

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

CRL.A.No. 845 of 2006 ()

**AGAINST THE JUDGMENT IN SC 61/2005 of ADDITIONAL SESSIONS COURT, FAST
TRACK-I, PALAKKAD DATED 04-03-2006**

APPELLANT(S)/ACCUSED:

**KANNAN, S/O. RAMAN, CHETTIYAMKADU
VEEDU, CHETTIYAMKADU DESOM, PERUNGOTTUKURUSI
VILLAGE, ALATHUR.**

**BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SRI.P.M.RAFIQ**

RESPONDENT(S):

**STATE OF KERALA, REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 845 of 2006

Dated this the 04th day of December, 2015

J U D G M E N T

Having found the accused guilty of the offence punishable under Section 8 of the Abkari Act, he was convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of six months.

2. The incident which gave rise to the case occurred on 03.01.2001. On that day PW1, an Assistant Excise Inspector attached to Kuzhalmannam Excise Range along with PW2, the preventive officer attached to the same department were on patrol duty. When they reached a place called Thottumukku, they happened to see the accused coming along with a can. When he tried to escape from the Excise officers, he was intercepted and the can was seized from his possession. On examination of the contents, it was found to contain 2½ litres of arrack. Sample of 300ml

was taken and both the sample bottle and the can were sealed and labelled. The labels contained the signatures of the accused and PW1. He prepared Ext.P1 mahazar and as per Ext.P2, arrest memo, accused was arrested. He reached the station and on the basis of the records and seized articles, registered crime as per Ext.P3 FIR. The articles were produced before court on 04.01.2001 and he claims to have filed forwarding note, namely, Ext.P4. He obtained Ext.P5 Chemical Analysis Report. PW5 took over investigation of the case. He recorded statements of witnesses, drew up Ext.P6 scene plan and after completing investigation, he laid charge before court.

3. 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, Palakkad 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, Palakkad, for trial and disposal.

4. 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 of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 5 examined and had Exts.P1 to P6 marked. MO1 was got identified and marked.

6. 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.

7. 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.

8. The court below, greatly impressed by the evidence of PWs 1 and 2, the two official witnesses taken

along with Ext.P1 mahazar, came to the conclusion that the prosecution has succeeded in establishing the case against the accused. Accordingly, convicted and sentenced him as already mentioned.

9. Assailing the conviction on various grounds, the learned counsel for the appellant contended that the conviction cannot stand for more than one reason. The most fundamental error is regarding the competency of the Detecting Officer. The learned counsel pointed out that as per the notification in force at the relevant time, only Officers of and above the rank of an Excise Inspector are empowered to detect, investigate and lay final charge before court. In the case on hand, PW1 was only an Assistant Excise Inspector and it was he who had detected the offence and conducted the major part of the detection and investigation. If that be so, going by the decision reported in **Unni v. State of Kerala** (2009 (2) KHC 661), the entire proceedings is vitiated.

10. The learned Public Prosecutor had no answer to the above contention.

11. In the decision reported in **Unni v. State of Kerala** (2009 (2) KHC 661), 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 was 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 inculcate 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."

12. It is not disputed before this Court that PW1 was only an Assistant Excise Inspector at the relevant time and that he is not covered by the then existing notification. If that be so, the principle relied on in the above decision squarely applies to the facts of the present case and the entire proceedings based on the detection made by an incompetent officer has to fail.

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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P.A. to Judge