

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

MONDAY, THE 20TH DAY OF JULY 2015/29TH ASHADHA, 1937

Crl.MC.No. 1695 of 2013 ()

S.C.NO.560/2012 of ADDITIONAL SESSIONS COURT, (AD HOC-1), THRISSUR

PETITIONER(S)/ACCUSED 1 & 4:

- 1. SHIHAB, AGED 28 YEARS,
S/O.MUHAMMED RASHEED, BANGLOW PARAMBIL HOUSE,
NEAR ST.JAMES HOSPITAL, CHALAKKUDY.**
- 2. JOBY, AGED 29 YEARS,
S/O.DEVASSYKUTY, PAYYAPPILLY HOUSE, THUMBOOR DESOM,
THAZHEKAD VILLAGE.**

**BY ADVS.SRI.C.HARIKUMAR
SMT.C.B.ANUROOPA
SRI.VIPIN VARGHESE**

RESPONDENT(S)/RESPONDENT/STATE:

**STATE OF KERALA
REP.BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, PIN 682 031.**

BY PUBLIC PROSECUTOR SMT. M. MADHUBEN.

**THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 20-07-2015,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS

**ANNEXURE-A1: THE TRUE COPY OF THE FINAL REPORT IN CRIME NO.868/2008 DATED
31.03.2008.**

**ANNEXURE-A2: CERTIFIED COPY OF THE DEPOSITION OF PW1 IN SC 181/2009 DATED
20.09.2012.**

**ANNEXURE-A3: CERTIFIED COPY OF THE DEPOSITION OF PW2 SC 181/2009 DATED
20.09.2012.**

ANNEXURE-A4: THE TRUE COPY OF THE JUDGMENT DATED 28.09.2012 IN SC 181/2009.

RESPONDENT(S)' EXHIBITS

NIL

//True Copy//

P.A. To Judge

Bb

RAJA VIJAYARAGHAVAN V, J.

Crl.M.C.No.1695 of 2013

Dated this the 20th day of July, 2015

O R D E R

This petition under Section 482 of Code of Criminal Procedure is preferred by the accused Nos.1 & 4 in S.C.No.560/2012 on the file of the Additional Sessions Judge, (Ad hoc -1), Thrissur. Their prayer is to quash all further proceedings in the said case on the ground that the substratum of the case is lost as a result of the acquittal of accused Nos.2 & 3 in the said case as per Judgment dated 28.09.2012 of the Court of Sessions, Thrissur Division.

2. The prosecution case is that, on 09.11.2007, at about 23.45 hours, the accused persons, five in numbers, were found standing on the veranda of an old building situated on the north of 'Seven Seas' bar at Irinjalakuda and were making preparations for committing dacoity. On seeing the police personnel, accused Nos.2 to 4 took to their heels and they were able to arrest only the 1st accused. On questioning, the 1st accused is alleged to have

divulged the details of the accused Nos. 2 to 4 who had fled seeing the police officers. Later, Crime No.868/2007 of Irinjalakuda police station was registered and after investigation, the charge was laid before the Judicial First Class Magistrate Court, Irinjalakuda. The learned magistrate committed the case for trial to the Court of Sessions, Thrissur Division and the case was taken cognizance of and numbered as S.C.No.181/2009.

3. During the course of proceedings, the 5th accused had died and 4th accused had absconded. The accused Nos.1 to 3 alone appeared before court and when the charge was read over, they pleaded not guilty and claimed that they be tried. When the trial commenced, 1st accused did not appear and the trial proceeded only as against accused Nos.2 & 3.

4. Before the learned Sessions Judge, the prosecution examined only CWs 1 & 3 as PWs 1 & 2. PW1 was the then Assistant Sub Inspector and PW2 was the Police Constable who accompanied the Sub Inspector who arrested the first accused from the veranda of the shop room. During the trial as is evident from Annexure IV Judgment, PWs 1 and 2 stated that they had accompanied the Sub Inspector during the night patrol duty at

11.45 p.m. on 09.11.2007. But, they stated that they could not identify the 4 persons who had fled from the scene. The learned Sessions Judge after analysing the evidence of PWs 1 & 2, closed the evidence. It was held that the case of the prosecution cannot be improved even by examining the Sub Inspector, who was not available, and the accused were acquitted for no evidence under Section 232 of the Code of Criminal Procedure. After the acquittal, the case against the accused Nos. 1 & 4 were re-filed as S.C.No.560/2012.

5. I have heard the learned counsel for the petitioners and also the learned Public Prosecutor.

6. The learned counsel for the petitioners has submitted that the basic ingredient of Section 399 of the Indian Penal Code is that, five or more persons should conjoin and make any preparation for commission of the offence of theft or dacoity and in view of the acquittal of accused Nos.2 & 3, the said ingredient will not be satisfied. Relying on the Judgment of the Apex Court in **Ram Lakhan Vs. State of Uttar Pradesh [1983 SCC (Cri) 339]**, it is submitted that before an offence under Section 395 can be made out there must be an assembly of five or more

persons. Reliance was also placed on the principles laid down in **Mohan Singh V. State of Punjab [AIR 1963 SC 174]**. The learned counsel also placed reliance on the judgment reported in **Jalalu Vs. Rajan [2013 (2) KLT SN 6 (Case No.7)]**, and submitted that after the acquittal of accused Nos.2 & 3, the remaining accused is less than five and in view of Annexure IV judgment of the learned Sessions Judge, it will be nothing but in abuse of process to proceed against the petitioners herein.

7. I have anxiously considered the arguments of the counsel appearing for the petitioners and also the learned Public Prosecutor. As is evident from Annexure IV Judgment passed by the learned Sessions Judge, the prosecution had miserably failed to prove the participation of any person in the crime. The witnesses examined were the Assistant Sub Inspector of Police and the Police Constable who accompanied the Detecting Officer and they were not able to identify the accused who are alleged to have participated in the preparation to commit dacoity along with the first accused. It appears that the first accused was standing outside the shop room near to the 'Seven Seas' bar at Irinjalakuda. From the tenor of evidence tendered by PWs 1 & 2

examined before the Sessions Judge, the contention raised by the learned Counsel that, the petitioners were falsely implicated in a grave crime cannot be ruled out. The prosecution has miserably failed to prove the ingredients of Section 399 of the Indian Penal Code in the instant case.

8. More over, I am of the considered view that in view of Annexure IV Judgment passed by the learned Sessions Judge, the substratum of the prosecution case is lost as has been held in Para.50 of the Judgment of this Court in **Moosa Vs. Sub Inspector of Police [2006 (1) KLT 552]**. No purpose will be served in subjecting the petitioners to undergo the ordeal of the protracted trial.

In the result, this Criminal Miscellaneous Case is allowed and all further proceedings in S.C.No.560/2012 on the file of the Additional Sessions Judge, (Ad hoc -1), Thrissur are quashed.

Sd/-
**RAJA VIJAYARAGHAVAN V,
JUDGE.**

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[True copy]

P.A to Judge