

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 5TH DAY OF OCTOBER 2015/13TH ASWINA, 1937

CRL.A.No.1172 of 2006 (A)

AGAINST THE JUDGMENT IN SC 247/2005 of ADDL.SESIONS COURT
(ADHOC-I), KASARAGOD DATED 25-04-2006

APPELLANT/ACCUSED:

NARAYANAN, S/O.KUKKAN,
AGED 40 YEARS, MANIYARA VEEDU, MOOLAPARA,
PARAPPA VILLAGE, HOSDURG TALUK, KASARAGODE DISTRICT.

BY ADV. SRI.JAWAHAR JOSE

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE STATION HOUSE OFFICER,
VELLARIKUNDU POLICE STATION, KASARAGODE DISTRICT,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

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

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
05-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.1172 OF 2006

Dated this the 5th day of October, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 55(g) of Abkari Act. Finding him guilty, he was convicted and sentenced to suffer rigorous imprisonment for three months and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for one month. Set off as per law was allowed.

2. The prosecution case in brief is that PW2 who was functioning as Sub Inspector of Police, Vellarikundu, in the evening on 02.09.2003, along with a team of officers had gone for law and order duty and when they reached in front of a toddy shop at Parappa bazar, they received reliable information that the accused is vending in illicit liquor. They stopped the vehicle near the toddy shop and when they reached the house of the accused, they saw the accused holding a can having a capacity of 35 litres coming on the western side of the compound. Seeing the police

officers, he kept the can down and took to his heels. Even though he was chased, he could not be apprehended. The abandoned can was examined and it was seen to contain 30 litres of wash. Samples were taken from the can and Ext.P1 mahazar was prepared. The rest of the contraband article was destroyed and then the police team returned to the Station and registered crime as per Ext.P2 First Information Report. Ext.P3 is the property list prepared by PW2. On 05.09.2003 the article was forwarded to the court. Accused was arrested on 04.09.2003. PW2 filed a forwarding note before court. He received Ext.P4 chemical analysis report.

3. PW7 conducted investigation of the case as per the instructions of Circle Inspector of Police, Vellarikundu Police Station. He prepared Ext.P7 scene mahazar. He recorded the statement of witnesses. PW1 completed investigation 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, Kasaragod under Section 209 Cr.P.C. The said court made over the case to Additional Sessions Court (Adhoc-I), Kasaragod for trial and disposal. The latter court, on receipt of records and on appearance of accused, framed charge for the offence punishable under Section 55(g) of Abkari Act, to which, he pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 7 examined and Exts.P1 to P7 marked. M.O.1 was also 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 also pleaded that he has been falsely implicated with ulterior motive.

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. Presumably, relying on the evidence of PWs 2 and 3 and Ext.P1 mahazar taken along with Ext.P4 chemical analysis report,

court below found the accused guilty and the conviction and sentence as already mentioned followed.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant contended that even going by the prosecution evidence, after taking the samples of contraband article, the rest of the article was destroyed. That is not in terms of Section 53A of Abkari Act and if that be so, there is no production of contraband article seized from the accused before court and therefore the proceedings are vitiated. For the said proposition, learned counsel relied on the decision in **Narayana Velichappada vs. Sub Inspector of Police and another** (2007 (4) KHC 748).

10. It is further contended by the learned counsel appearing for the appellant that PW7, the officer who conducted the investigation, was incompetent to do so since he was the Sub Inspector of Rajapuram Police Station and the place of occurrence was outside his territorial jurisdiction. No doubt, he says that he did so as per the instructions of the Circle Inspector of Vellarikkundu Police Station. It is contended that Circle

Inspector could not authorize Sub Inspector from an outside jurisdiction to conduct investigation of the case. For the above proposition, learned counsel relied on the decision in **Hamsa Koya vs. State of Kerala** (2015 (2) KHC 206). Learned counsel further contended that going by the prosecution case, accused was arrested on 04.09.2003. But the arrest memo is not seen produced. The articles were produced before court only on 05.09.2003. The delayed production of articles before court is sufficient to vitiate the proceedings. For the said proposition, learned counsel relied on the decision in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308). Learned counsel therefore contended that on the above grounds, conviction cannot stand.

11. Learned Public Prosecutor, on the other hand, sought to sustain the conviction and sentence on the ground that evidence of PWs 2 and 3 are sufficiently corroborated by Ext.P1 seizure mahazar and there is no material to show that the Police Officers had any reason to falsely implicate the accused. PW7 conducted investigation of the case under the instructions of the Circle

Inspector of Police. There is no infirmity in his investigation. In short, the contention is that the conviction and sentence is just and reasonable and they need not be interfered with.

12. It is not in dispute that the crime was detected on 02.09.2003. Going by the evidence of PWs 2 and 3, Police Officers who were on patrol duty, when they reached in front of a toddy shop, they received reliable information that the accused was dealing with illicit arrack. Both of them would say that they left the jeep near the toddy shop and approached the accused. They found the accused coming from the western side of his compound carrying a can of 35 litres capacity and on seeing the Police Officers he kept the can down and took to his heels. Even though he was chased, he could not be apprehended. Both of them would say that they had taken samples from the can and identified the contents of the can as wash. It is no doubt true that seizure mahazar narrates what had transpired on the date of the incident. However, it needs to be noticed that even though crime was detected on 02.09.2003, articles were produced before court only on 05.09.2003. It is significant to notice that even

though accused was arrested on 04.09.2003, arrest memo is not seen produced. There is delay in production of article before court and there is no reasonable explanation given for the delay. This Court, in the decision in **Ramankutty vs. Excise Inspector, Chelannur Range** (2013 (3) KHC 308), has held that unexplained delay in producing the contraband before court after seizure is fatal to the prosecution case.

13. In the case on hand, arrest memo has not been produced so also there is delay in producing the article before court. The principle laid down in the above decision applies to the facts of the case.

14. The argument based on defective investigation is a formidable one. Admittedly, investigation was done by PW7 who, at the relevant time, was functioning as Sub Inspector of Rajapuram Police Station. It is not disputed before this Court that PW7 has no jurisdiction to investigate the case coming under the limits of Vellarikkundu Police Station. PW7 no doubt says that he was authorised by the Circle Inspector of Vellarikkundu Police Station to investigate the case. The question is whether

that can be justified. This issue was considered in the decisions in **Haridas K. vs. State of Kerala** (2015 KHC 2405) and in **Hamsa Koya vs. State of Kerala** (2015 (2) KHC 206).

15. In the decision in **Haridas K. vs. State of Kerala** (2015 KHC 2405), it was held as follows:

“6. PW5 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 PW5 to conduct the investigation of the case. Such power must be conferred on PW5 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 PW5 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. The appellant was entitled to be discharged as provided under S.227 of Cr.P.C. 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”.

16. In the decision in **Hamsa Koya vs. State of Kerala** (2015 (2) KHC 206), the same view was taken.

17. First of the decisions referred to above, an identical situation was considered and this Court was called upon to consider whether investigation conducted by an officer authorized by another officer is valid or not. This Court in the said decision held that even though the Assistant Excise Commissioner had authorized an officer who was not competent to investigate the case, that does not ratify the investigation done by the officer concerned. The investigating officer can investigate only those cases which occurred within his territorial jurisdiction.

18. Admittedly, in the case on hand, PW7, though was acting under the instructions of the Circle Inspector of Police, was incompetent to investigate the crime as it was committed within

the jurisdiction of Vellarikkundu Police Station. Even though learned counsel appearing for the appellant raised several other grounds, it is not necessary for this Court to go into those grounds since on the above grounds, conviction and sentence cannot stand.

In the result, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of the charge levelled against him. His bail bond shall stand cancelled and he is set at liberty. If any amount is deposited by him before the court below, that shall be refunded to him.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A to Judge.