

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

CRL.A.No. 585 of 2006

AGAINST THE JUDGMENT IN SC 24/2005 of ADDITIONAL SESSIONS
COURT FAST TRACK COURT-I, PALAKKAD .

APPELLANT(S)/2ND ACCUSED.:

UNNIKRISHAN @ UNNI, S/O.MADHAVAN,
THADIKKAMARA VEEDU, PALAMPATTA, POTTASSERI
PALAKKAD.

BY ADV. SRI.VINOD KUMAR.C

RESPONDENT(S)/COMPLAINANT.:

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

BY PUBLIC PROSECUTOR SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P.BHAVADASAN, J.

Crl.A. No. 585 of 2006

Dated this the 16th day of October, 2015.

JUDGMENT

Two persons were prosecuted for the offence punishable under Section 55(a) of the Abkari Act. Both of them were found guilty and therefore, they were convicted and sentenced to suffer rigorous imprisonment for one year each and to pay a fine of ₹1 lakh each and in default of payment of which, they have to suffer rigorous imprisonment for a period of three months each.

2. The prosecution case is that on 9.10.2003, while P.Ws. 1 and 3 were on patrol duty, they happened to see an autorikshaw coming through the Kolppadam-Kanjiram road. P.W.1 asked them to stop the vehicle. The allegation is that when the Police Officers went near the autorikshaw, the driver of the autorikshaw, who was the first accused, the passenger, who was the second accused, tried to escape from the place. They were intercepted. The autorikshaw was found to contain a can containing 5 litres of arrack kept on the rear

seat. P.W.1 claims to have taken two samples of 375 ml each from the can and prepared Ext.P1 mahazar. He arrested the accused as per Ext.P2 arrest memo. He returned to the Police Station with accused and contraband articles and registered crime as per Ext.P3 FIR. The property was produced before the court on the very next day. Investigation was taken over by P.W.3, who is the Assistant Sub Inspector of Police. As per his forwarding note, the chemical analysis reports were obtained and they were marked as Exts. P4 and P5. He prepared Ext.P6 scene mahazar and after completing investigation, laid charge before the court.

3. The Judicial First Class Magistrate Court, Mannarkkad before whom the final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a Court of Sessions, after following the necessary procedures, committed the case to the Sessions Court, Palakkad under Section 209 of the Cr.P.C. The said court made over the case to Additional Sessions Court, Fast Track – I, Palakkad 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 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 examined P.Ws. 1 to 3 and had Exts. P1 to P6 marked. M.O.1 was got identified and marked.

5. After the close of prosecution evidence, the accused were questioned under Section 313 of the Cr.P.C. The accused denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent. The first accused, who was the driver of the autorikshaw, claimed that he was unaware of the fact that the second accused was carrying contraband article and he was only a driver of autorikshaw in which second accused was travelling. Finding that the accused could not be acquitted under Section 232 of Cr.P.C., they were asked to enter on their defence. They chose to adduce no evidence.

6. On an appreciation of the evidence in the case, the court below found no reason to doubt the testimony given by P.Ws. 1 and 2 and found that the incident as alleged by the prosecution stands proved. Since the chemical analysis reports were against the accused, they were found guilty of the offence alleged against them. The fact that when the autorikshaw was intercepted, the first accused, who was the driver, tried to run away from the place, led the lower court came to the conclusion that he too must be a privy to the transaction. Whatever that be, both were convicted and sentenced as already mentioned.

7. The said conviction and sentence are assailed in this appeal.

8. The main ground of attack is that there is no independent witness to speak about search and seizure, and conviction is based solely on the testimony of the official witnesses, who are interested witnesses. It is inconceivable, according to the appellant, that no independent person would have been available at that point of time to witness the search

and seizure and it is clear that a false case has been foisted on the accused persons with ulterior motive. It was also contended that by no stretch of imagination, the offence under Section 55(a) of the Abkari Act can be attracted. And finally, it is urged by relying on the decision reported in *Subash v. State of Kerala* (2008 (2) KLT 1047) that P.W.3, who conducted investigation and laid charge before court, was only an Assistant Sub Inspector of Police and he was not an officer competent under the Abkari Act to investigate and lay charge before court. If that be so, the final report could not have been accepted by the court below and proceedings could not have been taken on that basis. Therefore, the whole proceedings are vitiated.

9. It is true that no independent witnesses have been cited by the prosecution to prove the incident. Even P.Ws. 1 and 2, who detected the offence, do not say that independent witnesses were present at the relevant time. The reason given is that the incident happened late in the night and there was nobody on the road at that point of time to

witness the incident. So the Police Officers could not have procured the presence of any person.

10. Both P.Ws. 1 and 2 give a uniform and consistent version regarding the incident. They say that while they were on patrol duty on the date of incident at about 9.00 p.m., they happened to see the autorikshaw coming along the road already made mention of and feeling suspicious, they intercepted the vehicle. Both of them say that the driver as well as the passenger in the vehicle tried to run away from the place and they were intercepted and stopped. On verification, a 5 litre can containing arrack was found on the rear seat of the autorikshaw. P.W.1 says about preparation of mahazar and preparation of arrest memo and also about having returned to the Police Station and registered crime as Ext.P3 FIR. On going through the evidence of P.Ws. 1 and 2, there is no reason to believe that they had any ulterior or oblique motive to falsely implicate the accused persons. The fact that on seeing the Police officials, they tried to run away from the place itself shows the complicity in the matter. The court

below was therefore justified in its conclusion that on the basis of the evidence adduced by P.Ws. 1 and 2, their case stands proved. The court below found that no prejudice has been caused to the accused by the non presence of any independent witnesses at the spot at relevant time. There is no reason to interfere with the said finding.

11. However, formidable is the ground taken regarding the incompetency of the Investigating Officer to investigate and to lay the final report. The Abkari Act defines an Abkari Officer and also mentions about issuing of notification clothing certain officers with powers within the territorial limits. Section 70 of the Abkari Act is relevant in this context. The relevant notification which applies to the facts of the present case is S.R.O.321/1996. That clearly mentions that all Police Officers of and above the rank of Sub Inspectors alone are clothed with power to investigate and to lay final report. Admittedly, in the case on hand, PW3 was only an Assistant Sub Inspector of Police at the relevant time. That means, he was a junior officer and was not in the rank of

Sub Inspector.

12. The consequence of an Assistant Sub Inspector of Police investigating a case and final report being laid by him and consequently taking of cognizance and trial proceeding and ending in conviction, was considered in the decision reported in *Subash v. State of Kerala* (2008 (2) KLT 1047). After elaborately considering the various provisions in the Act and also the earlier decisions of this Court, a Division Bench of this Court laid down the law thus:

“6. Hence while dealing with abkari offence, the special provisions made in the Abkari Act should be strictly followed. Learned Government Pleader cited decision of a Division Bench of this Court in *Hassan v. State of Kerala*, 1989 (2) KLT 58 wherein it was held that investigation by Assistant Sub Inspector of Police will not vitiate the trial. It was also stated that there was a notification by the Government empowering the Assistant Sub Inspector to exercise all powers of the Sub Inspector. The above notification is published in 1973 as G.O. MS 217/73. Coupled with S.13(2) of the Interpretation and General Clauses Act, the Assistant Sub Inspector in this case be specifically authorized to do the act of Sub Inspector. But there is no such notification

issued under the Abkari Act. None of the provisions in the Abkari Act gives power to any authority to issue such notification. Even Cr.P.C. does not contain any such provision conferring on the Government power to issue notification conferring power of an officer to any other inferior officer under S.36, when only a Superior Officer is to exercise power of the officer in charge of a police station. The Allahabad High Court in *Ram Pargas v. Emperor*, AIR 1948 All. 129, while interpreting S.19 of the General Clauses Act held as follows:–

“The subordinate entering into the real functions of his superior by authority of law is one thing, but the subordinate using the powers vested in the superior without a legal sanction or delegated of authority by the superior is quite another. The section protects the former but not the latter incident.

S.7 of the Extradition Act conferred the power of issuing a warrant for extradition proceedings on the political agent, but when a warrant for extradition was issued not by the political agent but by another officer subordinate to the political agent, and there was no provision in the Act for delegation of powers by the political agent to any other functionary working under him, it was held by the High Court of Allahabad that the warrant thus issued by an officer other than the political agent was illegal.”

Further when it specifically states that Abkari Officer must be a police officer above the rank of Sub Inspector

and that a police officer below the rank of Sub Inspector of Police cannot be termed as the Abkari Officer. Apart from the above, the learned Public Prosecutor was not able to produce the notification mentioned in Hassan's case. Further, we also note that in Hassan's case a Divisions Bench of this Court was considering the question regarding Edible Oil Seeds, Edible Oils, Vanaspati and Baby Food Dealers Licensing Order, 1975. There, Sub Inspector was authorized to conduct search and investigation. But there was no provision like filing of a report before the Court by an officer below the rank of S.I. of Police. Irregularity in investigation is considered under S.527 as held by the Apex Court in H.N. Rishbud and Inder Singh v. State of Delhi, AIR 1955 SC 196. Irregularity in investigation is different from lack of power to initiate prosecution. S.50 of the Abkari Act says that as soon as the investigation into the offences under this Act is completed, the Abkari Officer shall forward to the Magistrate, empowered to take cognizance of the offence on a police report, a report in accordance with sub-s.(2) of S.173 of Code of Criminal Procedure, 1973. The Assistant Sub Inspector in this case was not even holding charge of Sub Inspector or officiating as Sub Inspector at the time of filing the report. Therefore S.13 (2) of the Interpretation and General Clauses Act, 1125 also will not enable the Asst. Sub Inspector of Police as an officer of the rank of Sub Inspector of Police, not

below the rank of Sub Inspector of Police mentioned in the Statute. It was also contended by learned counsel for the appellant that power to conduct investigation and power to prosecute are different powers as held in *Raj Kumar Karwal v. Union of India and Others* ((1990) 2 SCC 409). Mere illegality or irregularity of investigation will not vitiate the trial. It is a well settled principle that a defect or illegality in investigation however serious has no direct bearing on the competence or procedure relating to cognizance or trial. But that is different from taking cognizance of the offence on the basis of a report by an officer not authorized under law. The Magistrate has no power to take out cognizance of the case on the report of an officer other than an Abkari Officer and it will go to the root of the matter. In this connection we refer to paragraph 22 page 300 in A.R. Antulay's case (Supra). In this connection, we also refer to the decision of the Apex Court in *H.N. Rishbud and Inder Singh v. State of Delhi* (supra). Learned counsel also referred to the decision in *Varkey v. State of Kerala* (1993 (1) KLT 72). In that case, since the Excise Inspector who filed the complaint having no authority to file such complaint, a Division Bench of this Court held that the trial was vitiated. A Full Bench of this Court in *State of Kerala v. V.P. Enadeen* (1971 KLT 19 = AIR 1971 Ker. 193) held that a Magistrate has no jurisdiction to take cognizance of an offence upon a complaint filed by a person not

authorized to institute prosecution under S.28(1) of Prevention of Food Adulteration Act and the Magistrate cannot either acquit or convict the accused as he cannot take cognizance of the offence on the report filed by a person not authorized to institute prosecution. In para.3 of the above decision it is held as follows:

“3. We might at the outset observe that, although the learned Magistrate called it an acquittal, what he actually did was to discharge the accused from the case and not acquit him. If, as he thought, the complainant was not a person authorized to institute a prosecution under S.20(1) of the Act, the Magistrate had no jurisdiction to take cognizance of the case. He could no more acquit than he could convict. But, however, that might be, since the learned Magistrate purported to acquit the accused, we should think that S.417 of the Criminal Procedure Code is attracted. The question is, however, only academic since even if S.417 is not attracted because there is no acquittal. S.439 would, and, ex hypothesi, the bar in sub-s.(4) thereof against the conversion of a finding of acquittal into one of conviction would not apply.”

7. In *Vikraman v. State of Kerala* (2007 (1) KLT 1010) it was held that the mere fact that Assistant Sub Inspector conducted later part of investigation and laid charge will not vitiate the trial. We are of the opinion that on the plain reading of S.50 of the Abkari Act, the Magistrate

has no jurisdiction to take cognizance of the case as the report was filed by a person other than an Abkari Officer. Hence, Vikraman's case cannot be acceptable as an authoritative decision that despite the mandate in S.50 Magistrate can take cognizance on a report filed by a person other than an Abkari officer. In this connection we also refer to S.199(1) and S.461(d) of Cr.P.C. An officer other than an Abkari Officer as defined in the Act cannot file a report even if investigation is conducted by an Abkari Officer. When a report by a specifically empowered officer is a condition precedent for taking cognizance of an offence, trial on a report by Assistant Sub Inspector of Police is void. In this connection we refer to the following decisions:- Harikrishna v. State of Haryana (1974 Crl. L.J. 112), M/s. Lachman Singh and brothers and Another v. The Labour and Enforcement Officer (Central) and Another (1986 (3) Crime 17 A.P.). Lack of total jurisdiction for taking cognizance of an offence other than specially empowered officer is not an irregularity covered under Chapter XXXV of Cr.P.C. According to the counsel for the appellant, it is an irregularity also vitiating the proceedings in view of S.461(k) of Cr.P.C. Here there is a total illegality in taking cognizance as the report filed by an officer who is not empowered to do so. Even when the minimum fine to be imposed for the offence charged is Rs.1,00,000/- and punishment is a very hardship, we cannot understand

why Sub Inspector or investigating officer specifically authorized as Abkari Officer was not able to file report. Hence, we are of the view that since the report was filed not by an Abkari officer, the cognizance of offence taken by the Magistrate was illegal and the Magistrate ought to have discharged the accused. Hence, the entire proceedings from taking cognizance trial and sentence etc. are illegal.”

13. This Court found that an Assistant Sub Inspector of Police is incompetent and is not empowered to take any steps with regard to the detection, seizure and investigation as per the provisions of the Abkari Act and any proceedings taken on that basis is vitiated. The Division Bench of this Court in the said case set aside the conviction and sentence and discharged the accused.

14. The principle laid down in the said decision applies squarely to the facts of this case also. In this case too, P.W.3 was only an Assistant Sub Inspector of Police and he was not empowered at the relevant time, as could be seen from the notification already referred to, to take any steps in the mater. Cognizance taken on the basis of the investigation done by

him and the final report filed by him should be treated as non-est.

For the above reasons, this appeal is allowed. Conviction and sentence are set side and following the principle laid down in the decision reported in Subash's case (supra) the appellant stands discharged for lack of jurisdiction in taking cognizance.

P.BHAVADASAN,
JUDGE

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