

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

CRL.A.No. 556 of 2007 ()

**AGAINST THE JUDGMENT IN SC 357/2004 of ADDITIONAL DISTRICT & SESSIONS
COURT (FAST TRACK - I), TRIVANDRUM DATED 12-03-2007**

APPELLANT(S)/ACCUSED.:

**JOSEPH, S/O.CHELLAPPAN,
PURAVIMALAPPALLI PARAMBU, KOVILLOOR DESOM
AMBOORI VILLAGE.**

**BY ADVS.SRI.G.SASIDHARAN CHEMPAZHANTHIYIL
SMT.VIVEEJA RAVEENDRAN
SRI.MANOJ RAMASWAMY
SRI.S.VISHNU CHEMPAZHANTHIYIL**

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 18-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 556 of 2007

Dated this the 18th day of December, 2015

J U D G M E N T

The accused was prosecuted for the offences punishable under Sections 55(a) and 8(2) of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of ₹1 lakh with a default clause of rigorous imprisonment for a further period of one year. Set off as per law was allowed.

2. The incident which gave rise to this case occurred on 05.06.2002. PW3 was then functioning as the Assistant Sub Inspector of Police, Nayyardam Police Station. On that day, he along with his team of officers had gone on patrol duty as per the instructions given by the Circle Inspector. When they reached near the Puravimalakalam, they got reliable information that wash has been concealed in the compound of Joseph. The team went to the rubber

plantation of said Joseph. When they reached the place, they found a person running away carrying a blue can with him. He was followed by the Police Officer, but he threw away the can and jumped into the dam. The can was retrieved and on examination of the contents, it was found to contain 20 litres of arrack. A sample was taken in a bottle of 375ml capacity and it was sealed. On examination of the surroundings of the compound, they were able to unearth about 10 pots containing wash. PW3 claims to have prepared Ext.P2 seizure mahazar and he claimed that the sample was sealed and labelled at the place and a report was drawn up namely Ext.P3. He returned to the Police Station and handed over the contraband article and the documents to the SI of Police Station concerned. PW6 was the Sub Inspector of Police before whom the articles and the documents were produced by PW3. He accepted the same. Based on the available documents, he registered crime as per Ext.P7 FIR. The property was sent to court. Ext.P8 is the

property list. He also made a forwarding note to send the sample for chemical examination and it is marked as Ext.P9. He recorded statements of witnesses. Further investigation was done by PW4. He obtained the chemical analysis report, completed investigation and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offences to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Thiruvananthapuram, under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional District & Sessions Court, Fast Track-I, Thiruvananthapuram, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Section 55(a) & 8 (2) 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 7 examined and had Exts.P1 to P9 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. Accepting the evidence of PWs 2 and 3 and also relying on Ext.P2 mahazar said to have been prepared by PW3, the court below was considerably influenced by those items of evidence and found the accused guilty. Conviction and sentence followed.

9. After having gone through the records and after having heard the learned Public Prosecutor, it is felt that this

appeal will have to succeed on two grounds.

10. It is seen from the records that the detection was done by the Assistant Sub Inspector of Police, Neyyardam. The second ground is that the forwarding note does not contain the sample seal. It is by now well settled 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 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.”

It is therefore clear that the acts done by PW3 cannot have any support in law.

11. Equally formidable is the second ground that is the absence of sample seal in the forwarding note. That has been considered in the decisions reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624) and **Krishnan v. State** (2015 (2) KLT SN 8).

12. The principle laid down in the above decisions apply with all force to the facts of the present case. The result is that this appeal will have to succeed and the appellant is entitled for an acquittal.

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