IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 8TH DAY OF DECEMBER 2015/17TH AGRAHAYANA, 1937

CRL.A.No. 691 of 2006 ( )

AGAINST THE JUDGMENT IN SC 745/2003 of ADDITIONAL SESSIONS COURT, FAST TRACK-I, ALAPPUZHA

CP 69/2003 OF JUDICIAL FIRST CLASS MAGISTRATE, KAYAMKULAM

APPELLANT(S)/ACCUSED.:

SANKARAN, S/O.KOCHU KUNJU,
KANJIRAPPALLY KIZHAKKATHIL, ELIPPAKULAM MURI
KATTANAM VILLAGE.

BY ADVS.SRI.R.GOPAN
SRI.BASANT BALAJI

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ds

P.BHAVADASAN, J.

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Crl.A. No. 691 of 2006

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Dated this the 08th day of December, 2015

J U D G M E N T

The appellant was prosecuted for the offence punishable under Section 8(1) & (2) of the Kerala Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of six months. Set off as per law was allowed.

2. When the matter was taken up for hearing, the learned counsel appearing for the appellant submitted that the appellant is no more and his legal heirs have not inherited any estate. Since the sentence also involves fine, the appeal will not abate as a whole and his legal representatives were free to come on record if they wanted to continue with the sentence. The appeal is therefore disposed of on merits since the appeal does not abate in its

entirety on the death of the appellant for the reason already stated.

3. The incident in this case is said to have occurred on 03.03.2002. On that day PW1, the Preventive Officer attached to the Mavelikkara Excise Range at about 6.30 p.m., was on routine patrol duty along with other officers. When they reached near the house of Pullunnivilayil Bhaskaran Pillai, they happened to see the accused coming along the road with a bottle of 750ml capacity. As he passed the Excise officers, he became nervous and he tried to run away. He was intercepted and the bottle was seized from his possession. On examination of the contents, it was found to be arrack. A sample of 200ml in a bottle of 375ml capacity was taken and it was sealed and labelled as per the requisite procedures. The labels contained the signatures of PW1, the accused and the witnesses. Ext.P1 mahazar was prepared at the spot. Thereafter, PW1 handed over the accused, records and the contraband articles to the Range

Office. PW4, the Excise Inspector speaks on behalf of the Assistant Excise Inspector, who took various steps after the accused and the records were produced before the range Office. The person, who received the articles and the accused and the documents, was one Sri. Asok Kumar, who was the Assistant Excise Inspector at the relevant time. As per the records which he received by him, he had registered the crime as per the occurrence report namely, Ext.P2. He had prepared the property list and he had sent the requisition for sending the sample for chemical examination, which is marked as Ext.P5. Further investigation was done by PW4 who received the Chemical Analysis Report, recorded statements of witnesses, completed investigation and laid charge before court.

4. 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, Alappuzha under Section 209 of

Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track-I, Alappuzha, for trial and disposal.

5. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 8(1) & (2) of the Abkari Act.

6. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 4 examined and had Exts.P1 to P5 marked. MO1 was got identified and marked.

7. 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.

8. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

9. Presumably based on the evidence of PWs 1 and 2, the two Excise Officers and also on Ext.P1 mahazar which is a contemporaneous document and also the fact that the accused and the documents were produced promptly before the court, the court below was impressed with the prosecution case and came to the conclusion that the accused has committed the offence and held him guilty. Conviction and sentence as already mentioned followed.

10. Sri. Gopan, the learned counsel appearing for the appellant raised one point for consideration. It was pointed out by the learned counsel for the appellant that after PW1 detecting the offence, he produced the accused, documents and other materials before the Excise Office where one Asok Kumar, who was only the Assistant Excise Inspector, had received all the documents and taken further steps in the matter including filing of remand report and also seeking the chemical examination of the sample produced before court etc.. This, according to the learned counsel, is illegal

because he was neither an officer notified under Section 5A of the Abkari Act nor was an Abkari Inspector at the relevant time. Even assuming that he was in charge of the Station, he could not carry out the functions of the Excise Inspector in view of the notification wherein, it is stated that officers of and above the rank of Excise Inspector alone are competent to act under the Abkari Officer. For the above proposition, he relied on the decision reported in **Unni** v. **State of Kerala** (2009 (2) KHC 661)

11. The learned Public Prosecutor opposed the above contention by pointing out that PWs 1 and 2 have given cogent and convincing evidence regarding the seizure and there is no reason to doubt their version. They get corroboration from Ext.P1 mahazar prepared simultaneously in the detection of the crime and that contains all the essential details. As regards the incompetency of the officer is concerned, it is pointed out that all that the Assistant Excise Inspector did is to receive the accused, thondi articles

and the documents and he had not conducted any investigation also. He had only done routine matters. Therefore, the infirmity attached to the detection and investigation will not apply to the facts of the case. The court below has chosen to accept the version given by PWs 1 and 2 and there is no reason for this Court to interfere with the said finding.

12. The learned counsel for the appellant relied on the decision reported in **Unni** v. **State of Kerala** (2009 (2) KHC 661), wherein it was held 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 ws 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 inculpate 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. The same issue was considered in the decision reported in **Subash v. State of Kerala** (2008 (2) KLT 1047).

14. True, in those cases, the detection, investigation or filing of the final report was done by a competent officer namely the Excise Inspector or Assistant Sub Inspector

Police as the case may be. In none of those cases, the question as to whether an Assistant Excise Inspector can receive the documents and the accused and file a remand report before court and also whether requisition for chemical analysis etc has been sought for by him, was considered. However one cannot omit to note certain statutory provisions. Section 40(3)(b) reads as follows:

> "(b) to the officer empowered under Section 5A, or to the Abkari Inspector".

15. That means whenever a person is arrested under Sections 31, 34, 35, he is to be produced before the officer authorised under Section 5A or an Abkari Inspector. An Abkari Officer under Section 5A as per the notification then stood, only Officers of and above the rank of a Excise Inspector are empowered to detect, investigate and lay final charge before court. As per the notification then existed, Assistant Excise Inspectors were not competent to detect the offence or file final report before court. The question is whether that squarely will apply in receiving the documents,

sending a remand report and producing the accused before the appropriate court. Here one will have to also read Section 41 of the Abkari Act which reads as follows:

> **41. Disposal of persons arrested**.-(1) Where any person accused of or suspected of, the commission of an offence punishable with imprisonment which may not extend to three years under this Act is arrested or brought in accordance with the provisions of Section 40, he may be released on bail, if sufficient bail be tendered for his appearance before the concerned Abkari Inspector or the Magistrate, as the case may be.
>
> (2) Where a person accused of, or suspected of the commission of an offence punishable with imprisonment which may extend to three years or more under this Act is arrested or brought in accordance with the provisions of Section 40, he shall without any delay be produced before the Magistrate, who shall take such measures as may be necessary to proceed against such person in accordance with the provisions of the Code of Criminal Procedure, 1973, (Central Act 2 of 1974)

16. A combined reading of Sections 40 and 41 leaves one in no doubt that after detection, if the accused, contraband article and documents were produced before the Excise Office, only a person who is an officer empowered

under Section 5A or an Abkari Inspector can take custody of the accused, the documents and the articles produced before him. It is evident from a reading of the above provision that the officer before whom the accused is produced as in terms of Section 40(3)(b) has certain duties to be performed with regard to the accused as well as the documents and articles produced before him. That he can receive the accused, documents, article and deal with them in accordance with the Sections 40 and 41 only if he is an authorised officer under Section 5A or he is an Abkari Inspector. Otherwise, going by the statute, there is no provision which enables an Assistant Excise Inspector to deal with such matters as is mentioned in Sections 40 and 41 of the Act. That means, all the acts done by Sri. Asok Kumar cannot have any legal value.

17. The principle laid down in the decisions already referred to applies with all force to the case on hand.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands 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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//True copy//

P.A. to Judge