

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

CRL.A.No.384 of 2007 (E)

AGAINST THE JUDGMENT IN SC 389/2002 of ADDL. SESSIONS COURT
ADHOC III, THALASSERY DATED 22.01.2007

APPELLANT/ACCUSED:

POTTANKI SANTHOSH, S/O. KUMARAN,
KAVINMOOLA HOUSE, SIVAPURAM, MALOOR,
KANNUR DISTRICT.

BY ADV. SRI.CIBI THOMAS

RESPONDENTS/COMPLAINANT & STATE:

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1. SUB INSPECTOR OF POLICE,
MALOOR POLICE STATION.
 2. STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY SRI.C.K. JAYAKUMAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
15-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.384 OF 2007

Dated this the 15th day of September, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(a) of Abkari Act. He was found guilty of the offence under Section 8(2) of Abkari Act and was therefore convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of simple imprisonment for six months. Set off as per law was allowed.

2. The prosecution case is that on 02.10.2001, while PW1 was working as Sub Inspector of Maloor Police Station, he along with his team of officers had gone for patrol duty and at about 20.35 hours while they were doing duty, they happened to see the accused coming along the road holding a can. When the police jeep reached near him, the allegation is that he tried to escape. He was intercepted and the can was seized. On examination of the contents of the can, it was seen to contain 30 liters of arrack. The accused was arrested and Ext.P1 is the

arrest memo. PW1, in the presence of witnesses, took two samples from the articles seized and had prepared Ext.P2 seizure mahazar. He sealed the can and the sample and packed the residue and had labels containing the signature of accused and himself affixed on the articles. He returned to the Police Station and registered a crime as per Ext.P3 First Information Report. He produced the seized articles before court as per Ext.P4 property list. He had also filed the forwarding note, Ext.P5 for sending the sample for chemical examination and obtained Ext.P6 chemical analysis report. However, investigation of the case was done by Sub Inspector of Kelakam Police Station as per the directions of Circle Inspector, Peravoor. Investigation was completed. Charge was laid by PW1.

3. Cognizance of the offence was taken by Judicial First Class Magistrate, Kuthuparamba who, on finding that the offence is exclusively triable by a Court of Sessions, committed the case to Sessions Court, Thalassery for trial and disposal. The said court made over the case to Additional Sessions Court (Adhoc III), Thalassery. On receipt of records and on appearance of the accused, charge was framed for the offence under Section 55(a)

of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

4. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P7 marked.

5. After the close of the prosecution evidence, 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. He also added that he was apprehended by the Police without any justification.

6. On finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He adduced no evidence.

7. Based mainly on the evidence of PW1 and a contemporaneous document, court below came to the conclusion that the offence has been proved and convicted and sentenced the accused as already mentioned.

8. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that the evidence solely based on the testimony given by PW1 and there is no other independent witness examined by the prosecution. Even going

by the prosecution case, there were quite a few police officers who had accompanied PW1 and none of them have been examined. Two independent witnesses turned hostile to the prosecution and one of them totally denied of having seen the incident and the other denied of having his signature affixed in the mahazar. When there were more available evidence, the prosecution should have tried to procure them but it solely relied on the evidence of PW1. It was also pointed out that the investigation was done by the Sub Inspector of Kelakam Police Station who has no jurisdiction over the area from where the articles were seized. In other words, according to the learned counsel, investigation was done by an incompetent officer and that vitiates the investigation. If investigation is vitiated, then cognizance cannot be taken and all proceedings are vitiated. For the above purpose, learned counsel appearing for the appellant relied on the decisions in **Saji @ Kochumon vs. State of Kerala** (2010 (3) KLT 471), **Haridas vs. State of Kerala** (2015 (1) KLT 958) and in **Narayanankutty vs. State of Kerala** (2015 (2) KLT S.N 18). Learned counsel contended that the conviction and sentence passed by the court below cannot stand.

9. Learned Public Prosecutor, on the other hand, contended that the investigation was done by Sub Inspector of Kelakam Police Station as per the directions of Circle Inspector of Peravoor and final report was laid by PW1, Sub Inspector of Maloor Police Station. PW1 speaks in terms of the prosecution case. He speaks about having gone for patrol duty and having intercepted the accused. He then speaks about seizing of can from the accused. He also says about examining the contents of can which revealed that can contained 30 litres of arrack. He says about the sampling done in the presence of witnesses, affixing label on them and also packing of residue materials. He says about preparation of seizure mahazar Ext.P2 and also says that after he returned to the Police Station seizing the articles and arresting the accused, he registered a crime as per Ext.P3. He then speaks about having produced the materials before court as per Ext.P4 property list and then speaks about having filed forwarding note before the court below which is Ext.P5. He then says that investigation was taken over by Sub Inspector of Kelakam Police Station as per the instructions of Circle Inspector of Peravoor and investigation was conducted by him though final

report was laid by PW1.

10. PW2 is an independent witness. He denied of having seen the incident and also putting his signature on Ext.P2.

11. PW3 is also an independent witness who turned hostile though he admitted his signature on Ext.P2. However, he deposed that he signed on Ext.P2 from Maloor Police Station.

12. PW4 is a person who conducted the investigation. He says that as directed by the Peravoor Circle Inspector, he investigated Crime No.78/2001 of Maloor Police Station and he had inspected the scene and prepared the scene mahazar Ext.P7. He also says that he questioned the witnesses and recorded their statement. After conducting the investigation, he claims to have entrusted the CD to PW1 who laid charge before court.

13. It is true that there are no independent witnesses to support the prosecution case. It is strange to note that PW1 says that there are several other police officers along with him. The prosecution did not feel it necessary to examine any one of them. It is not as if that the evidence of PW1 cannot be believed. If the evidence is found to be convincing enough and corroborated by items of evidence, there is no justification for not accepting the

same. In the case on hand, Ext.P2 which is a contemporaneous document contains all the details and it has been produced before court on a very near date. There is nothing to show that PW1 had any axe to grind against the accused or any ill motive against him.

14. True, PWs 2 and 3, independent witnesses, turned hostile though PW3 admitted his signature on Ext.P2 mahazar. If the court below who had opportunity to watch the demeanour of the witnesses chose to believe PW1, there is no reason as to why this Court disbelieve him. But, that is not the end of the case.

15. The question is whether PW4 who has conducted the case is a competent officer to do so. Abkari Act defines an Abkari Officer and also prescribes that notified officers acting within the territorial limits is competent to conduct the investigation. This Court had occasion to consider the matter on several occasions and it was held that if either detection or investigation etc. is by an officer who is not competent to do so, it is vitiated or in other words, officer can act only within his territorial jurisdiction and any act done outside his jurisdiction is non est.

16. In the case on hand, PW4 is attached to Kelakam Police Station. He obviously had no jurisdiction over Maloor area. The investigation conducted by him is without jurisdiction. Even assuming that he acted as per the directions issued to him by the Circle Inspector, Peravoor, he lacks inherent jurisdiction to investigate the case. In the decision in **Haridas vs. State of Kerala** (2015 (1) KLT 958), it was held as follows:

"6. P.W.5 deposed before the court that he had conducted the investigation of the case as directed by the Assistant Excise Commissioner, Pathanamthitta. The Assistant Excise Commissioner had no authority to empower P.W.5 to conduct the investigation of the case. Such power must be conferred on P.W.5 by a notification issued by the Government of Kerala under S.4 of the Abkari Act. In the absence of such a notification, the investigation conducted by P.W.5 cannot be accepted to be a legal one even if it was done as directed by the Assistant Excise Commissioner, Pathanamthitta.

7. Since the investigation of the case had been conducted by an incompetent officer, the court below had no jurisdiction to take cognizance of the offence alleged in the complaint filed based on such investigation. Consequently, the court below could not have framed charge against the appellant as it

was without jurisdiction. The trial which followed after framing the charge must be treated as non est in the eye of law as it was done without jurisdiction . As the trial was conducted without jurisdiction by the court below, it cannot end either in conviction or in acquittal. Therefore, the conviction and sentence passed by the court below against the appellant are liable to be set aside. He is entitled to be discharged in this case.”

17. In the decision in **Narayanankutty vs. State of Kerala** (2015 (2) KLT S.N 18), it was held as follows:

“In the light of the provisions of S.R.O No.321 of 1996 as interpreted by this Court in this ruling (2010 (3) KLT 471), a Sub Inspector of Police authorised to act as Abkari Officer can exercise his jurisdiction only within the territorial limits of his police station. Therefore, PW6, the Sub Inspector of Police, Hemambika Nagar Police Station, had exceeded the limits of his jurisdiction by investigating the case on hand which was within the territorial limits of Kongad Police Station”.

18. It is therefore evidenced that PW4 is an incompetent officer to conduct the investigation and therefore the investigation is bad in law. If investigation could not have been conducted by PW4, there is no investigation in the case in

accordance with law. That vitiates the proceedings.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused is acquitted of the charge levelled against him. The bail bond executed by the accused shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.