the can, which was taken from the possession of the accused, from the place of occurrence. Therefore, there was no guarantee that the sample taken is from the contraband article seized from the possession of the accused.

15. Further, the forwarding note which is alleged to have been prepared by PW6, is also not seen produced. These infirmities cannot be omitted to be noticed as they have a substantial bearing on the issue involved. In fact, all these aspects are covered by decision referred to above which go against the prosecution.

16. For the above reason, this Court is unable to accept the finding of the court below and uphold the

conviction.

This appeal is allowed. The conviction and sentence passed by the court below are set aside. The accused is acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge