

(2016) 03 KL CK 0076

High Court Of Kerala

Case No: Crl.A. No. 339 of 2005 (A).

Mattathil Thomas @ Chalakkudi
Thomas, Aged 52 Years, S/o.
Devasya, Konnanamkkad, Balal
Village - Appellant/Accused
@HASH S.I. of Police,
Vellarikundu Police Vellarikundu
Police Station in Cr. No. 227/2000
/Complainant

APPELLANT

Vs

RESPONDENT

Date of Decision: March 23, 2016

Acts Referred:

- Kerala Abkari Act, 1077 - Section 4, Section 5, Section 50, Section 55(b)

Citation: (2016) 4 KLT 60

Hon'ble Judges: P.D. Rajan, J.

Bench: Single Bench

Advocate: Sri. C.K. Sreejith, Advocate, for the Appellant/Accused; M.R. Jayaprasad (State Brief) by Public Prosecutor Sri. N. Suresh, Advocate, for the Respondent/Complainant

Final Decision: Disposed Off

Judgement

Mr. P.D. Rajan, J. - This appeal is preferred by the accused against the conviction and sentence in S.C.No. 260/2002 of Additional Sessions Judge (Adhoc-1), Kasaragod under section 55(b) and (g) of the Abkari Act. The charge against the appellant is that on 20.12.2000 at 3.30 p.m., the appellant was found manufacturing arrack in the property of one Thankachan, Kotahanamkadu in Balal Village by the Sub Inspector of Police, Vellarikundu Police station. Accused was arrested and the contraband articles were seized after preparing a mahazar. Reaching at the Police Station, he registered a crime, after completing investigation, laid charge before Judicial First Class Magistrate Court-II, Hosdurg from there the case was committed

to Sessions Court. Subsequently, it was made over to Additional Sessions Judge, Adhoc-I, Kasaragod.

2. During trial, prosecution examined PW1 to PW3 and marked Exts. P1 to P6 as documentary evidence. The material objects MO1 to MO3 were admitted in evidence. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He did not adduce any defence evidence. The learned Magistrate convicted him. Being aggrieved by that, he preferred this appeal.

3. There was no representation for the appellant, hence this Court appointed Adv. C.K. Sreejith as the counsel to provide legal aid to the appellant. The learned counsel appearing for the appellant contended that there is no independent witness to prove the seizure of the seized article. S.I. of Police, Chittarikkal Police Station has no jurisdiction to investigate the crime as per the direction of C.I. Vellarikundu which is outside the jurisdiction of the Chittarikkal Police Station. No notification has been produced to show that he was empowered to conduct investigation in this case also.

4. The learned Public Prosecutor admitted that no notification has been issued so far conferring such power to Chittarikkal Sub Inspector.

5. According to Section 4(d) of the Abkari Act, the Government may, by notification in the Gazette, appoint officers to perform the acts and duties mentioned in Section 40 to 53 of this Act. According to Section 4(e), the Government may appoint subordinate officers of such classes and with such designations, powers and duties under this Act as the Government may think fit. According to Section 5, the Government may from time to time make rules prescribing the powers and duties under the Act to be exercised and performed by Abkari Officers of the several classes.

According to Section 3(2) of the Abkari Act, an "Abkari Officer" means the Commissioner of Excise or any officer or other person lawfully appointed or invested with powers under Section 4 or 5. Therefore, notification conferring the power to exercise duties mentioned in Sections 40 to 53 is necessary by appropriate Government order.

6. As per SRO 321/96 dated 23.9.1996, the Government have 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 within their respective jurisdiction as Abkari Officers vested with power under section 40 to 53 of the Abkari Act. The notification SRO No. 321/1996 reads as follows:

"SRO No. 321/96.- In exercise of the powers conferred by Section 4 of the Abkari Act, 1 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 purposes of Sections 31, 32, 33, 34, 35, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 2, 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. (GO(P) No. 69/96/TD dated 29/03/1996)."

The impact of investigation by Sub Inspector out side the territorial jurisdiction has been discussed by this Court in **Saji @ Kochumon v. State of Kerala [2010 (3) KLT 471]** and held as follows:

"6. The final report was submitted before the court by PW7, in his capacity as Sub Inspector, Veeyapuram. The report does not disclose on what power or authority he submitted the final report when he is not the Abkari Officer competent to exercise the power under Section 50 of the Abkari Act within the territorial jurisdiction of Edathwa police station. The final report does not disclose that he was authorised by the Government to exercise the power under Section 50 of the Abkari Act in respect of jurisdiction of Edathwa police station. Though from the witness box PW7 claimed that he was authorised by the Circle Inspector of police as per order in 83/1998 to file the report, no such order was produced either along with the final report or even at the time of evidence. In spite of the fact that PW7 was cross examined with regard to the non production of the order as the final report does not disclose that he has been authorised by the Circle Inspector of Police much less by the order in 83/1998 to either verify or investigate or submit a report, it was not produced. If that be the case, it can only be found that PW7 who laid charge is not the competent Abkari Officer authorised to file a final report as provided under Section 50 of Abkari Act in the case. Question is what is the consequence of the cognizance taken on that final report submitted by an officer who is not the Abkari Officer authorised to file final report and the subsequent trial.

The Sub Inspector of Police authorised to act as Abkari Officer can exercise his jurisdiction within the territorial limits of his police station.

7. According to Section 50 of the Abkari Act, the report of the Abkari Officer gives jurisdiction to competent magistrate to take cognizance of the offence. Every investigation into the offence under this Act shall be completed without unnecessary delay. As soon as investigation into the offence under this 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 section (2) of Section 173 of Code of Criminal Procedure, 1973 (hereinafter referred to as the "Code"). Before amendment of the Abkari Act, filing of reports by Excise Inspector is treated as complaints and the Court is competent to take cognizance of the same by virtue of the provisions contained in the Code. On a perusal of Sections 4, 5 and 50, it is clear that a Magistrate can take cognizance of the offence on a report of the Abkari

Officers within their jurisdiction alone. Here, the offence was detected by Vellarikkundu Police and final report was filed by Chittarikkal Police. Therefore, the report filed by Chittarikkal Police lacks jurisdiction to enter into another jurisdiction without a Government notification. Therefore, the final report laid down by the Chittarikkal Police is illegal.

8. In this context, I have examined the evidence. The evidence of PW1 shows that on 20.12.2000 at 3.30 p.m., while he was conducting patrol duty, he reached at Kothanamkadu, at that time, he got information that the appellant was manufacturing arrack near a pond in the property of one Thankachan. Immediately, he proceeded to the place of occurrence with one independent witness. On seeing the Police party, appellant tried to escape, but he was caught and the Police party seized MO-1 to MO-10. For that, he prepared Ext. P1 seizure mahazar. He took sample from the seized article and sealed and labelled at the place of occurrence itself. The independent witness present there attested the mahazar and put his signature in the label. Reaching at the Police Station, he registered a crime. Ext. P2 is the FIR. Ext. P3 is the property list. Samples were produced before Court as per Ext. P4 forwarding note. Ext. P5 is the chemical examination result. In Ext. P5, it is stated that 10.52 percentage of ethyl alcohol was detected in the wash and 20.97 percentage of ethyl alcohol was detected in the arrack. PW2 Police Constable accompanied PW1 and supported the oral evidence of PW1. Analysing the oral evidence in this case, it is found that the Sub Inspector of Police, Vellarikkundu Police Station detected the offence and seized MO-1 to MO10 as alleged.

9. However, after seizure, C.I. of Police, Vellarikkundu directed PW3 to conduct investigation in this case. As per the direction, PW3 conducted investigation and arrived at the place of occurrence. He prepared Ext. P6 scene mahazar. He questioned the witness. After completing investigation, he laid charge before Court. A perusal of the evidence of PW3 shows that it is violation of Section 50 of the Abkari Act. It is the primary responsibility of the investigating officer to complete the investigation without unnecessary delay. As soon as the investigation is completed, the Abkari Officer shall forward report to a Magistrate empowered to take cognizance of the offence on the police report. Therefore, S.I. of Police, Chittarikkal Police has no territorial jurisdiction to conduct investigation of an abkari case within the jurisdiction of Vellarikkundu Police Station. Moreover, no notification under section 4 and 5 has been produced before Court. In such a situation, such final report filed by the investigating officer is nonest and it was done without any jurisdiction.

10. In an earlier decision in **Subash v. State of Kerala [2008(2) KLT 1047]** it was held that Magistrate cannot take cognizance of an offence under the Act on the basis of a report filed by a person other than Abkari Officer as defined under section 50 of the Abkari Act. Similarly, a report filed by a Police Officer, who has no territorial jurisdiction to conduct investigation, lacks jurisdiction and the Magistrate also lacks

jurisdiction to take cognizance of the offence. Saji @ Kochumon 's case (supra) is followed by another bench of this court in **Hamsakoya v. State of Kerala [2015 (2) KLT SN 25 Case No. 35]**. Analysing the evidence, it is clear that the cognizance was taken on the basis of final report submitted by PW3 Sub Inspector of Police, Chittarikkal Police Station, which is illegal. Therefore, the cognizance taken by the Magistrate, framing of charge, consequent conviction and sentence passed by the Additional Sessions Judge against the appellant are illegal.

11. In the result, the conviction and sentence passed by the Additional Sessions Judge (Adhoc-1), Kasaragod against the appellant are set aside and he is acquitted and set at liberty.