

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 11TH DAY OF SEPTEMBER 2015/20TH BHADRA, 1937

CRL.A.No. 1304 of 2007 (E)

AGAINST THE JUDGMENT IN SC 293/2005 of ADDL.DISTRICT & SESSIONS
COURT FAST TRACK (ADHOC-I), KOZHIKODE DATED 05-06-2007

APPELLANT/ACCUSED:

BIJEESH, S/O. CHANDRAN,
PADANNATHODI HOUSE,
VALAYANAD AMSOM DESOM,
KOMMERY PLAZHI ROAD, KOZHIKODE DISTRICT.

BY ADVS.SRI.P.K.RAMKUMAR
SMT.ANIHA RAMKUMAR

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REP. BY THE PUBLIC PROSECUTOR AT
HIGH COURT OF KERALA AT ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.C.K. JAYAKUMAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
11-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.1304 OF 2007

Dated this the 11th day of September, 2015.

J U D G M E N T

The accused in this case was prosecuted for the offences punishable under Section 55(a) of Abkari Act and Rule 9 of Foreign Liquour Rules. He was found guilty. Accordingly, he was convicted and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1 lakh with default clause of rigorous imprisonment for six months. Set off as per law was allowed.

2. The prosecution case in short is that on 09.10.2004, PWs 1 and 2 along with other officers were returning to the Police Station after conducting patrol duty and when they reached at Melady road junction, they happened to see the accused alighting from a bus at about 6.50 a.m carrying a bag in his hand. Feeling suspicious, he was intercepted and contents of the bag was examined. The bag contained 10 bottles of aristocrat brandy. PW1 would say that one bottle was taken as sample and label was affixed on it and the accused was arrested as per Ext.P1

arrest memo. Ext.P2 seizure mahazar was prepared and thereafter they returned to the Police Station along with the accused and the articles and registered First Information Report as per Ext.P3. He prepared the property list namely, Ext.P4 and forwarding note Ext.P5 and sent the articles to the court. The chemical analysis report is Ext.P6. M.Os 1 and 2 are the articles seized from him.

3. Investigation in this case was done by PW3 who at the relevant time was the Sub Inspector of Meppayyur Police Station. He visited the place of occurrence and prepared Ext.P7 scene mahazar. He recorded the statement of witnesses and then returned the records to Payyoli Police Station. PW4, the Sub Inspector of Police, Payyoli verified the records and laid charge before court.

4. Judicial First Class Magistrate, Payyoli took cognizance of the offence and finding that the offences are exclusively triable by a Court of Sessions, committed the case to Sessions Court, Kozhikode under 209 Cr.P.C after following necessary procedures. The said court made over the case to Additional District and

Sessions Court Fast Track (Ad hoc -I), Kozhikode for trial and disposal. The latter court, on receipt of records and on appearance of the accused before the said court, framed charge for the offences already made mention of. To the charge, accused pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 5 examined and Exts.P1 to P7 marked. M.Os 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.

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. Relying mainly on the evidence of PWs 1 and 2 and also the contemporaneous document, Ext.P2, court below came to the conclusion that incident as alleged by the prosecution is proved and therefore found the accused guilty. The conviction and

sentence as already mentioned followed.

9. Assailing the conviction and sentence, learned counsel appearing for the appellant pointed out that there are may vitiating circumstances in the case on hand which would show that the incident has not taken place at all. It is first contended that only one sample was taken and more glaring is that investigation of the case was done by an incompetent officer and if that be so, any proceedings taken on such an investigation cannot survive. In support of his contention, learned counsel relied on the decision in **Saji @ Kochumon vs. State of Kerala** (2010 (3) KLT 471) and **Narayanankutty vs. State of Kerala** (2015 (2) KLT S.N 18 Case No.25). An Abkari Officer under the Act can act only within his territorial jurisdiction and he cannot do anything outside his jurisdiction and if he does so, such steps are invalid and illegal. The investigation conducted by PW3 therefore is without jurisdiction and that vitiates the whole proceedings.

10. That 10 bottles of 375 ml containing Indian Made Foreign Liquor was seized from the accused on 09.10.2004 at 6.50 a.m cannot be much in doubt. The accused was alighting

from a bus and the patrolling team were returning to the Police Station. PWs 1 and 2 were given a consistent and uniform version of the incident that they saw the accused carrying a bag and on seeing the Police Officers he panicked and that made PW1 and others suspicious. They intercepted him and seized bag from his hand and on examination it was found that bag contained contraband articles. PW1 says about preparation of arrest memo, seizure mahazar and regarding the sample taken in one of the bottles. He also makes mention of the fact that he had prepared the property list and forwarding note and had also registered the case against the accused. PW1 gets ample support from PW2. There is nothing to show that PWs 1 and 2 had any axe to grind against the accused and they had any reason to falsely implicate the accused. Therefore, the court below was perfectly justified in coming to the conclusion that the contraband article was seized.

11. But, as rightly pointed out by the learned counsel for the appellant, one glaring infirmity in the proceedings is there. PW3 conducted the investigation of the case. PW3 is admittedly

attached to the Meppayyur Police Station which does not cover the jurisdictional area in which the incident took place. That means, Investigating Officer namely, PW3 conducted investigation of an incident which had taken place outside his jurisdiction. Going by Sections 4, 5 and 70 of Abkari Act, it is well settled by law that an Abkari Officer as mentioned under the Act can only act within his territorial jurisdiction and any act done by him outside his jurisdiction is without legal sanction. It is also well settled that any proceedings taken on that basis is vitiated.

12. This Court is not forgetful of the fact that final report was laid by PW4 who is the Sub Inspector of Payyoli Police Station which had the jurisdiction of the area where the incident had taken place. Investigation was done by PW3 who had no jurisdiction over the area.

13. In the decision in **Saji @ Kochumon vs. State of Kerala** (2010 (3) KLT 471), it was held as follows:

“5. Sub-section (2) of S.50 of Kerala Abkari Act provides that as soon as investigation into the offence under the Act is completed, the Abkari Officer shall forward to a Magistrate, empowered to take cognizance of the offence on a police report, a

report in accordance with sub-s.(2) of S.173 of Code of Criminal Procedure. Abkari Officer is defined under S.3(2), means Commissioner of Excise or any officer or other person lawfully appointed or invested with powers under S.4 or 5. S.4 provide that Government may appoint an officer to control the administration of abkari department by notification in the gazette. Under clause (d) of S.4 Government may by notification in the gazette appoint officers to perform the acts and duties mentioned in Ss.40 to 53 (inclusive) of the Act. S.5 provides that Government may from time to time make rules prescribing the powers and duties under the Act to be exercised and performed by the Abkari Officers of the several classes and regulating the delegation by the Government or by Commissioner of Excise, of any powers conferred by the Act or exercise in respect of Abkari revenue in any law for the time being in force. S.R.O..321/1996 was issued in exercise of the powers conferred by S.4 of the Act by the State Government. Under the S.R.O. Government of Kerala thereby appointed "all police officers on 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" to be Abkari Officers under the respective jurisdiction for the purpose of Ss.31 to 35, 38 and 40 to 53 and 59 of the Act and to exercise all the powers and discharge

of all the duties conferred in Abkari Officer in the sections aforesaid. Therefore, by notification issued by the Government in exercise of the power provided under S.4, a Sub Inspector of Police in charge of law and order and working in the general executive branch of police department is appointed as Abkari Officer, within his respective jurisdiction to exercise the powers provided thereunder. The respective jurisdiction could only be the jurisdiction of that Sub Inspector. It can only be within the territorial limits of his police station. Therefore, Sub Inspector of Police, Edathwa is the Abkari Officer empowered by the Government to exercise the powers under Ss.31 to 35, 38 and 40 to 53 and 59 of Act. Therefore, the officer who is competent to file a final report as provided under S.50 is only the Abkari Officer namely, Sub Inspector of Police, Edathwa or an officer superior to him.

14. In the decision in **Narayanankutty vs. State of Kerala** (2015 (2) KLT S.N 18), it was held as follows:

“In the light of the provisions of S.R.O No.321 of 1996 as interpreted by this Court in this ruling (2010 (3) KLT 471), a Sub Inspector of Police authorised to act as Abkari Officer can exercise his jurisdiction only within the territorial limits of his police station. Therefore, PW6, the Sub Inspector of Police, Hemambika Nagar Police Station, had

exceeded the limits of his jurisdiction by investigating the case on hand which was within the territorial limits of Kongad Police Station”.

15. It is therefore clear that investigation done by PW3 is without jurisdiction and is non est. If that be so, any proceedings taken in furtherance to the investigation done by PW3 cannot be sustained. It cannot be disputed that investigation forms a significant portion of the criminal proceedings and has much bearing on the charge that is laid before court.

16. It is evident from the testimony of PW3 that he had prepared the scene mahzar and recorded the statement of witnesses. The act of PW3 being illegal, the proceedings has to quash. Cognizance taken on the basis of the investigation done by an incompetent officer cannot survive.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused is found not guilty. The bail bond executed by the accused shall stand cancelled and he is set at liberty.

Sd/-

**P.BHAVADASAN
JUDGE**

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