

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 21ST DAY OF AUGUST 2015/30TH SRAVANA, 1937

CRL.A.No. 1077 of 2005 ()

**AGAINST THE JUDGMENT DATED 6.6.05 IN S.C. NO. 534/2004 ON THE FILE OF THE
ADDITIONAL SESSIONS COURT (ADHOC)-II, THODUPUZHA.**

APPELLANT(S)/ACCUSED:

**ACHANKUNJU,
S/O.VISWASAM NADAR, KONNACKAL HOUSE, UPPUTHARA VILLAGE,
PORIKANNI KARA.**

**BY ADVS.SRI.K.R.SACHIDANANTHAN
SRI.RENJITH B.MARAR
SMT.RESHMI JACOB
SMT.B.DEEPALAKSHMI**

RESPONDENT/STATE:

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

R1 BY PUBLIC PROSECUTOR SMT. SAREENA GEORGE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-08-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.D. RAJAN, J.

Crl. A. No.1077 of 2005

Dated this the 21st day of August, 2015

JUDGMENT

The appellant is the accused in S.C.534/2004 on the file of Additional Sessions Judge (Adhoc-II), Thodupuzha challenges judgment of conviction for offence punishable under Section 8(1) and (2) of the Abkari Act (hereinafter referred to as the 'Act'). He was sentenced to undergo rigorous imprisonment for one year and to pay fine of Rupees one lakh, in default of payment of fine, rigorous imprisonment for 3 months. Being aggrieved by that he preferred this appeal.

2. The prosecution case is that, on 21.08.02 at 11.30 am, the Assistant Sub Inspector of Police was conducting patrol duty within his jurisdiction, at that time, on seeing the police party, the accused abandoned a plastic can and ran away. He inspected the can, it was realized that the can contains arrack. He seized the arrack and glass after preparing a mahazar, thereafter registered a crime 172/02. After completing investigation, Sub inspector of

Police laid charge before the Judicial First Class Magistrate, Kattappana. Subsequently, the case was committed to Sessions Court for trial.

3. To prove the offence prosecution examined PW1 to PW7 and marked Exts.P1 to P4 as documentary evidence. The material objects MO1 to MO3 were also marked by the trial court. The incriminating circumstances brought out in evidence were denied by the accused while questioning him and also heard under 232 Cr.P.C. He did not adduce any defence evidence. The trial court after analyzing the evidence convicted the accused.

4. The learned counsel appearing for the appellant contended that the seizure of the arrack was made by a non-empowered officer. There was no arrest of the accused by the investigating officer and there is no independent corroboration to the alleged seizure. The Sub Inspector who laid charge was not examined. When there was non-compliance of the provisions of the Abkari Act, the appellant is entitled to get the benefit of doubt.

5. The offence was detected by the Assistant Sub Inspector of Police, Upputhara, while he was conducting patrol duty. Since Assistant Sub Inspector of Police is not an empowered officer as per the Abkari Act, I have perused a Government Notification issued vide S.R.O.No.321/1996 dated 29.3.1996. 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.”

6. The report of abkari officer u/s 50 of the Abkari Act confer jurisdiction to a competent Magistrate to take cognizance. According to S. 50(1), every investigation into the offence under this Act shall be completed without unnecessary delay and S.50 (2) says as soon as investigation into the offences under this Act is completed, the Abkari Officer shall forward it to a Magistrate, empowered to take cognizance of the offence on a police report, which is a report in accordance with sub-s.(2) of S.173 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974). A close reading of the Section shows that the Magistrate can take cognizance only on the basis of a report filed by the Abkari Officer. An Abkari Officer is defined under sub-s.(2) of S.3, which reads as follows:

'Abkari Officer" means the Commissioner of Excise or any officer or other person lawfully appointed or invested with powers under Ss.4 or 5.'

Government by notification dated 29.3.1996 authorized all police officers above the rank of Sub Inspector of Police to discharge all the duties conferred on an Abkari Officer. In the light of the above Government Notification and Abkari Act, Assistant Sub Inspector of Police is not an Abkari Officer as defined under the Act.

7. According to Section 2(h) of Cr.P.C. 'investigation' includes all the proceeding under that code for the collection of evidence by a police officer or by a person authorised by a Magistrate. The code of Criminal Procedure empowers the police officers or any other persons (other than Magistrate) authorised by a Magistrate to conduct investigation. Apex Court in **State of M. P. V. Mubarak Ali 1959 SC 707** held that investigation consists of following steps generally;;

- (i) Proceeding to the spot;
- (ii) ascertainment of the facts and the

circumstances of the case; (iii) discovery and arrest of the suspected offender. (iv) collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial and (v) formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by the filing of a charge sheet under Section 173.”

Chapter XIV of the Code directs the procedure for investigation. According to the code, investigation starts after the police officer receives information with regard to an offence.

8. An Assistant Sub Inspector is not authorised as an Abkari officer by the State Government, but he registered a case, recorded the statement of the witnesses and investigated major portion of the case and submitted the case file to 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 Code provided that when a Subordinate Officer makes an investigation he shall report the result to the officer in charge of the Police Station under Section 168 of the Cr.P.C. There is no provision for delegation but only provision for supervision by superior officers. 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.

9. The evidence of (PW7) Asst. Sub Inspector, shows that on 21.8.2002, he was conducting law and order patrol duty within his jurisdiction. At that time, he got information that the accused was selling arrack near the Coffee Plantation at Karintharuvi Estate, immediately, he arrived at the place of occurrence, the accused was found standing in the Estate with two cans in his hands. He was also holding a glass, then PW7 proceeded near the

revision petitioner, at that time, he abandoned the cans and glass and ran away from there. In one of the cans, there was 4 litres of arrack. In the other can, 5 litres of water. A glass was seized by PW7, which was taken into custody after preparing Ext.P1 mahazar. He also took 180ml as sample in two bottles, reaching at the Police Station, he registered a crime and he conducted further investigation. PW7 identified MO1 to MO3. Ext.P2 is the FIR and Ext.P2(a) is the statement. Ext.P3 is the property list.

10. The seizure of MO1 to MO3 were not supported by the independent witnesses. PWS 1 and 2 are the independent witnesses cited by the prosecution to prove the alleged seizure. These two witnesses admitted their signature in Ext.P1 mahazar, but they deposed that they never saw the seizure of MO1 to MO3. But, PW1 admitted that MO1 to MO3 were seized from the place of occurrence and he attested Ext.P1 mahazar. But, he did not see the accused at the place of occurrence, at the time of seizure of MO1 to MO3. PW3, PW4, PW5 and PW6

did not support the alleged seizure. Analysing the evidence of PW1 to PW6, it is found that there is no independent corroboration to the alleged seizure.

11. The detection was made on 21.8.2002 and MO1 to MO3 were produced before Court on 26.8.2002. There is delay of 5 days in producing the seized articles. The samples taken by PW7 were produced before Court and sent it for chemical examination. Ext.P4 is the Chemical Examiner's report, which shows that the samples contained 53.41% and 53.13% of ethyl alcohol. There is no dispute with regard to the contents in Ext.P4. In Ext.P4, it is reported that one sealed packet having two sealed bottles marked 1 and 2 in the laboratory each containing 180ml of a colourless and clear liquid alleged to be 'illicit arrack'. The seals on the packet were intact and found tallied with the sample seal provided.

12. Apex 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."

13. On a close reading of the Government Order issued u/s.5 of the Abkari Act, it is found that an investigation can be conducted by the Abkari Officer or 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 Collector to be Abkari Officers under their respective jurisdiction to exercise the powers and to exercise all the powers and to discharge all the duties conferred to Abkari Officers for Section mentioned in the Government Order. There was no investigation by an authorised officer in this case and the real investigation was conducted by an Assistant Sub Inspector, who was never authorised.

14. While discussing the NDPS Act, Apex Court in **Roy V.D. v. State of Kerala [2001 KHC 52]** held as follows:

“16. Now, it is plain that no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 41(1) of the NDPS Act or make a complaint under clause (d)

of sub-section (1) of Section 36A of the NDPS Act. It follows that any collection of material, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorised officer under Section 41(2) of the NDPS Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the NDPS Act and use of such material by the prosecution vitiates the trial.”

Therefore, the investigation in this case is conducted by a non-empowered officer and detection of any material during arrest or search of a person and makes a complaint, it lacks sanction of law for a prosecution. Such procedure followed by the non-empowered officer itself is inherently illegal, which lacks sanction of law and the prosecution on the basis of that material itself vitiates the trial. The trial Court failed to appreciate mandatory directions issued u/s.5 of the Abkari Act and in the notification.

Therefore, the conviction and sentence passed by the trial Court u/s.8(1) and (2) of the Abkari Act are to be set

aside. In the result, conviction and sentence u/s.8(1) and (2) are set aside. The appellant is acquitted and set at liberty. If any amount is remitted by the appellant in the trial Court, it shall be refunded to him at the earliest.

STK

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P.A. TO JUDGE

Sd/-
P.D. RAJAN,
JUDGE