

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

CRL.A.No.586 of 2006

AGAINST THE JUDGMENT IN SC 66/2004 of ADDL. SESSIONS COURT
(ADHOC)-I, KALPETTA DATED 25.02.2006

APPELLANT/ACCUSED:

LAKSHMANAN, AGED 54, S/O. NARAYANAN,
VETTAPARAPURATHU, NEERVARAM, PANAMARAM,
WAYANADU DISTRICT.

BY ADV. SRI.MATHEW KURIAKOSE

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REP. BY SUB INSPECTOR OF POLICE (CRIME NO.185/00)
KAMBLAKKAD POLICE STATION, REP. BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY SMT. LILLY LESLIE, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
02-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 586 of 2006

Dated this the 2nd day of November, 2015.

JUDGMENT

The accused was prosecuted for the offence punishable under Section 55(a) of the Abkari Act. He was found guilty and therefore convicted and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for three months. Set off as per law was allowed.

2. The incident in this case took place on 4.10.2000. On that day, P.W.1, the Assistant Sub Inspector of Police, Kumbalakkad Police Station, while conducting patrol duty along with other officers, received information that a person by name Lakshmanan was selling illicit arrack. They reached the place and they found the accused standing by the side of the road with a plastic bag. Members of Anti Liquor Squad were seen to have restrained the accused. The bag was

examined and it was found to contain 13 packets each containing 100 ml of arrack. Ext.P1 arrest memo was prepared and the accused was arrested. Nine packets were opened and the contents therein was taken in three bottles as samples. They were sealed and labels were affixed containing the signature of the accused, P.W.1 and the witnesses. Balance article was also seized. Ext.P2 mahazar was prepared. P.W.1 entrusted the accused, the articles seized and the records through Ext.P3 report to the Sub Inspector of Police.

3. P.W.5 was the Sub Inspector at the relevant time. On 4.10.2000 at about 18.55 Hours, P.W.1 handed over the accused, the seized articles and Ext.P3 report to P.W.5. On the basis of that, P.W.5 registered crime as per Ext.P5 FIR. He prepared Ext.P4 scene mahazar and recorded statements of witnesses. Ext.P6 is the property list prepared by him. He completed investigation and laid charge before court.

4. The court, before which final report was laid, took cognizance of the offence. Finding that the offence is exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Kalpetta. The said court made over the case to Additional Sessions Court (Adhoc)-I, Kalpetta for trial and disposal.

5. The latter court, on receipt of records and on appearance of the accused framed charge for the offence punishable under Section 55(a) of the Abkari Act. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore examined P.Ws. 1 to 5 and had Exts.P1 to P8 marked. M.Os. 1 to 3 were got 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 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.

6. Accepting the evidence of P.Ws.1 and 2 and also on the basis of the contemporaneous document, the court below found the accused guilty and conviction and sentence as already mentioned followed.

7. Assailing the conviction and sentence, learned counsel contended that P.W.1 was only an Assistant Sub Inspector at the relevant time and going by the notification, he was not a competent officer to detect or investigate the crime under the Abkari Act. Any action taken by such an officer is non-est in law and no conviction can be based on that. For the above proposition, learned counsel relied on the decisions reported in Sabu v. State of Kerala (2007(3) KHC 753), Unni v. State of Kerala (2009(2) KHC 661) and Subash v. State of Kerala (2008(2) KHC 703). Learned counsel pointed out that in the decision in reported in Joy v. State of Kerala (2010 (3)

K.L.T. 20) the court has occasion to hold that detection by the Assistant Sub Inspector is valid detection. But in that decision, the court has not considered the decisions in Subash v. State of Kerala (2008(2) KHC 703) and Sabu v. State of Kerala (2007 (3) KHC 753).

8. Learned counsel then drew the attention of this Court to the fact that detection of the offence was on 4.10.2000. Thondi articles were produced before court only on 28.11.2000 and there is want of explanation for the delay. No explanation whatsoever was given by the prosecution for not producing the articles before court within a reasonable time. Learned counsel pointed out that the reason given before the court below was that the delay occurred due to the lack on the part of the court in numbering the case though there is no endorsement found on Ext.P6. Learned counsel went on to point out that unless the delay is explained, it is fatal to the prosecution case. For the above proposition,

learned counsel relied on the decision reported in Ravi v. State of Kerala (2011(3) K.L.T. 353).

9. Learned Public Prosecutor on the other hand supported the finding of the court below based on the evidence of P.Ws. 1 and 2 and the contemporaneous document. Learned Public Prosecutor went on to point out that properties were promptly produced before the court below and there was delay in numbering the same and that is why the delay had occurred. It is also contended that P.W.1 has spoken to the fact that both the sample and the balance contraband were sealed and there is no case for the defence that the seal was seen tampered. Therefore, even if there is any delay, that is not fatal to the prosecution. At any rate, according to the learned Public Prosecutor, the court below has chosen to accept the prosecution case and found the accused guilty. Unless it is found that the finding is so perverse, interference may not be justified.

10. First of all, on facts and in the evidence of the case, Section 55(a) of the Abkari Act cannot be attracted at all. The possession contemplated under that Section is for export or import and in this case there is such case for the prosecution. Under such circumstances, the offence comes under Section 8(1) of the Abkari Act.

11. Now comes the question regarding the incompetency of P.W.1 to detect the offence. Learned counsel for the appellant seems to be fully justified in his submission that P.W.1 was an incompetent officer to exercise powers under the Abkari Act at the relevant time. The relevant notification empowers that only officers of and above the rank of Excise Inspectors alone are qualified to be known as an abkari officer. In the decision reported in Subash v. State of Kerala (2008(2) KHC 703) it was held as follows:

“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.”

12. The decision reported in Joy v. State of Kerala (2010(3) K.L.T. 20) has been rendered without taking note of the decision in Subash's case (supra). Therefore, it cannot be said that the law laid down in Joy's case (supra) is the correct position of law.

13. Further, an identical issue was considered in the decision reported in Unni v. State of Kerala (2009(2) KHC 661), wherein it was held as follows:

“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.”

14. In the light of the decisions referred to above, it follows that P.W.1 was only an Assistant Sub Inspector and he is not competent to detect the case and investigate the same.

15. The reason given for the delay seems to be not correct. On a perusal of the records, it is seen that the documents were received by the court below on 28.11.2000 and no explanation whatsoever has been offered by any one of the officers. In the decision reported in Ravi v. State of Kerala (2011 (3) K.L.T. 353), what is meant by 'forthwith' was considered and it was held that production of property before court without unreasonable delay is a necessary requirement. If there is delay, the decision says that, that would have to be properly explained. In the decision reported in Ramankutty v. Excise Inspector, Chelannur Range (2013(3) KHC 308) it was

held that unexplained delay in producing the contraband before court after seizure is fatal to the prosecution case.

16. Inspite of best efforts, this Court is unable to unearth any reason given by the prosecution for the delay in producing the article. The reason given that there was delay in numbering the case does not appear to be justified.

17. There is yet another flaw. Forwarding note, namely, Ext.P7 does not contain the sample seal. Ext.P2 mahazar prepared at the time of seizure also does not contain the specification of the seal. Therefore, this Court is not in a position to state that the sample sent for chemical examination is the sample taken from the article seized from the possession of the accused.

18. In the light of the above facts, this Court is unable to uphold the conviction and sentence passed by the court below.

For the above reasons, this appeal is allowed, the conviction and sentence passed by the trial court are set aside and it is held that the prosecution has not succeeded in proving the guilt of the accused beyond reasonable doubt. The accused is acquitted of the charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

P. BHAVADASAN,
JUDGE

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