

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 12TH DAY OF MARCH 2015/21ST PHALGUNA, 1936

Crl.Rev.Pet.No. 231 of 2003 ()

**AGAINST THE JUDGMENT IN CRL.A.NO.31/1998 of SESSIONS COURT, MANJERI
DATED 10.10.2002**

**AGAINST THE JUDGMENT IN C.C.NO.215/1995 of JUDICIAL FIRST CLASS
MAGISTRATE COURT-II (FOREST OFFENCES), MANJERI
DATED 24.02.1998.**

REVISION PETITIONER(S)/APPELLANT(S)/ACCUSED:

- 1. RAGHU, S/O.NARAYANAN,
THAZHATHUVEETIL HOUSE, CHUNGATHARA,
MALAPPURAM DISTRICT.**
- 2. PURUSHOTHAMAN, S/O.KOCHUKUNHU,
THAYYIL HOUSE, CHUNGATHARA, MALAPPURAM DISTRICT.**

BY ADV. SRI.BABU S. NAIR

RESPONDENT(S)/COMPLAINANT:

**THE STATE OF KERALA REPRESENTED BY
THE FOREST RANGE OFFICER, NILAMBUR - THROUGH
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI-31.**

**BY SRI.M.P.MADHAVANKUTTY, SPL. GOVT. PLEADER FOR FOREST
DEPARTMENT
PUBLIC PROSECUTOR SMT.V.H.JASMINE.**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12-
03-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

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C.R.

K. Ramakrishnan, J.

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Crl.R.P.No.231 of 2003

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Dated this, the 12th day of March, 2015.

O R D E R

Accused Nos.1 and 3 in C.C.No.215/1995 on the file of the Judicial First Class Magistrate Court - II (Forest Offences), Manjeri are the revision petitioners herein.

2. The revision petitioners along with second accused were charge sheeted by the Forest Range Officer, Nilambur in O.R.No.4/1994 alleging offences under Section 9(1), 40(2) and 44(v) read with Section 51(1) of the Wild Life (Protection) Act (hereinafter called 'the Act').

3. The case of the prosecution in nutshell was that, on 16.10.1993 at about 4.00 a.m., in front of Thadathil Stores at Aanichuvadu junction, the accused persons were found to be in possession of the carcasses of two Nilgiri Langurs, a scheduled animal under this Act which they have hunted from the forest and they were found to be in possession of the same without any valid documents and thereby, they have committed the above said offences. After investigation, complaint was filed by the Forest Range Officer, Nilambur against the accused

persons including the revision petitioners alleging the commission of the above said offences and it was taken on file as C.C.No.215/1995 on the file of the Judicial First Class Magistrate Court - II (Forest Offences), Manjeri. On getting summons, PW1 was examined and Exts.P1 and P2 were marked and after considering the evidence, charge under Section 9(1) (wrongly shown as 9(2) in the judgment), 40(2), 44(v) read with Section 51(1) of the Wild Life (Protection) Act was framed and the same was read over and explained to them and they pleaded not guilty. Thereafter, the second accused absconded and case was proceeded against the present revision petitioners alone. PW1 was recalled and he was cross examined and thereafter, PWs 2 to 5 were examined and Exts.P1 to P8 were marked on their side. After closure of the prosecution evidence, the present revision petitioners were questioned under Section 313 of Code of Criminal Procedure and they denied all the incriminating circumstances brought against them in the prosecution evidence. Further, they have stated that, they came for a church festival and they have been taken in to custody by the police and they have not committed any offence. No defence evidence was adduced on

their side.

4. After considering the evidence on record, the learned magistrate found the revision petitioners not guilty for the offence under Section 44(v) read with Section 51(1) of the Wild Life (Protection) Act and acquitted them of that charge under Sections 248(i) of Code of Criminal Procedure. But, the learned magistrate found them guilty for the offence under Sections 9(1) and 40(2) read with Section 51(1) of the Act and convicted them thereunder and sentenced them to undergo rigorous imprisonment for three years and also to pay a fine of Rs.5,000/- in default to undergo simple imprisonment for six months under Section 40(2) read with Section 51(1) of the Act and further sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.5,000/- in default to undergo simple imprisonment for six months under Section 9 (1) read with Section 51(1) of the Act and directed the substantive sentences to run concurrently. Aggrieved by the same, they filed Crl.Appeal No.31/1998 before the Sessions Court, Manjeri, the learned Sessions Judge by the impugned judgment, dismissed the appeal confirming the order of conviction and sentence passed by the court below. Aggrieved

by the same, the present revision has been filed by the revision petitioners - accused Nos. 1 and 3 before the court below.

5. Heard the Counsel for the revision petitioners and Shri.M.P.Madhavankutty - Special Government Pleader for Forest.

6. The Counsel for the revision petitioners submitted that, none of the original documents namely., the First Information Report and the seizure mahazar said to have been registered and prepared by PW1, have been produced. The procedure for admitting secondary evidence has not been complied with. The lower court also came to the conclusion that, since they are secondary evidence, the same cannot be admitted in evidence, but, relied on the evidence of PWs 1 and 2 and convicted the accused persons which is unsustainable in law. Further, the investigation was conducted by an incompetent person in violation of Section 50(8) of the Act. So, any evidence collected by an incompetent person cannot be used in evidence. Further, the confession statements have not been proved in accordance with law as PW5 had stated that it was not he who recorded the statement. The person

who recorded the statement has not been examined as well. So, under the circumstances, according to the learned Counsel, these legal aspects have not been properly appreciated by both the courts and the conviction entered is unsustainable and the revision petitioners are entitled to get acquittal.

7. On the other hand, the Special Government Pleader for Forest supported the concurrent findings of the court below. He had also argued that, though the investigation was conducted by an incompetent person, the complaint was filed by a proper person and if there are other evidence adduced by the prosecution to prove the case, there is nothing wrong for the court to rely on those evidence and come to an independent conclusion regarding the commission of the offence and can convict the accused persons if the court is satisfied with that evidence.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows:

On 16.10.1993, while PW1 - the Sub Inspector of Police, Ramapuram police station was doing patrol duty along with PW2 - Head Constable attached to that police station and others and when they reached in front of a shop by name

Thadathil Stores at Aanichuvadu junction, they saw three persons standing on the veranda and there was a hardboard box found near them. When he questioned them, they revealed that the hardboard box contained carcasses of Nilgiri Langurs (കരിങ്കുരങ്ങ്) and immediately he had opened the box and found the carcasses of two Nilgiri Langurs and he had prepared Ext.P2 mahazar in the presence of PW2 and seized the same and arrested the accused persons and came to the police station and registered the original of Ext.P1 First Information Report and since it is a forest offence, he had produced the documents and accused along with the article seized before PW5 - Forest Range Officer, Erumeli who had questioned these accused persons and satisfied that the carcasses were that of Nilgiri Langurs and it was revealed that the offence was committed within the jurisdiction of Nilambur Forest Range and he had registered an occurrence report and forwarded the same to the Forest Range Officer, Nilambur which was received by PW4 and according to him, he conducted the investigation and filed the complaint.

9. Admittedly though PW1 is an authorised person to detect crimes under the Wild Life (Protection) Act under

Section 50(1), he is not competent to conduct investigation or file complaint under the Act. Even Section 50 says that articles so seized and the persons arrested must be produced before the Chief Wild Life Warden or the officer authorised by him in this regard.

10. Further, Section 50(8) of the Act deals with the investigation part of the offence which reads as follows:

“Notwithstanding anything contained in any other law for the time being in force, any officer not below the rank of an Assistant Director of Wild Life Preservation or [Wild Life Warden] shall have the powers, for purposes of making investigation into any offence against any provision of this Act,-

- (a) to issue a search warrant;
- (b) to enforce the attendance of witnesses;
- (c) to compel the discovery and production of documents and material objects; and
- (d) to receive and record evidence.”

That shows that the investigation can be conducted only by an officer not below the rank of an Assistant Director of Wild Life Preservation or Wild Life Warden as it then stood and not by a Forest Range Officer. This power of investigation has been subsequently entrusted to an officer of and above the rank of Assistant Conservator of Forests as per S.R.O.No.436/2007 dated 09.05.2007 which reads as follows:

“In exercise of the powers conferred by sub-section (8) of section 50 of the Wildlife (Protection) Act, 1972 (Central Act 53 of 1972), the Government of Kerala hereby authorize all officers

of and above the rank of Assistant Conservator of Forests for exercising the powers specified in clauses (a) to (d) of the said sub-section for purposes of conducting investigation into any offence against any provision of the said Act.”

11. So, it is clear from this, even the Assistant Conservator of Forests will be an officer not below the rank of a Divisional Forest Officer and not Forest Range Officer though he is entitled to file a complaint under Section 55 of the Act.

12. It is seen from the evidence of PW5 that Exts.P6 to P8 - the alleged confession statements of the accused persons were not recorded by him and it was recorded by somebody else. Unless it is recorded by him, he is not competent to prove that documents as the extra judicial confession given by the accused persons regarding the commission of the offence for the purpose of relying on the same as a piece of evidence against them. The person who recorded Exts.P6 to P8 was not examined as well. Further, by virtue of Section 50(8) of the Act, he is not competent to record evidence as well even assuming that it was recorded by him. So, under the circumstances, only if it is recorded by a competent person authorised under Section 50(8) of the Act, it can be admitted in evidence under Section 50(9) in a subsequent proceedings. So, the confession statements said to have been recorded have

no evidentiary value and that should not have been relied on by the courts below for the purpose of convicting the revision petitioners.

13. Though PW1 had stated that Exts.P1 and P2 are the copies of the First Information Report and seizure mahazar prepared by him, the Forest Officials have no explanation as to why the originals of those documents were not produced or even at least the certified copies taken from the court, so that, it ought to have been treated as the certified copies of public documents under Section 74 of the Evidence Act. These documents cannot be said to be documents not available or beyond the reach of the officers as well so as to rely on the secondary evidence namely., the copies of the documents. Further, it will be seen from Explanation 2 to Section 62 of Evidence Act that, any copies taken by using mechanical process will be deemed to be not primary evidence and that can be only treated as a secondary evidence. Unless the prosecution is able to establish the circumstances mentioned in Section 65 of the Evidence Act for relying on the secondary evidence, the secondary evidence produced cannot be accepted as well. The court below had come to the conclusion

that the documents produced to prove the seizure is not primary evidence, but, secondary evidence and since the ingredients of Section 65 of the Evidence Act had not been established by the prosecution, the same cannot be relied on as well. But, the court below had relied on the oral evidence alone for the purpose of convicting the accused coupled with the confession statements said to have been given by accused persons which this court in the previous paragraph has observed that since it was recorded by an incompetent person, the same cannot be relied on for any purpose.

14. Further, the evidence of PW1 will go to show that the seizure mahazar was not prepared in his handwriting, but, it was prepared in the handwriting of the Head Constable namely., PW2. But, PW2 had a case that he did not know who had prepared the seizure mahazar. If that be the case, it cannot be said that Ext.P2 seizure mahazar even though it was a carbon copy which is inadmissible in evidence has been said to have been proved by the witness. Once the genuineness of Ext.P2 seizure mahazar has not been established, then, that cannot be used as an evidence against the person against whom it was intended to be used as well.

15. Further, another aspect in this case is that it was the articles were not seized from the possession of the accused persons. It was seen near the accused persons in the veranda of the shop. The ownership of which has been disowned by them. They can be connected with those article only if the confession statements said to have been given by them have been proved in accordance with law. If such an evidence is absent, then, it cannot be said that the articles were seized from the possession of the accused persons as well. But, the Special Government Pleader for Forest wanted to impress upon this court that the presumption under Section 57 of the Act will be available and unless the contrary is proved by the accused, it can be presumed that they were in possession of the same. But, it is settled law that in order to attract the presumption under Section 57 of the Act, there is a primary duty cast on the prosecution to prove that the articles were seized from the possession of the accused persons. In this case, it was not seized from the possession of the accused persons and merely because they were found near the same, it cannot be said that they were in possession of the same or having control over the same so as to attract the presumption under Section 57 of the

Act as well. Once the prosecution has failed to prove the possession of the article with the accused persons, then, it cannot be said that the prosecution has proved beyond reasonable doubt that they have committed the offence under Section 9(1) or Section 40(2) read with Section 51(1) of the Act. These aspects have not been properly appreciated by the courts below though such contentions were raised in the court below. So, under the circumstances, the courts below were not justified in coming to the conclusion that the prosecution has proved beyond reasonable doubt that the revision petitioners have committed the offence punishable under Sections 9(1) and 40(2) read with Section 51(1) of the Wild Life (Protection) Act and the consequential conviction and sentence passed by the court below are unsustainable in law and the same is liable to be set aside and the revision petitioners are acquitted of the charge levelled against them giving them the benefit of doubt.

So, the revision is allowed. The order of conviction and sentence passed by the Judicial First Class Magistrate - II (Forest Offences), Manjeri in C.C.No.215/1995 and confirmed by the Sessions Court, Manjeri in Crl.Appeal No.31/1998 are

set aside and the revision petitioners are acquitted of the charge levelled against them giving them the benefit of doubt. They are set at liberty. The bail bond executed by them will stand cancelled. If they have remitted any amount towards the fine, then, the lower court is directed to refund the same to them.

Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.Ramakrishnan, Judge.

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[True copy]

P.A to Judge