

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 16TH DAY OF NOVEMBER 2015/25TH KARTHIKA, 1937

CRL.A.No. 965 of 2006

AGAINST THE JUDGMENT IN SC 289/2005 of ADDL.SESIONS COURT
(ADHOC)-II, THODUPUZZHA DATED 05.05.2006

APPELLANT/ACCUSED:

JAYARAMAN @ JAYAN,
S/O. VELU, CHERUKUZHAYIL VEEDU, ANACHAL KARA,
KUNCHITHANNY VILLAGE.

BY ADV. SRI.S.RAJEEV

RESPONDENT/RESPONDENT:

STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA
(CRIME 338/2001 OF VELLATHOVAL POLICE STATION)

BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.965 OF 2006

Dated this the 16th day of November, 2015.

J U D G M E N T

The accused who faced prosecution for the offence under Section 55(a) of Abkari Act was found guilty for the offence under Section 55(i) of Abkari Act and was therefore convicted and sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for three months.

2. PW3, Assistant Sub Inspector of Police attached to Vellathooval Police Station was on festival duty in a nearby temple. On 23.12.2001, while he was carrying out his duty, he received reliable information that a person is engaged in sale of illicit liquor. He happened to see a person standing in the northern side of a shop with something in his hand. He and his team of officers went near the person and seized the plastic bag which he had and on examination of the bag, he found 7 bottles of 375ml Victoria XXX Rum. Two bottles were opened and by

taste and smell, it was confirmed that it is Indian Made Foreign Liquor. Accused was arrested on the spot and Ext.P1 mahazar was prepared. In the sample taken by him, he had the label affixed containing the signature of the accused and the witnesses. He returned to the station and registered Crime No.338/2001 as per Ext.P3 First Information Report. He registered the case on suo moto. On the next day, he had the accused, articles and records entrusted to Sub Inspector of Police attached to the station.

3. PW4 took over the investigation. He had the accused and the articles produced before court on 24.12.2001. The property list prepared by him is Ext.P4 and the forwarding note is Ext.P5. He obtained Ext.P6 chemical analysis report. He recorded the statement of witnesses, verified the records and laid charge before court.

4. The court before which final report was laid took cognizance of the offence and finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Thodupuzha under Section 209

Cr.P.C after following requisite procedures. The said court made over the case to Additional Sessions Court (Adhoc)-II, Thodupuzha for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charge for the offence under Section 55(a) of Abkari Act. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P6 marked. M.O.s 1 and 2 were got identified and marked.

6. 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 added that he was a committee member of the temple and during festival season, people used to play cards for money and this was with the silent consent of the police officers. He had complained about the same and therefore he was implicated.

7. 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.

8. Impressed by the evidence furnished by PW3 taken along with contemporaneous document Ext.P1, court below was satisfied that the offence had been committed by the accused and accordingly, convicted and sentenced him as already stated.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that the court below has omitted certain serious infirmities in the case. First of which is highlighted as considerable delay in producing the seized articles before court by PW4. It was produced 35 days after the detection of offence and there was no reasonable explanation offered for the same. Apart from that, the fundamental defect is that PW3, the officer who detected the offence, who registered the crime and who prepared the records, had no authority to do so as he was only an Assistant Sub Inspector of Police at the relevant time and as per the notification, only Sub Inspector of Police or officer above the rank of Sub Inspector can act as Abkari Officer. For the said proposition, learned counsel relied on the decision in **Haridas vs. State of Kerala** (2015 (1) KLT 958).

10. Learned Public Prosecutor, on the other hand, contended that final report was laid by Sub Inspector of Police and that would be sufficient to cure the initial defects.

11. It is difficult to accept the contention raised by the learned Public Prosecutor in this regard. 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.”

12. PW3, admittedly, was only Assistant Sub Inspector of Police. Going by the decision cited above, it is evident that he was incompetent to act as Abkari Officer at the relevant time. If that be so, any act done by him is non est in law. Add to this is the fact that there is unexplained delay in producing the articles seized before court.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused is not guilty of the offence. He stands acquitted of the charges levelled against him. His bail

bond shall stand cancelled and he is set at liberty. If any amount is deposited as per the orders of the court, the same shall be refunded on proper application.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.