

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

CRL.A.No. 1162 of 2014 () IN Cr1.L.P.177/2014

AGAINST THE ORDER/JUDGMENT IN CC 61/2010 of JUDICIAL FIRST CLASS
MAGISTRATE-II, SULTHANBATHERY DATED 17-07-2012

AGAINST THE ORDER/JUDGMENT IN Cr1.L.P.177/2014 of HIGH COURT OF
KERALA

APPELLANT/COMPLAINANT:

FOREST RANGE OFFICER
CHEDLETH RANGE
SOUTH WAYANAD DIVISION.

BY ADV. PUBLIC PROSECUTOR: SRI MADHAVANKUTTY (SP.GOVERNMENT
PLEADER-FOREST)

RESPONDENT/ACCUSED:

KUNHU VARKEY @ K.P.VARGHESE
S/O PAILI, KOCHIKUDIYIL HOUSE, PALAKKOLLY P.O.
PULPALLY VILLAGE, SULTHAN BATHERI TALUK
WAYANAD DISTRICT-673579.

R1 BY ADV. SRI.MATHEW KURIAKOSE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1162 of 2014

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Dated this the 30th day of September, 2015

JUDGMENT

This appeal, at the instance of the Forest Range Officer, Wayanad Division, challenges the judgment of the learned magistrate by which the accused was acquitted for offence alleged against him.

2. The allegation of the prosecution was that the accused had trespassed into the reserve forest and hunted a wild boar. He was intercepted with carcass of the wild boar, while it was being transported out of the reserve forest. According to the forest officials, he was intercepted while carrying a sack containing meat and the knives for cutting it were recovered. After investigation, final report was laid and the accused faced trial before the learned magistrate. On the side of the prosecution PW1 to 5 were examined, Exts.P1 to P6 were marked and MO1 to 4 were identified. After completion of the trial, court below held that the prosecution failed to substantiate the allegation and acquitted the accused. This is under challenge in this appeal.

3. Heard both sides and examined the records.

4. The finding of the court below was that the available evidence was not sufficient to prove that the meat allegedly seized was that of a wild boar as alleged. This finding was based on the fact that even after steps were taken by the prosecution to obtain scientific report to confirm whether it was meat of a wild boar, the report was not produced. Consequently, accused was acquitted. This is assailed inter alia on the ground that prosecution did not get sufficient opportunity to produce additional evidence. It was contended that the court below went wrong in holding that steps were not taken to take samples from the wild boar and to get it examined by the expert. Along with this appeal, Annexure-I, the report of the Associate Professor (Wildlife Forensic Unit), Thrissur was produced. It is a report of the Associate Professor & Head, Wildlife Forensic Unit of the College of Forestry, Kerala Agricultural University. Relying on this, learned counsel for the prosecution contended that this could not be produced before the court below due to oversight and it had resulted in manifest injustice.

5. This was vehemently opposed by the learned counsel for the accused essentially on the ground that Section 391 Cr.P.C cannot be pressed into service to fill up the lacuna in evidence. It was the obligation of the prosecution to prove that the meat was that of wild boar. After having failed to prove it, they cannot, in

appeal let in evidence to fill up the lacuna. To support the contention, learned counsel relied on the decisions reported in **Rambhau and Anr. Vs. State of Maharashtra (2001 KHC 1096)** and **Ashok Tshering Bhutia Vs. State of Sikkim ((2011) 4 SCC 402)**. In the former decision, the Supreme Court held that the powers of the appellate court to receive additional evidence is not intended to fill up gap in the prosecution case, but to oversee that the concept of justice does not suffer. It was held relying on the earlier decision, in **Rajeswar Prasad Misra Vs. State of West Bengal (AIR 1965 SC 1887)** that the order must not ordinarily be made, if the prosecution had fair opportunity and had not availed of it. Learned counsel further contended that Section 391 is akin to Order 41 Rule 27 of the CPC. To buttress his argument, learned counsel relied on the decision reported in **Chirag Enterprises Vs. Star Traders and Anr. (2012(4) ILR Kerala 266)**.

6. Even though along with the appeal memo, a copy of certificate issued from the Agricultural Department is produced, there is no explanation, why it was not produced before the court below. In the appeal memo, apart from raising the above grounds, specific reason as to what prevented the prosecution from producing the document at the time of trial is not mentioned. It is also not clear as to what prevented or disabled the prosecution from

producing that document.

7. However, a perusal of the above certificate indicates that there is a covering letter dated 04.08.2010 of the Associate Dean forwarding the certificate. It is seen that the above certificate with the covering letter produced as Annexures I(a) and (b) were forwarded directly to the Court. Records reveal that the trial of the case commenced on 03.12.2010 and the judgment was delivered on 17.07.2012. Evidently, at the time of commencement of the trial, this document was in the Court file. There is nothing on record to show that the prosecution had received a copy of this intimation. That being so, the prosecution cannot be completely blamed for not having produced it at the relevant time. Evidently, there was some latches on some part of the prosecution for not effectively enquiring about the fate of the requisition for scientific analysis and in not bringing to the notice of the Court and to get it marked. Since samples were forwarded for forensic opinion on the request of the prosecution, evidently, it was for the prosecution to follow it up and to trace out the report and to bring it to the notice of the Court.

8. However, as held by the court below, this is one of the crucial point on which the entire finding of the court below rested. The latches of prosecution shall not be a reason for declining an opportunity to let in evidence the document which, even according

to the prosecution is a crucial document.

9. Evidently, the Court is bound to take into consideration the prejudice that is likely to be caused by belated production in appeal. I feel that this can be overcome by remand of the appeal, enabling the accused to effectively cross examine, touching upon the correctness of the document. In the light of what is stated above, I feel that the matter is liable to be remanded for the purpose of enabling the prosecution to let in evidence Annexures-I(a) and (b). The accused will be entitled to cross examine the evidence, touching upon it.

In the result, the appeal is allowed. The impugned judgment is set aside and the matter is remanded to the court below to have a fresh consideration and to enable the prosecution to adduce evidence in relation to Annexure-I(a) and (b). Both sides shall appear before the court below on 30.10.2015. The court below shall proceed to adduce evidence touching upon the above documents and pass fresh orders, untrammelled by any of the observations made above.

SUNIL THOMAS
Judge

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P.A to Judge