

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

MONDAY, THE 6TH DAY OF JULY 2015/15TH ASHADHA, 193

Crl.Rev.Pet.No. 2357 of 2003 ()

AGAINST THE JUDGMENT IN CRA 121/2000 of ADDL.DISTRICT COURT (ADHOC),
KOZHIKODE DATED 29-05-2003

AGAINST THE JUDGMENT IN CC 586/1995 of J.M.F.C.-I, THAMARASSERY DATED
26-02-2000

REVISION PETITIONER(S):

AHAMMAD, S/O. ABU HAJI
KUNNUMMAL HOUSE,
MADAVOOR AMSOM, MADAVOOR DESOM,
KOZHIKODE DISTRICT.

BY ADVS.SRI.P.VIJAYA BHANU
SMT.P.MAYA

RESPONDENT/RESPONDENT/COMPLAINANT:

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

BY PP SMT SAREENA GEORGE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 06-07-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.D.RAJAN, J

.....
Crl.R.P.No.2357 of 2003
.....

Dated 1st July, 2015

ORDER

'CR'

The revisional power of the High Court is the supervisory jurisdiction, which gives an effective role in order to correct the miscarriage of justice arising from the erroneous orders of the courts below. Any error may arise from the misconception of law, irregularity of procedure, misreading of evidence or misconception of facts. The revision petitioner is the appellant in Crl.A.No.121 of 2000 on the file of the Additional Sessions Judge (Fast Track) Adhoc I, Kozhikode challenges the judgment of conviction for offence under Section 9 B(1)(b) of the Explosives Act 1884 (hereinafter referred to as the Explosives Act). He was convicted in C.C.526 of 1995 by the Judicial First Class Magistrate-I, Thamarassery for the above offences under section 9 B(1) (b) of the Explosives Act and sentenced to undergo rigorous imprisonment for one year and Rs.3000/- as fine, against that the above appeal.

2. The facts necessary for the indictment were that on 29.4.1998 at 11.30 pm, PW1 got information that revision petitioner was in possession of 107 kgs of pottassium nitrate

and detonators and 4 ½ kg of combustibles in his shop, 8/580 at Narikkuni bazar in Narikuni panchayat for sale without valuable license. The Circle Inspector, Koduvally conducted a search and seized the explosives, the accused was arrested and a case was registered by Koduvally police. After completing investigation, charge was laid before Judicial First Class Magistrate I, Thamarassery. Prosecution examined PW1 to PW14 and produced Ext.P1 to P8 as documentary evidence to prove the incident. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. He did not adduce any defence evidence. The trial court convicted the accused. The appeal was also dismissed.

3 . Learned counsel appearing for the revision petitioner contended that there is no evidence to prove the possession of the building. PW1 deposed that the building was in the name of Mohammed, but there is no evidence that Mohammed and Ahamed are the same person. There is no evidence to show that the seized articles were kept in proper custody of the detecting officer and sample was taken after four months. These legal infirmities were not appreciated by the courts below and the revision petitioner is entitled to benefit of doubt.

4. Now the question is whether the possession of the explosives in the shop of the revision petitioner was proved in this case ? According to the ' Explosives Act' whoever in contravention of the rules made under Section 5 of the Explosives Act, or the conditions of the license granted is punishable for offence under Section 9B. Therefore, whoever possess or use, sells or transport any explosive shall be punishable according to the Explosives Act 1984. The Circle Inspector of Police, Koduvally, is the detecting officer. PW1 deposed that on 29.4.1993 at 11.30 pm, he arrived at the premises of building 8/580 of Narikuni panchayat, the room was found locked, he sent a messenger to the owner of the building. Before search, he prepared Ext.P3 search memorandum and obtained the presence of PW4 to PW6 who are the independent witnesses from the locality. He inspected the shop room in the presence of the official witnesses and three independent witnesses and detected 98 kgs of pottassium nitrate in 40 plastic bags, 9 kgs of pottassium nitrate in another plastic bag (total 107 kgs). He also seized 24 number of detonators and 4 ½ kgs of compustables in a hard board box and two other card board boxes from the shop

room. After seizing the aforesaid substances, he prepared Ext.P1 search list and obtained the signature of the independent witnesses PW4, PW5 and PW6 and copy of the search list was also given to the revision petitioner after obtaining his signature in it. PW1 deposed that one room was owned by petitioner's wife and revision petitioner was conducting the sale of hard wares in 8/580 from where the explosives seized. Analysing the above oral testimony of PW1, it is clear that there is no infirmity in the search and seizure.

5. The revision petitioner was arrested from the spot, the explosives were seized from the shop and reaching at the police station, he registered a case. In Ext.P1, the owner of the building is shown as one Rabia, wife of Mohammed, but in Ext.P2 the address of the revision petitioner was shown as K.Mohammed, son of Abdu Haji. But in Ext.P3 the occupier of the shop is mentioned as Ahmed, son of Abuhajee. The revision petitioner contended that no document had been produced by the prosecution to show that Mohammed and Ahamed are one and the same person. While adverting to that argument, it is necessary to look into the evidence of the panchayat Secretary, Narikuni panchayat. PW12 deposed that

while he was Panchayat Secretary during 1993-1994, Room No.580, K. Ahammed was conducting Hardware shop and he was in possession of that room, which was recorded in Ext.P6. PW4 was conducting a barber shop near the revision petitioner's hardware shop and deposed that he was present at the time of search and he signed in Ext.P1 search list. PW6 also admitted his signature in Ext.P1. PW7 deposed that he was present near PW1. PW14, the Sub Inspector of Police, Koduvally, deposed that the shop NP 8/580 of Narikuni Panchayat was possessed by the revision petitioner. Analysing the evidence of PW4, PW7, PW12 and PW1, it is found that revision petitioner was in possession of the search room and the names Ahammed and Mohammed are one and the same person. The entry of name in Ext.P1 and Ext.P2 are only clerical mistake committed by PW1.

6. Another contention was that there was delay in sending the sample for chemical analysis, which will cause prejudice the revision petitioner. It is true that PW1 got communication from the Controller on 10.5.1993 with a direction to retain explosives seized in safe custody in an isolated place until examination of the Chief Controller. PW1

took sample on 29.4.1993 from the shop. PW8 was present at the time of producing the sample before Explosive Controller, Kochi. His evidence shows that the explosive substance was mixed with water and took sample in a small jar, and present at the time of preparing Ext.P4. PW13 deposed that the explosive sample taken by the Explosive Controller was entrusted at the Police Station and he produced that sample before Court for forwarding it to the chemical examination. Ext.P7 is the forwarding note and Ext.P8 is the chemical examination report. The report shows that the seal on the packet was in tact and found tallied with the sample seal provided. Therefore the delay in sending sample will not prejudice the revision petitioner.

7. While incorporating the word 'possession' it could mean physical possession with animus custody or dominion over the explosives. The mental element and the physical control is the primary element to establish possession. Personal knowledge about the particular location of the explosives at the relevant time complete the manifest possession. In this context I have referred to the decision of the Apex Court in **Durga Prasad Gupta V. State of**

Rajasthan (2003(12) SCC 527) which reads as follows:-

" 22. It is highlighted that unless the possession was coupled with the requisite mental element i.e conscious possession and not mere custody without awareness of the nature of such possession, Section 5 is not attracted.

23. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supdt. & Remembrancer of Legal Affairs W.B V. Anil Kumar Bhunja* to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

24. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

25. As noted in *Gunwantlal V. State of M.P*, possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power of control.

26. The word "possession" means the legal right to possession (See *Heath V. Drown*). In an

interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan V. Earl of Caithness)".

8. The learned counsel appearing for the revision petitioner contended that there is violation of Rule 128 (2) of the Explosives Rules, 2008. According to Rule 128(1), any authority specified in column (1) of the Table may within the jurisdiction enter, inspect and examine and conduct a search and seizure for explosives and take a sample found therein. They may also seize, detain or removes any explosives or ingredients thereof found therein together with connected documents thereof. According to Rule 128(2), whenever any officer other than the Chief Controller seizes, detains or removes any explosive or ingredients thereof or any connected documents thereof under this rule, he shall forthwith report the fact by telegram to the Chief Controller and the Controller under whose jurisdiction the place where the explosives were seized falls and whenever any officer not being the District Magistrate seizes, detains or removes any explosives or ingredients thereof or any connected documents thereof under

this rule, he shall forthwith report the fact by telegram to the district authority concerned. In this case, PW1 deposed that he complied with the above statutory formalities. PW1 reported the matter to the District Superintendent of Police on the next day itself. On 7.5.1993, the District Superintendent of Police sent message to the Controller. The provisions under Rule 128 have been substantially complied with and there is no violation in that aspect.

9. The revisional power is discretionary one and there is no vested right of revision in the sense, when there is vested right mentioned in appeal. In an appeal, the appellant is given a statutory right to demand adjudication upon a question of law or question of fact or of both. But in a revisional jurisdiction, the appellant has no such right, what so ever right beyond the right bringing in a case to the notice to the court, it is for the court to interfere in exceptional cases whether it seems to have some real and substantial injustice has been done. PW11 U.D. Clerk of D5 Section Collectorate, dealing with issue of licence for explosives stated that no licence was issued to the revision petitioner for keeping explosives. Therefore I can conclude that revision petitioner

was not holding explosives license on the date of seizure. The trial Court considered the relevant evidence and convicted the revision petitioner. Therefore, I do not find any illegality in the conviction.

10. The question of sentence is in the discretion of the trial court and ordinarily it will not disturb while exercising its revisional jurisdiction. The facts and circumstances in each case, the commission of the crime, the manner in which it was planned, the conduct of the accused are relevant factors which would be considered at the time of imposing sentence. In **Jameel v. State of Uttar Pradesh** (2010) 12 SCC 532), apex court reiterated the principle by stating that the punishment must be appropriate and proportional to the gravity of the offence committed. Speaking about the concept of sentencing, the Court observed thus: -

“15. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed,

the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence”.

11. Coming to the plea of sentence, it would be noted that PW1 detected 40 plastic bags containing 98 kgs of potassium nitrate, 9kgs of potassium nitrate in another plastic bag, 24 numbers of detonators and 4 ½ kgs of combustibles in the shop room. The quantity of explosives seized from the shop room shows that the articles were kept in the shop room with the intention of sale itself, even then sentence can be reduced on the ground of special reasons. The learned counsel for the revision petitioner submitted that the revision petitioner is now aged 60 years and he prays for leniency in sentence. Considering the rule of proportionality and other factors, the

sentence is modified as follows:

1) The revision petitioner is sentenced to imprisonment for six months and to pay fine of Rs.3000/-, in default of payment of fine, imprisonment for three months.

Crl.R.P. is partly allowed.

P.D. RAJAN, JUDGE.

Lgk/acd