

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

THURSDAY, THE 3RD DAY OF SEPTEMBER 2015/12TH BHADRA, 1937

CrI.Rev.Pet.No. 873 of 2004 ()

**AGAINST THE JUDGMENT IN CRL.A.NO.262/2000 of ADDL.SESIONS COURT (AD HOC)
FAST TRACK COURT NO - II, MANJERI DATED 02-09-2003**

**AGAINST THE JUDGMENT IN C.C.NO.1141/1998 of JUDICIAL FIRST CLASS MAGISTRATE
COURT - II (FOREST OFFENCES),MANJERI DATED 31-10-2000**

REVISION PETITIONER(S)/APPELLANTS/2ND AND 3RD ACCUSED::

- 1. O.K.ARAMUGHAN,
S/O. OOTTUPARA VEETIL KUMARAN,
R/O. OOTTUPARA VEETIL, VARAKKULATH,
KURUMBALANGOD VILLAGE, ERNAD TALUK,
MALAPPURAM DISTRICT.**
- 2. T.K.KESAVAN,
S/O. THALAYANGEL KUNHIRAMAN NAIR,
R/O. THALAYANGEL HOUSE, VARAKKULATH ,
KURUMBALANGODE VILLAGE, ERNAD TALUK,
MALAPPURAM DISTRICT.**

BY ADV. SRI.K.M.SATHYANATHA MENON

RESPONDENT(S)/RESPONDENTS/COMPLAINT-STATE;:

- 1. THE FOREST RANGE OFFICER,
NILAMBUR, MALAPPURAM DISTRICT.**
- 2. THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, COCHIN- 682 031.**

BY SRI.M.P.MADHAVANKUTTY, SPL. GOVT. PLEADER FOR FOREST

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
17.08.2015, THE COURT ON 03-09-2015 PASSED THE FOLLOWING:**

Bb

RAJA VIJAYARAGHAVAN V, J.

Crl.R.P.No.873 of 2004

Dated this the 03rd day of September, 2015

O R D E R

Accused Nos.2 & 3 in C.C.No.1141/1998 on the files of the Judicial First Class Magistrate - II (Forest Offences), Manjeri challenges the concurrent findings arrived at against them under S.27(i)(e)(iv) and 27(i)(e)(iii) of the Kerala Forest Act as amended by Act 2 of 1993. They were sentenced to undergo rigorous imprisonment for 1 year each and to pay a fine of Rs.1,000/- under S.27(i)(e)(iv) and to undergo rigorous imprisonment for 1 year each and to pay a fine of Rs.1,000/- each under S.27(1)(e)(iii) of the Kerala Forest Act. In default of payment of fine, they were directed to undergo simple imprisonment for 2 months each. The conviction and sentence imposed against them were confirmed by the Court of Sessions, Manjeri in Crl.A.No.262/2000. In the course of proceedings, the 1st petitioner expired and the revision petition stands abated in so far as he is concerned.

2. The prosecution case can be summarized as follows:

PW1 – a Guard attached to the Kanakuth section of Nilambur Forest Range while inspecting the 1946 teak plantation, chanced across a freshly cut stump of a teak tree. It appeared to him that the tree was cut and removed on the previous day. Ext.P1 mahazar was prepared. While so on 08.12.1995, PW2 – another guard attached to the Kanakuth section got reliable information that sawing of timber was going on in the property of the first accused. PW2 found that the accused persons were indulging in the process of sawing of timber. On questioning, the first accused is said to have admitted that the teak tree was cut from the plantation on 06.12.1995 and further disclosed that all the accused were involved in cutting and removing the tree. The accused were arrested and the teak logs were recovered. The properties as well as the accused were taken to the Range Office. On the basis of the above, the Forest Range Officer booked a case

against the accused and also recorded the statement of accused Nos.1 to 3. The accused were later released on bond and after investigation, PW5 filed Form No.II report before court.

3. The petitioners pleaded not guilty to the charges framed by the trial magistrate. In order to prove its case, prosecution examined PWs 1 to 5 through whom Exts.P1 to P6 were marked. MOs 1 to 5 were produced and identified. The trial court on an appreciation of the evidence and circumstances upheld the prosecution case and convicted the petitioners. The findings of the trial court was upheld by the first appellate court as well.

4. It is against the above findings that the petitioners have come up in revision.

5. Before discussing the merits of the case, it is

relevant to note that the first accused from whose house the timber was seized, did not appear before the trial court. As he was absconding, case against him was split up and refiled as C.C.No.143/2000. While the petitioners herein who were accused Nos.2 & 3 appeared before the trial court and suffered conviction which was upheld by the appellate court, the first accused approached the Department and got his case compounded departmentally. Though this court had directed the respondents to consider the application filed by the petitioners for compounding , the same was rejected.

6. The contention urged by the learned counsel appearing for the revision petitioners is that the notification regarding the declaration of Reserved Forest and its publication has neither been produced nor proved and the prosecution is liable to fail on that sole ground. It was further contended that there is no acceptable evidence to show that the places from where the trees were alleged to have been

cut and removed are included in the area declared to be reserve Forest under a notification validly issued under S. 19 of the Act. The learned counsel relied on various precedents of this Court to substantiate this aspect.

7. In **Chacko Pyli and Others Vs State of Kerala [1966 KLT 102]**, a Division Bench of this Court had held as follows:

"It is a pre-requisite for a person to be held guilty under S.27 of the Act that there should be a notification under S.19 duly published in the Gazette. In the absence of such a notification the accused could not be found guilty, for contravention of the provisions of S.27 of the Act."

Similar views have been taken by this Court in **State of Kerala V Kuttan Panicker [1970 KLT SN 17 (C.No.20)]**, **A.M. Antony V Forest Range Officer (1977 KLT 691)** and also in **Alipilla and Others V State of Kerala (1983 KLT 107)**.

8. The trial court relied on a judgment rendered by a

Division bench of this Court in **Asst. Collector of Central Excise v. Vasantha Kumar (1988 (1) KLT 92)**. In the above Judgment, a Division Bench of this Court had held as follows :

As pointed out by the Full Bench in the above decision the Court should have looked into the gazette or other book or document for the purpose of ascertaining whether or not the alleged notifications had been issued. Of course if the Court is not able to trace the notification, it is open to the Court to call upon the person who requires the court to take judicial notice of the notification to produce the same and to refuse to take judicial notice unless and until such person produces any such book or document which contained the notification. This is provided for in S.57 of the Evidence Act itself. In the instant case, Sri. K. Prabhakaran, counsel for the appellant submitted that the book containing the notification was placed before the lower court. The records do not disclose that the book containing the relevant notifications was produced in the court below. However, there is no allegation that the court could not trace the notifications from the gazette or the appellant was directed to produce the same or give number of the notification or the date of the gazette in which the notifications were published and he failed to do so, so as to enable the court to decline to take judicial notice of the notification.

9. The prosecution has neither produced any notification nor had convinced the learned Magistrate that the teak tree was cut from a reserve forest notified as such under S 19 of

the Forest Act, 1961. Instead, relying on the above judgment, the learned Magistrate perused the case records and found out a notification No. 471 dated 30.10.1900 which apparently revealed that Kanakuth is a forest area. The court also relied on the alleged confessional statements given by the accused and marked as Exhibit P 4 to P 6 to hold that the accused had also admitted that Kanakuth is a Forest Area.

10. Section 19 of the Forest Act reads as follows :-

19:Notification declaring forests reserved:-

*"When the proceedings prescribed in the preceding sections have been taken, the Government may publish a notification in the Gazette specifying the limits of the forests which it is intended to reserve and declaring the same to be reserved from a date to be fixed by such notification. Copies of the notification shall also be published at the headquarters of each taluk in which any portion of the land included in such notification is situate, and in every town, village and headquarters of Panchayats in the neighborhood of such land. From the date so fixed, the forest shall be deemed to be a **"Reserved Forest"**.*

11. S.19 will reveal that it is not enough that the particular area is a Forest Area as noted by the learned Magistrate in the Judgment. It has to be **"Reserved forest"**

as enumerated in Chapter II of the forest Act , 1961. It does not appear from the evidence that the learned Magistrate has ascertained this particular aspect from the Forest officers who were examined before court.

12. It has to be borne in mind that the above endeavor was made by the learned Magistrate after the hearing of the case was over. I have perused the questions put to the 2nd petitioner under S.313 of the Code of Criminal Procedure. No question is seen put to the 2nd petitioner to the effect that that the teak logs which were cut and removed are included in the area declared to be Reserved Forest under a notification validly issued under S.19 of the Act. I am of the considered view that though the notification could have been taken judicial notice of by the learned Magistrate Magistrate, the failure on the part of the learned Magistrate to put this incriminating fact to the notice to the accused under S.313(1) (b) of the Code of Criminal Procedure is a serious irregularity

which vitiates the trial. By stealthily relying on a notification which was found in the case bundle and without verifying whether the said notification related to the reserve forest in question with the prosecutor and the officers concerned, the learned Magistrate could not have found the accused guilty. As held in **Chacko Pyli and Others Vs State of Kerala [1966 KLT 102]**, this is a case where either the notification or a copy thereof was not produced before Court and no attempt was made to prove the same. I am of the considered view that its extremely unfair for a Magistrate to rely on a circumstance as being incriminating without giving the accused notice of it and without giving an opportunity of explaining the circumstance. There was total absence of materials to hold that the items seized from the property of the first accused were teak logs which were cut from the Reserved Forest. In the facts of the instant case as noted above I am of the considered view that failure of the court below amounts to serious irregularity vitiating the trial.

13. In the case of **Asraf Ali Vs. State of Assam, [(2008) 16 SCC 328]**, the Apex Court had held as follows:-

"[21] Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

[22]. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in S. Harnam Singh vs. State (Delhi Admn.) (1976) 2 SCC 819 while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

14. In **Sharad Birdhichand Sarda V State of**

Maharashtra (AIR 1984 SC 1622) the Apex Court has held that an incriminating fact that has not been put to the accused under S.313 of the Code of Criminal Procedure cannot be used against him.

15. The option open to this court was to remand the matter so that this irregularity could be cured by granting an opportunity to the prosecution. But I take note of the fact that the case against the first accused from whose house the teak logs were actually seized has already been compounded by the Forest Department as is revealed from order No.B2 - 2271/2015 dated 25.3.2015 of the Divisional Forest Officer, Nilambur North Division. When this aspect was brought to the notice of this Court, as per order dated 10.3.2015 in Crl.R.P.873 of 2004, this court had issued directions to the Divisional Forest Officer, Nilambur North Division to consider the application filed by the petitioners as well in the light of the above development. The said application was considered

and the same was rejected by the Divisional Forest Officer. As per S.68 of the Forest Act, 1961, an offence other than an offence u/s 62 or 65 of the Forest Act can be compounded by an officer not below the rank of an Assistant Conservator of Forest after accepting a sum of money by way of compensation for the offence which has been committed and he is also empowered to release the property seized on payment of the value estimated by such officer or confiscate such property to the Government. S.68 sub-clause (2) further provides that on payment of such sum of money or such value or both, the accused person shall be discharged and the property seized shall be released and no further proceeding shall be taken against such person or property. Admittedly in the instant case the allegation is that the petitioners along with the 1st accused had trespassed into the Government Forest and illicitly cut teak trees and converted the same into pieces and removed the same from the forest thus causing a loss of Rs.1500/- to the Government. The case against the 1st

accused, the principal offender has been compounded by the Department and the loss caused to the Government has been realized. The 1st accused has been left Scot free as well. It is the fundamental principle of criminal law that Court takes cognizance of the offence and not the offender. When the forest department has already compounded the offence against the principal accused from whose house the teak logs were seized, it will not be justified to pursue with the criminal prosecution against the workers who were found working with the teak logs in the house of PW1. The benefit of compounding of the offence in favour of the 1st accused will have to be extended to the petitioners as well. During the course of proceedings, the 2nd accused has expired and it is the 3rd accused who is pursuing this revision petition.

16. Insofar as the 2nd petitioner is concerned, he was in judicial custody from 23.08.2000 till 31.10.2000, on which date, the trial Court has passed the judgment. He executed

the bail bond only on 14.11.2000 and this would reveal that he was in judicial custody for about 84 days. The judgment of the Sessions Judge was rendered on 2.9.2003 and even thereafter the 2nd petitioner had undergone substantial part of the sentence. It was as per order dated 25.3.2004 that this Court had granted bail to the 2nd petitioner. In spite of that, bail bond was executed only on 30.7.2004. On that count as well the 2nd petitioner has undergone the sentence for a period of 332 days. Thus in the instant case, the petitioner has undergone incarceration for a total period of 416 days.

17. Taking these facts on consideration and after evaluating the various aspects of the prosecution case , I am of the considered view that this court will not be justified in remanding the matter to the Trial Court to cure the gross irregularity in not putting incriminating circumstances that arose from the prosecution evidence to the accused / petitioner No 2.

18. For all the aforesaid reasons, I am of the considered view that the conviction and sentence passed against the petitioner is liable to be set aside. He is entitled to an order of acquittal for the offence under S.27(i)(e)(iv) and S.27(i)(e)(iii) of the Kerala Forest Act as amended by Act 2 of 1993.

In the result, the conviction and sentence passed by the courts below against the petitioner is hereby set aside. He is acquitted of the offence under S.27(i)(e)(iv) and S.27(i)(e)(iii) of the Kerala Forest Act as amended by Act 2 of 1993 and he is set at liberty. The bail bond executed by him shall stand cancelled.

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

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[True copy]

P.A to Judge