

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA, 1937

CRL.A.No. 731 of 2006

AGAINST THE JUDGMENT IN SC 83/2001 of ADDL.SESIONS COURT
(ADHOC-II)KASARAGODE DATED 09.03.2006

APPELLANTS/ACCUSED:

1. M.RAGHAVAN, S/O. MALINKU NAIK,
KANNIYADUKKAM, MALAKKALLU, KALLAR VILLAGE.
2. M. NARAYANAN, S/O. MALINKU NAIK,
NARIYANTA PUNA, KARIVEDAKAM.
3. A. RAGHAVAN, S/O. BALU NAIK,
POOKAYAM, KUNNEERADUKKAM, KALLAR VILLAGE.
4. J.K. BABY @ JOSEPH, S/O. KURUVILA,
ITIPLAKKAL VEEDU, KALLAR VILLAGE, MALAKKALLU.

BY ADVS.SRI.M.THAMBAN
SMT.T.SUDHAMANI

RESPONDENT/COMPLAINANT:

THE 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
04-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

Crl.Appeal. No. 731 of 2006

Dated this the 4th day of November, 2015.

JUDGMENT

The accused were found guilty of the offence punishable under Section 55(a) of the Abkari Act. They were convicted and each of them was sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.1,00,000/- each, in default, to undergo rigorous imprisonment for six months.

2. The incident is alleged to have occurred on 25.4.2000. On that day, P.W.1 who was then the Sub Inspector of Rajapuram Police Station along with P.W.2 and others had gone on patrol duty. They received reliable information over phone that contraband article was being carried in a jeep. After entering in the GD, they proceeded to the place and reached Thimmachal picket post. There they found a jeep parked which on examination was found to contain several cans containing liquid. By taste and smell the police officers

came to the conclusion that it was arrack. Ext.P1 arrest memo was prepared and the accused were arrested. Thereafter from the five cans 180 ml was taken in two bottles as sample and they were sealed and labelled as is required. The balance was also was so done. Then, P.W.1 prepared Ext.P2 mahazar. They returned to the station and P.W.1 suo motu registered crime against the accused and that is Ext.P3 FIR. P.W.4, who was the Assistant Sub Inspector of Police of Rajapuram Police Station took over investigation. He prepared Ext.P6 scene mahazar and recorded statements of witnesses. He sent the articles to the court by preparing Ext.P7 property list and he also claims to have forwarded the requisition to the court to send the articles for analysis. He completed investigation and laid charge before court.

3. The court, before which final report was laid, took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions, the said court committed the case to Sessions Court, Kasaragod. The said

court made over the case to Additional Sessions Court (Adhoc)-II, Kasaragod for trial and disposal.

4. The latter court, on receipt of records and on appearance of the accused framed charge for the offences 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 had P.Ws.1 to 4 examined 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 were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. They chose to adduce no evidence.

5. The court below, presumably impressed by the evidence of P.Ws. 2 and 3 coupled with the fact that the articles were promptly produced before the court along with

the accused, was inclined to accept the prosecution version of the incident and holding so the accused was found guilty. Conviction and sentence as already mentioned followed.

6. Learned counsel appearing for the appellant pointed out that this appeal will have to succeed on a very short ground. The incident according to the learned counsel occurred on 25.4.2000. At that time, the Assistant Sub Inspector of Police was not a competent officer to detect or investigate the case as per the notification then in force. The said detection or investigation conducted by such an officer is non-est in law. Detection will form the basis for initiation of proceedings against any person and since that is non-est, therefore the whole proceedings is bad in law. In support of her contention, she relied on the decisions reported in Subash v. State of Kerala (2008 (2) K.L.T. 1047) and Subrahmaniyan v. State of Kerala (2010(2) K.L.T. 470. Accordingly, it is contended that the conviction is bad in law.

7. Learned Public Prosecutor tried to sustain the conviction on the ground that on an appreciation of evidence in the case, it becomes crystal clear that the accused was in actual possession of the contraband article. The evidence of P.Ws.2 and 3 are sufficient to establish the said fact. The chemical analysis report shows that the article contained ethyl alcohol. Under these circumstances, learned counsel pointed out that it will not be proper on the part of this Court to acquit the accused on this ground.

8. The issue is not as simple as the learned Public Prosecutor puts it. The officers of the various departments who are empowered to act under the Abkari Act is mentioned in 1967 notification which continues to hold the field even in the year 2000. In the said notification, it is clearly stated that only officers of and above the rank of Excise Inspectors are entitled to investigate abkari offences and file final report. These officers can act only within their territorial limits also.

9. It is therefore clear that the investigation in the case was carried on by the Assistant Sub Inspector, who, going by the notification was incompetent to do so. 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.”

10. In the decision reported in Unni v. State of Kerala (2009(2) KHC 661), 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.”

11. The principle in the above decisions applies to the facts of the case and obviously the accused is entitled to the benefit.

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 are acquitted of the charges levelled against them. Their bail bonds shall stand cancelled and they are set at liberty.

P. BHAVADASAN,
JUDGE

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