

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 19TH DAY OF AUGUST 2015/28TH SRAVANA, 1937

CRL.A.No. 912 of 2005 ()

**AGAINST THE JUDGMENT IN SC 40/2003 of ADDITIONAL SESSIONS COURT
FAST TRACK-I (ADHOC), MANJERI**

APPELLANT(S):

**MALAYIRAMBIL RAJAGOPALAN,
S/O.M.K.GOPALAN, POTTENTHARIPPA, UPPADA
MALAPPURAM DISTRICT.**

BY ADV. SRI.BABU S. NAIR

RESPONDENT(S):

**THE STATE OF KERALA, REPRESENTED BY
THE SUB INSPECTOR OF POLICE
EDAKKARA POLICE STATION-THROUGH THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI-31.**

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19-08-2015,
ALONG WITH CRA. 1003/2005, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. A. Nos.912 & 1003 of 2005

Dated this the 19th day of August, 2015

JUDGMENT

The appellants are the accused in S.C.40/2003 on the file of the Additional Sessions Court-1 (Adhoc) Manjeri challenges the judgment of conviction under Section 55(a) of the Abkari Act. They were found guilty under Section 55(a) of the Abkari Act and sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rupees One lakh under Section 55(a) of the Abkari Act, in default of payment of fine, imprisonment for six months.

2. The facts given rise to indictment were that on 19.12.97, the local people intercepted the appellant with 10 litres of arrack at Unichandam near to Uthirakulam temple. On the basis of that information, Police party arrived at the place of occurrence at 11.30 am and seized arrack from the possession of A1 and registered a crime. After investigation, Sub Inspector of Police laid charge before Judicial First Class Magistrate, Nilambur. From there, the case was committed to Sessions Court for trial.

3. To prove the offence, prosecution examined the PW1 to PW7 and marked Exts.P1 to P10 as documentary evidence. The kannas seized was marked as MO1. The incriminating circumstances brought out in evidence were denied by the appellants while questioning them. They were also heard under Section 232 Cr.P.C. The trial court after analyzing the evidence, convicted the appellants. Being aggrieved by that, accused preferred this appeal.

4. The learned counsel appearing for the appellants submitted that, there is no independent corroboration to the alleged seizure. The second accused was standing at the place of occurrence without any contraband articles, he was arrayed as accused without any legal evidence. The major portion of the investigation was conducted by a non-empowered officer. The independent witness present there turned hostile did not support the prosecution case.

5. The learned Public Prosecutor contended that the detection was made by an empowered officer and final report was also filed by an empowered officer. When detection and final report was filed by empowered officer,

no illegality in conducting investigation by his subordinate officer. The independent witness present there attested the seizure mahazar and no reason to disbelieve their signature.

6. The seizure of the arrack was made by PW1, who was the Sub Inspector of Police, Edakkara. The evidence of PW1 shows that on 19.12.97 at 11.00 pm, two persons came to the Police Station and informed him that appellants were intercepted by the local people with 10 litres of arrack. Immediately he arrived at the place of occurrence at 11.30 pm and A1 was found carrying MO1 plastic cannas. A2 was also found near to him. He identified arrack in MO1 and arrested the accused after preparing Ext.P1 arrest memo. He took sample of 200 ml from MO1 and sealed the place of occurrence in the presence of independent witness, thereafter prepared Ext.P2 seizure mahazar. Reaching at the Police Station, he registered a crime and Ext.P3 is the FIR. On the next day, the seized articles were produced before court. Introduction of Section 50 in the Abkari Act gives

jurisdiction to a competent Magistrate for taking cognizance of the offence. Section 50 of the Abkari Act reads as follows;

“50. Report of Abkari Officer gives jurisdiction to a competent Magistrate:- (1) Every investigation into the offence under this Act shall be completed without necessary delay.”

(2) As soon as investigation into the offences under this Act is completed, the Abkari Officer shall forward a Magistrate, empowered to take cognizance of the offence on a police report, a report in accordance with sub section (2) of section 173 of Code of Criminal Procedure, 1973 (Central Act 2 of 1974).

7. Therefore, Magistrate can take cognizance of the offence only on the basis of a report submitted by an Abkari Officer. It is specifically stipulated in 50(2) of the Abkari Act that, as soon as the investigation is completed, the Abkari Officer shall forward it to the Magistrate empowered to take cognizance of the offence. An Abkari Officer is defined under Section 3(2) of the

Abkari Act is as follows:

“(2) Abkari Officer:- “Abkari Officer”, means the (Commissioner of Excise) or any officer or other person lawfully appointed or invested with powers under Section 4 or 5.”

Subsequently Government issued a notification issued vide S.R.O.No.321/1996 dated 29.3.1996 authorizing Police Officers above the rank of Sub Inspector of Police to discharge of duties conferred on the Abkari Officer. As per the notification, the Government of Kerala appointed all police officers of and above the rank of Sub Inspector of Police in charge of Law and Order and working in the General executive branch of the Police Department was designated as Abkari officers as per Section 5 of the Abkari Act, which reads as follows:

“S.R.O.No.321/96.- In exercise of powers conferred by section 4 of the Abkari Act, I of 1077 the Government of Kerala hereby appoint all police officers of and above the rank of Sub Inspector of Police in charge of Law and Order and working in the General executive branch of the Police Department and all Revenue Officers of and above the rank of Deputy Collectors to be Abkari Officers under their respective Jurisdiction for the purpose of Sections 31, 32, 33, 34, 35, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 59 of the Act and to exercise all the powers and to discharge all the duties conferred and imposed on

Abkari Officers, in the sections aforesaid.

This notification shall come into force with immediate effect."

8. In the light of the above statutory provision, I have examined the oral evidence of the other witness, who were present at the time of seizure. PW2 supported the oral evidence of PW1. He also give a similar version given by PW1. He categorically stated that PW1 verified MO1 cannas and affirmed it as arrack. PW3 admitted that he attested Ext.P5 scene mahazar. PW4 admitted signature in seizure mahazar, but he did not support the prosecution case. His evidence shows that, he signed the mahazar at the police station. PW5 is also another independent witness attested the mahazar. He also did not support the prosecution case and independent witnesses PW4 and PW5 turned hostile. PW6, the Assistant Sub Inspector of Police, Edakkara admitted that he conducted investigation in this case. He arrived at the place of occurrence and prepared Ext.P5. He questioned the witnesses. He prepared Ext.P8 forwarding note. PW7 verified the investigation and laid charge before court. He

obtained Ext.P9 chemical examination report and finally laid charge before court.

9. A close scrutiny of the evidence of these witnesses, it is clear that a portion of investigation was conducted by a non-empowered officer. The impact of the investigation by a non-empowered officer was discussed by this court in **Sabu v. State of Kerala [2007(4) KLT 169]** held as follows:

“As per S.4 of the Abkari Act, the Government of kerala is empowered to authorize an officer of the State to detect or investigate an offence contemplated under the provisions of the Abkari Act. The Government of Kerala had notified that all police officers above the rank of Sub Inspector of Police is empowered to discharge all the duties conferred on an Abkari Officer. In the light of S.R.O. No.321/96, PW3 who was only, a Assistant Sub Inspector of Police was not empowered to detect or investigate the offence. If so, the evidence of PW3 corroborated by the evidence of PWs 4 and 5 would not prove any case against the appellant. Even if he was empowered as per the provisions of S.2(o) Cr.P.C., he cannot exercise the power conferred on an Abkari Officer.”

The above decision was followed by the Division Bench of this Court in **Subash v. State of Kerala [2008(2) KLT 1047]**, in which it is held as follows:

“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 the 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. 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. 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 offence on the basis of a report by an officer not authorised 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 also refer to S.199(1) and S.461 (d) of Cr.P.C. An officer other than 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. Lack of total jurisdiction for taking cognizance of an offence other than specially empowered office is not an irregularity covered under Chapter XXXV of Cr.P.C.”

10. Now the relevant point for consideration is whether a police officer, who is neither an Abkari officer under Abkari Act, nor a sub inspector in charge of a police station can validly investigate any offence under Abkari Act. An Assistant Sub Inspector, who was not appointed

as an Abkari officer by the State Government, registered the case, recorded the statement of the witnesses and investigated major portion of the case and submitted the case file to the Sub Inspector, who was the designated Abkari Officer. The scheme of the Code of Criminal Procedure shows that it is permissible for an officer in charge of a Police Station to depute some subordinate officer to conduct some steps in the investigation. The responsibility of every one such person in the situation is that of the officer in charge of the Police Station. S. 168 of the Code provided that when a Subordinate Officer makes an investigation he shall report the result to the officer in charge of the Police Station. The final step in the investigation is the formation of the opinion whether the accused is to be placed for trial or not. There is no provision for delegation but only provision for supervision by superior officers.

11. The investigation by non-empowered officer in corruption cases was discussed by this court in **Hashim T.K. V. Assistant Sub Inspector, Chandra Police**

Station and Anr. (2014(1) KHC 283);

“11. The power of Abkari Officer or empowered officer to deal with the offences under the Abkari Act are specifically mentioned in the above act and therefore, they have to investigate such offences according to that provisions. Therefore, it is presumed that the investigation can be held only by an empowered officer and not by an ordinary police officer mentioned in the Cr.P.C. If such parallel investigation is being conducted by the non-empowered officer, or by two different agencies, which will create duplication of such proceedings. There is nothing mentioned in the Abkari Act to co-ordinate the activities of the regular police with respect to cognizable offences under the Act and those of the specially empowered officer. The empowered officer or the Abkari Officer is a police officer always of the rank specifically mentioned in the Statute or in the Abkari Act, through out the local area to which he is appointed within the jurisdiction of his limit. The Apex Court had the opportunity to discuss the difference between the special officer mentioned under Section 5 (A) of the Prevention of Corrupt Act 1947 and the powers of Police officer mentioned in the

Cr.P.C.

The three Judge bench of the Apex Court in ***Munnalal v. State of Uttar Pradesh*** [AIR 1964 SC 28] held thus:

“Held that though the letter of S.5A of the Act was complied with its spirit was not, for in reality there was no investigation by the officer authorised under that section and the real investigation was by a sub-inspector of police who was never authorised. S. 5A is mandatory and not directory and an investigation conducted in violation thereof is illegal. Even if however there was irregularity in the investigation and S.5A was not complied with in substance, the trials could not be held to be illegal unless it was shown that miscarriage of justice had been caused on account of the illegal investigation. There was no miscarriage of justice in these cases at all due to the irregular investigation. As a matter of fact on the alternative case put forward by the accused the substance of the prosecution case was practically admitted by him and he merely pleaded certain mitigating circumstances. No objection was taken at the trial when it began and it was allowed to come to an end. “

12. Therefore the illegality committed by the non-empowered officer shows that the final report was on the basis of defective investigation. Therefore, the materials obtained by non-empowered officer cannot not be used for a conviction in an Abkari case. It is not an irregularity or illegality mentioned under Section 461 Cr.P.C. as

discussed in **H.N. Rishbud v. State of Delhi [AIR 1955
SC 196]**.

Therefore, the conviction and sentence under Section 55(a) of the Abkari Act is liable to be set aside. In the result the conviction and sentence under Section 55(a) of the Abkari Act is set aside and these appeals are allowed.

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P.A. TO JUDGE

Sd/-
P.D. RAJAN,
JUDGE