

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937

CRL.A.No. 538 of 2006 ()

**AGAINST THE JUDGMENT IN SC 268/2005 of ADDITIONAL SESSIONS COURT
(ADHOC)-I, KOTTAYAM DATED 27-02-2006**

**AGAINST THE ORDER IN CP 24/2005 OF JUDICIAL FIRST CLASS MAGISTRATE
COURT, VAIKOM**

APPELLANT(S)/ACCUSED 1 AND 2:

- 1. SUNNY, SON OF KURIEN,
NEDUMATTATHIL HOUSE, PERUVA, MULAKKULAM
KADUTHURUTHY.**
- 2. MOHANAN, SON OF NARAYANAN,
KANIARKALAYIL HOUSE, KUNNAPPILLI, MULAKKULAM.**

**BY ADVS.SRI.ABRAHAM VAKKANAL (SR.)
SRI.PAUL ABRAHAM VAKKANAL
SRI.DIJO SEBASTIAN
SMT.VINEETHA SUSAN THOMAS
SMT.JASMY KATTOOR**

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 538 of 2006

Dated this the 29th day of September, 2015

J U D G M E N T

Four persons were sought to be prosecuted for the offences punishable under Sections 286, 338 read with Section 34 of Indian Penal Code and Section 3 of the Explosive Substances Act. Among them, the 4th accused died during the pendency of the case before the trial court and therefore, the charge against him stood abated. Among the other three accused, the 3rd accused was found not guilty of the charges levelled against him and he stood acquitted of all charges. Accused Nos. 1 and 2 were found guilty of the offence punishable under Section 286 of IPC and they were sentenced to undergo three months rigorous imprisonments and to pay a fine of ₹1,000/- each with a default clause of rigorous imprisonment for one month; they were found guilty of the offence punishable under Section 338 of IPC and sentenced to suffer rigorous imprisonment for

six months and to pay a fine of ₹1,000/- each with a default clause of one month rigorous imprisonment and they were also found guilty of the offence punishable under Section 3 of the Explosive Substances Act and sentenced to suffer rigorous imprisonment for three years with a fine of ₹ 20,000/- each with a default clause of one year. It is also ordered that if the fine amount was realized, ₹40,000/- would be paid as compensation to PW2. Set off as per law was allowed and the sentences were directed to run concurrently.

2. The incident in this case is said to have occurred on 18.05.2000 at about 9.15 a.m.. PW1 and Sunny, the first accused owned adjacent properties. The prosecution allegation is that in the property which belonged to the first accused, a well was being dug. He had engaged the second accused as its contractor. The 3rd and the 4th accused were the employees of the second accused. Prosecution would accuse that for deepening the well, explosion was caused

with the dynamite, a piece of which escaped from the well and fell into the compound of PW1. PW2 happened to tamper with the same and it exploded in his hands causing injury to him. PW2 was removed to the hospital and Ext.P14 is the wound certificate. On getting intimation from the hospital, PW13, the Head Constable of Velloor Police Station went to the hospital where PW2 was being treated and as PW2 was unable to give any statement, the statement of PW1, his father was taken and that is marked as Ext.P1. On the basis of Ext.P1, PW13 registered crime as per Ext.P10 FIR. He visited the scene of occurrence and prepared Ext.P11 scene mahazar. He claims to have recovered certain items from the scene of occurrence. Further investigation was done by PW14. He recorded statement of witnesses and prepared Ext.P6 mahazar. He recovered pieces of granite stones as per Ext.P6 and also prepared the list of property and produced before court. He also prepared a forwarding note and filed before court. He also filed Ext.P2

report excluding A1 and A2, who were initially shown as accused in the case, and adding Section 34 and Section 3 of the Explosive Substances Act, 1908 to the charge. Further investigation was done by PW17 and he had the pieces of particles recovered from the eyes of PW2 sent for chemical examination and a mahazar prepared for the said purpose is marked as Ext.P15. The forwarding note prepared by him is Ext.P16. It was forwarded to the forensic laboratory. He recovered tractor, jackhammer etc., from the place of occurrence and prepared Ext.P17 mahazar for the same. Subsequent investigation was done by PW18. He found that the offence under Section 338 of IPC is also committed and filed a report to incorporate the same as per Ext.P18. Subsequent investigation was done by PW15 who verified the records and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offences to be exclusively triable by a Court of Sessions, committed the

case to Sessions Court, Kottayam under Section 209 of Cr.P.C. after following the necessary procedure. The said court made over the case to Additional Sessions Court, Adhoc-I, Kottayam for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Sections 286, 338 of IPC and Section 3 of the Explosive Substances Act, 1908 read with Section 34 of IPC.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 18 examined and Exts.P1 to P18 marked. MO1 series was got identified and marked.

6. After the close of prosecution evidence, the accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent.

7. Finding that they could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their evidence. They chose to adduce no evidence.

8. The trial court mainly based on the evidence of PWs 1 and 2 and also the forensic evidence, came to the conclusion that the prosecution has succeeded in establishing the case against the accused persons and found accused Nos. 1 and 2 guilty of the offences already made mention of and they suffered conviction and sentence as mentioned.

9. Assailing the conviction and sentence, Sri. Abraham Vakkanal, the learned senior counsel appearing for the appellants contended that conviction and sentence cannot stand for more than one reason. Drawing attention of this Court to the conviction for the offence under Section 3 of the Explosive Substances Act, 1908, the learned senior counsel pointed out that apart from the fact that the sanction required under Section 7 of the Act has not been

duly proved, the ingredients necessary to attract Section 3 is also not available in the case on hand. The learned senior counsel also contended that having found the accused guilty under Sections 286 and 338 of IPC, it was imprudent on the part of the court to have found the accused guilty under Section 3 of the Explosive Substances Act also. Highlighting on the above aspect, the learned senior counsel pointed out that the sanctioning authority from whom sanction has been obtained has not been examined and if that be so, sanction granted is not duly proved. Further, it was contended that the incident occurred on 18.05.2000 and as Section 7 of the Explosive Substances Act then stood, sanction of the Central Government was necessary. In the case on hand, the sanction has been obtained from the District Magistrate, who became the competent authority by way of the amendment brought in 2002 only. In support of his above proposition, the learned counsel relied on the decision reported in **Awahesh Mishra alias Sri Awadhesh Mishra**

and Another v. State of Bihar (2009 KHC 5793). In support of his contention that the sanctioning authority ought to have examined, the learned counsel relied on the decision reported **In re: Chandrahasan** (1996 Crl.L.J. 4308).

10. The learned senior counsel pointed out that apart from the above facts, it is strange to note that the accused, who had been named in the FIR, have been deleted and substituted with a fresh set of accused without any basis whatsoever and without any evidence in that regard. No explanation is offered by the prosecution for the same. It is also contended by the learned senior counsel that except for saying that the property was owned by the first accused, no document worth the name to show that the first accused was in actual enjoyment and possession of the property and also had title to the property was produced by the prosecution. When the documentary evidence is available to show the actual ownership and possession, oral evidence

cannot be a substitute for the same.

11. The learned senior counsel then went on to point out that there is no evidence at all to show that the explosive which exploded in the hands of PW2, was the same as the explosive alleged to have been used by the accused persons to deepen the well. In the absence of such evidence, the prosecution could not have said that the accused persons have any responsibility for the explosion which resulted in causing injuries to PW2. The learned senior counsel pointed out that by no stretch of imagination, the court below could have taken aid of Section 34 which involved prior meeting of minds to do a criminal act and that vital ingredient are conspicuously absent in the case on hand. Apart from the fact that there is no such allegation in the charge, the evidence also does not warrant such a conclusion. In short the contention is that the conviction and sentence cannot be sustained.

12. The learned Public Prosecutor on the other hand sought to support the findings of the court below and the conviction and sentence passed by the court below. According to the learned Public Prosecutor, PW10, the Village Officer has stated that the property belongs to A1 and he has not been cross examined on that aspect. It was also pointed out by the learned Public Prosecutor that the evidence of PW1 shows that he had taken objections to the conduct of using explosives in the property of A1, but that went unheeded. The learned Public Prosecutor pointed out that the fact that an explosion occurred from an article which PW2 had occasion to pick up from his courtyard and that cause severe injuries to PW2 is beyond dispute. There is no case for the defence that either PW1 or PW2 were dealing in explosive substances. The explosive substance, which exploded in the hands of PW2, could have come only from the explosive substances used by the accused persons for the purpose of digging the well. The learned Public

Prosecutor contended that the lower court has chosen to rely on the evidence of PWs 1 and 2 and other items of evidence and it is not shown that the appreciation of evidence made by the lower court is either perverse or contrary to the evidence on record. It is therefore contended that there are no grounds to interfere with the order of the court below.

13. The accused are being prosecuted for the offences punishable under Sections 286, 338 and Section 3 of the Explosive Substances Act, 1908. The three Sections read as follows:

“286. Negligent conduct with respect to explosive substance.--

Whoever does with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

338. Causing grievous hurt by act endangering life or personal safety of others.-- Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

3. Punishment for causing explosion likely to endanger life or property.-- Any person who unlawfully and maliciously causes by--

(a) any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be punished with imprisonment for life, or with rigorous imprisonment of either description which shall not be less than ten years, and shall also be liable to fine;

(b) any special category explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be punished with death, or rigorous imprisonment for life, and shall also be liable to fine.”

14. A reading of the above three Sections shows that while Sections 286 and 338 of IPC involves negligent act, Section 3 of the Explosive Substances Act involves unlawful and malicious act causing explosion. There is necessity for a guilty mind to commit the offence under Section 3 of the Explosive Substances Act, 1908 and it cannot be an accidental one. When once it is found that the offences under Sections 286 and 338 of IPC are attracted, it becomes difficult to comprehend as to how Section 3 of the Explosive Substances Act, 1908 can also survive simultaneously. To attract Section 3 of the Explosive Substances Act, the existence of *mens rea* is necessary. That would be clear from the words 'unlawfully' and 'maliciously' used in the

Section. There should be material to come to the conclusion that the explosion was caused with malicious intention. The State of mind is a vital constituent to attract the offence under Section 3 of the Explosive Substances Act, which is conspicuously absent in the case on hand. So the finding of guilty for the offence under Section 3 of the Explosive Substances Act cannot stand.

15. Apart from the above fact, Section 7 of the Explosive Substances Act requires sanction to be obtained from the authority concerned before proceeding with the trial of any person for any of the offences under the Act. One may recall here that the offence occurred on 18.05.2000 at 9.15 a.m.. Section 7 of the Explosive Substances Act 1908 as it stood then, required sanction from the Central Government for prosecution. The said Section was amended in 2002 making the sanctioning authority as the District Magistrate. In the case on hand, sanction of the District Magistrate seems to have been obtained.

16. In the decision reported in **Awahesh Mishra alias Sri Awadhesh Mishra and Another v. State of Bihar** (2009 KHC 5793), an identical issue was considered and it was held that the law as it stood as on the date of offence is to be considered and not the subsequent provision. Holding so, it was held that the sanction was given by the wrong authority and conviction and sentence were set aside.

17. In the decision reported in **In re: Chandrahasan** (1996 Crl.L.J. 4368), the Madras High Court was called upon to consider the question of proof of sanction given by the authority. Holding that mere production of sanction order is not sufficient, it was held as follows:

“But, so far as the offence under Section 3 of the Explosive Substances Act, there is no independent evidence as to the sanction granted by the District Collector. The sanction Ext.P-46 has been marked through the Investigating Officer P.W.21 and he did not know anything relating to the papers perused by the Collector for granting the sanction

Ext.P-46. Unfortunately, the prosecution had not chosen to examine any witness connected to the sanction Ext.P-46 in the office of the Collectorate. A mere production of the sanction order by itself is not sufficient to hold that the sanctioning authority had applied its mind and considered the reasons for giving such sanction. This aspect is completely lacking in this case and therefore, we are unable to hold that Exhibit P-46 is a valid sanction granted by the Collector for the prosecution of the appellants 1 and 2. Therefore, we do not propose to support the findings of the learned Sessions Judge with regard to the charge No.5 finding the appellants 1 and 2 guilty of the offence under Section 3 of the Explosive Substances Act. But in so far as the other offences are concerned, as mentioned above, the evidence is satisfactory, reliable, convincing and more clinching. Under these circumstances, we fully agree with the learned Sessions Judge for holding the appellants guilty of the offences for the other charges except charge No.5 relating to the Explosive Substances Act.”

18. This Court had occasion to consider a similar question with regard to the sanction granted under the

Prevention of Corruption Act and in the decision reported in **Savithri v. Deputy Superintendent, Vigilance and Anti-Corruption Bureau** (2015 (3) KLT 909), wherein it was held as follows:

“The Investigating Officer is not the competent person to prove a prosecution sanction issued by some other authority S.19 of the P.C. Act. S.19 of the P.C. Act even bars cognizance in the absence of a proper prosecution sanction granted by the competent authority. Such sanction granted by the authority competent to remove the public servant from service must be proved by the said authority during the trial process. If not so proved, as prescribed under the Indian Evidence Act, such a sanction simply marked by the Investigating Officer cannot be accepted as a proper and legal sanction. In such a situation, the bar of cognizance under S.19 of the P.C. Act would apply, and the accused will have to be acquitted on the ground that the whole prosecution is barred.”

19. Even assuming that the decision of the Kerala High Court is with regard to Section 19 of the Prevention of

Corruption Act, the decision by the Madras High Court is squarely on point and it lays down the principle that the sanctioning authority has to be examined to prove the sanction for prosecution. Principle behind such a view is that the sanctioning authority alone can give information regarding the actual material that weighed with the authority which ultimately culminated in granting sanction. In the case on hand, it is the Investigating Officer who has proved the sanction granted for prosecution. That obviously cannot stand. Therefore, the prosecution for the offence under the Explosive Substances Act, cannot stand.

20. Coming to the offences punishable under Sections 286 and 338 of IPC, initially when Ext.P1 FIR was laid, the persons, who are shown as accused, were entirely different persons. Ext.P1 given by PW1 shows that even though the property, according to him, belonged to the first accused, since the first accused was not in station, his affairs were being managed by his brother, i.e., the digging of the well

was being supervised by him. Of course, at the time of evidence he deviates and says that on that particular date, Sunny was present. But that can be taken only with a pinch of salt. Even though PW10, who has prepared the scene plan, says that the property belonged to Sunny, it is surprising to note that prosecution thought it unnecessary to produce any documents to establish the fact that the property was owned, possessed and enjoyed by the first accused. Nor is there any evidence to show that on the date of occurrence, A1 was actually present at the spot. Further, there is absolutely no evidence to show that even assuming explosives were used to deepen the well, that was with the connivance, knowledge and consent of the first accused.

21. PW14 is one of the Investigating Officers. He simply says that during his investigation, he came to know that the person named in the FIR had nothing to do with the incident and it was the accused now arrayed before court who was responsible for the explosion. As to how he

reached such a conclusion is not discernible from the records. From the evidence now available before court, there is nothing to show that the first accused was present anywhere near the place of occurrence on the date of incident or that he had anything to do with the use of explosives.

22. In the absence of material to show that he was actually present or that the act was authorized by him and was done with his consent that the explosives were used, he cannot be held responsible for the explosion even assuming it did as alleged by the prosecution.

23. As far as A2, the contractor who was engaged by the first accused, is concerned, there is nothing to show that he had made use of the explosives. It is strange to note that there was no attempt from the side of the prosecution to show that the explosives alleged to have been used for deepening the well was the same explosive which exploded in the hands of PW2 which he is alleged to have picked up

from the courtyard of his house had same contents. Without establishing the similarity or the identity of the explosive substance, it could not have been found that the explosion that occurred when PW2 picked up the material from his courtyard, was caused due to the negligent act on the part of the second accused.

24. At the risk of repetition, it may be said that it is not shown by the prosecution that the explosive substance alleged to have been used by A2 to deepen the well is the same material that had exploded in the hands of PW2. The traces of exploded materials while PW2 had picked up the article from his courtyard, do not seem to have the contents sent for forensic examination for identification of the explosive substance. However, the granite pieces collected from the compound, where the well was being dug, shows the traces of nitroglycerin.

25. Indeed it is a sad incident. But sad incident cannot make bad law. Unless the prosecution establishes that

accused Nos. 1 and 2 were actually responsible for the explosion and had direct involvement in the incident, it will be imprudent on the part of court to find them liable for the explosion that caused injury to PW2.

26. For the above reasons, this Court is unable to uphold the conviction and sentence passed by the court below as against accused Nos. 1 and 2.

Hence, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that they are not guilty of the charges levelled against them. Their bail bond shall stand cancelled and they are set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge