

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

MONDAY, THE 17TH DAY OF AUGUST 2015/26TH SRAVANA, 1937

Crl.Rev.Pet.No. 1070 of 2006 ()

**AGAINST THE JUDGMENT IN CRL.A.NO.686/2003 of II ADDL. SESSIONS COURT, KOZHIKODE,
DATED 14-12-2005**

**AGAINST THE JUDGMENT IN C.C.NO.443/2001 of JUDICIAL FIRST CLASS MAGISTRATE
COURT-I, PERAMBRA DATED 22-10-2003**

REVISION PETITIONER(S)/APPELLANTS/ACCUSED NOS.1 AND 3 TO 8::

1. RASHEED, S/O. MOIDEEN,
KARUVANCHERY HOUSE, MARUTHERI, KOYILANDY TALUK.
2. PARIPPURMEETHAL RASHEED, S/O. SOOPPY,
MENHANNIAM AMSOM, MARUTHERI, KOYILANDY TALUK.
3. SHAMSUDHEEN, S/O. USSAIN,
MOLETTIL, MENHANNIAM AMSOM, MARUTHERI,
KOYILANDY TALUK.
4. SOOPPY, S/O. PARIYAYIKUTTY,
KALLARAM KETIL, MENHANNIAM AMSOM, MARUTHERI,
KOYILANDY TALUK.
5. RAHIM, S/O. KUNHABDULLA,
THALIYOTH, MENHANNIAM AMSOM, MARUTHERI,
KOYILANDY TALUK.
6. MUHAMMED, S/O. MOIDI,
KARUVANCHERY, MENHANNIAM AMSOM, MARUTHERI,
KOYILANDY TALUK.
7. JAFAR, S/O. IBRAHIM,
KOMMINIYOTTUKANDY, MENHANNIAM AMSOM, MARUTHERI,
KOYILANDY TALUK.

BY ADV. SHRI.P.V.KUNHIKRISHNAN

RESPONDENT(S)/RESPONDENT/COMPLAINANT & STATE::

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

Crl.Rev.Pet.No. 1070 of 2006 : 2 :

BY PUBLIC PROSECUTOR SMT.BINDU GOPINATH

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 07.08.2015,
THE COURT ON 17-08-2015, PASSED THE FOLLOWING:**

Bb

C.R.

RAJA VIJAYARAGHAVAN V, J.

Crl.R.P.No.1070 of 2006

Dated this the 17th day of August, 2015

O R D E R

The sustainability of the concurrent findings arrived at by the courts below against the petitioners, finding them guilty under section 158 of the Indian Penal Code and section 48 (a) of the Kerala Police Act, 1960, is raised in this Criminal Revision Petition filed under section 397 and section 401 of the Code of Criminal procedure.

2. The petitioners who are accused Nos. 1 and 3 to 8 in C.C.No.443/2001 on the file of the Judicial First Class Magistrate Court - I, Perambra were proceeded against on the allegation of having committed offence punishable under section 158 of the Indian Penal Code and section 48(a) of the Kerala Police Act.

3. Concisely, the allegation against the petitioners as per prosecution records is that, the accused, 9 in numbers, were found traveling in a jeep bearing Reg.No.KL.D.7639 on 20.09.2001 at 10.30 p.m., with dangerous weapons with intent to commit some offence and thus committed offence punishable under section 158 of the Indian Penal Code and under section 48 (a) of the Kerala Police Act, 1960.

4. PW2, the Sub Inspector of Police, Perambra detected the offence and after investigation, the case was laid before the Judicial First Class Magistrate - I, Perambra.

5. As the accused Nos. 2 and 9 were not available for trial, the case against them were split up and refiled.

6. PWs 1 to 8 were examined and Exts.P1 to P4 were marked. MO1 series and MO2 series were produced and identified.

7. After the close of prosecution evidence, the incriminating materials arising out of the prosecution case were put to the accused under section 313(1)(b) of the Code of Criminal Procedure. They denied the circumstances and maintained that they were innocent. No evidence was adduced on the side of the defence.

8. The learned magistrate as per judgment dated 22.10.2003, came to the conclusion that the prosecution evidence revealed that the accused were found travelling in a Jeep in which MO1 sticks and MO2 series stones were found under the back seat, and as it was for committing some offence they were guilty of offence punishable under section 158 of the Indian Penal Code and section 48(a) of the Kerala Police Act, 1960. Accordingly, they were convicted and sentenced to undergo rigorous imprisonment for 3 months for offence u/s. 158 of the Indian Penal Code and simple imprisonment for 1 month for offence u/s.48(a)

of the Kerala Police Act.

9. Against the said conviction and sentence, the petitioners herein preferred appeal as Crl.A.No.686/2003 before the Court of Sessions, Kozhikode Division and the II Additional Sessions Judge, Kozhikode as per judgment dated 14.12.2005, dismissed the appeal confirming the conviction and sentence passed by the learned magistrate. The above concurrent findings are challenged by the petitioners by filing this Criminal revision Petition.

10. I have heard Adv.Shri.P.V.Kunhikrishnan, the learned counsel appearing for the petitioners and Smt.Bindu Gopinath, the learned Public Prosecutor.

11. Adv.Shri.P.V.Kunhikrishnan, the learned counsel appearing for the petitioners, as a preface, submitted that the courts below have gravely erred in convicting the petitioners on the strength of the prosecution evidence.

According to the learned counsel, this is an eminently fit case warranting interference in revision as the evidence let in has not been properly appreciated to ascertain whether the basic ingredients of the offence alleged was attracted. It was further argued that the petitioner No.4 is the father of petitioners 2 and 3 and the other petitioners are the near relatives of petitioner No.4. Merely because the petitioners were found traveling in a jeep driven by the absconding accused No.9, and MO1 series stick and MO2 series stones were found under the back seat of the said vehicle , will not be sufficient enough material to bring home an offence under section 158 of the Indian Penal Code or under section 48(a) of the Kerala Police Act. Expatiating further, the learned counsel contented that the prosecution should allege and prove that the petitioners were engaged or hired, or at least or offered or attempted to be hired or engaged, or that they assisted in doing any of the acts specified in section 141, if the accused were to brought within the ambit of section 158 of the Indian Penal Code. In order to bring

out that this was a case where the evidence was appreciated in a blatantly perverse manner by the trial magistrate, which was upheld by the learned Sessions Judge, the learned counsel drew the attention of this court to the material part of the evidence of prosecution witnesses to show that the ingredients of the offence was miserably lacking.

12. In so far as section 48(a) of the Kerala Police Act is concerned, it was contented by the learned counsel ,that the prosecution had no case, that the petitioners were travelling in the Jeep with intent to commit an offence which is a pre-requisite for attracting section 48(a) of Police Act. In other words, the crux of the contention of the learned counsel appearing for the petitioners is that merely because certain sticks and stones were found in the jeep in which they were traveling, by the police at 10.30 p.m., at night will not be sufficient enough to attract either section 158 of the Indian Penal Code or section 48(a) of the Kerala Police

Act, particularly when the prosecution has no case that the intention of the accused was to commit some offense. According to the learned counsel, an error in the application of law has crept in and this was a justifiable reason for interfering in revision.

13. Per contra, the learned Public Prosecutor has submitted that the witnesses have clearly stated that that a tense situation was prevailing in the area in connection with the college election and the mere presence of the petitioners in a Jeep in which sticks and stones were found in the back side was sufficient enough to bring home the guilt under section 158 of the Indian Penal Code. It is also argued that the learned Sessions Judge as well as the learned trial magistrate has considered all the relevant aspects and this court will not be justified in interfering with the said findings.

14. PW1, the Head constable of Perambra Station,

who accompanied the investigating officer has stated in cross examination that he is unaware as to the party affiliation of the accused, that he was unaware of their intent or as to whether they had entertained a common object. He also states that no one ascertained as to the purpose for which why they were traveling in the Jeep and no force had to be used at the time of their arrest. PW2, the detecting officer stated that the sticks and stones were kept under the back seat of the Jeep. He also stated that he was unaware of the the political background of the accused and asserted that no one was in actual physical possession of the sticks or stones. He also pleaded ignorance when asked whether he was aware that the accused were near relatives. He has not stated anywhere in his evidence that the accused had been engaged or hired or was offered or attempted to be engaged or hired to do any of the acts specified in section 141 of the Code. PW3, is the Head Constable of Perambra Police Station and he deposed that there was tension prevailing in the area in connection with the college

election. He would say that he was unaware as to where the petitioners were headed to .

15. PWs 4 to 7, who were cited as independent witnesses did not support the prosecution.

16. PW9 was the A.S.I of Perambra Police station at the relevant time and he deposed that he is unaware as to the party affiliations of the accused. He admitted that the sub inspector who registered the crime suo moto had not recorded his satisfaction in Exhibit P2 FIR. He admitted in emphatic fashion that he was not aware as to what the objectives of the accused were. He pleaded ignorance as to the place from where the accused had boarded the jeep and also their destination of travel and whether they had boarded the Jeep together. He also stated that he is unaware as to the purpose for which they were traveling in the Jeep.

17. I have analysed the evidence let in for the limited purpose of ascertaining whether the basic ingredients of the offence charged has been made out by the prosecution. I find that the evidence let in by the prosecution is grossly insufficient to bring home the guilt.

18. A reference to section 158 of the Indian Penal Code will be apposite at this juncture.

*Section 158 - "**Being hired to take part in an unlawful assembly or riot:-***

Whoever is engaged, or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,

***or to go armed:-**and whoever, being so engaged or hired as aforesaid, goes armed or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

(emphasis supplied)

19. In order to attract section 158 of the Indian Penal Code, the prosecution must prove that (1) the accused

offered or attempted to be hired or engaged or was in fact hired or engaged (2) That the object of it was to assist in doing any of the five acts provided under section 141 : (3) that the accused offered to go armed or went with a deadly weapon.

20. Question is whether the prosecution has alleged and proved by adducing legal evidence that the accused were engaged or hired or offered or attempted to be hired or engaged to do or assist in doing a particular act which amounted to an offence under section 141 and that they went armed or offered to go armed with deadly weapons so as to bring their act within the ambit of section 158 of the Indian Penal Code. The scope and ambit of section 141 of the Indian Penal Code is relevant in this context.

21. Section 141 of the Indian Penal Code reads as follows:

*Section 141 - **Unlawful assembly:-** An*

assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First.--To overawe by criminal force, or show of criminal force, 1 [the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

Second.--To resist the execution of any law, or of any legal process; or

Third.--To commit any mischief or criminal trespass, or other offence; or

Fourth.--By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or 10 enforce any right or supposed right; or

Fifth.-- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.--An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

22. Section 141 defines an "unlawful assembly" by declaring an assemblage of more than five persons, for any purpose indicated in the section illegal. The object of section 141 is to prevent the resort to criminal force by five or more

persons to do any of the acts which are set out in the section. Law still continues to look askance at the concourse of men but it could not punish men assembled for lawful purpose and therefore it had to lay down that though the assemblage of men however large, is not per se illegal, it may become illegal, if more than five persons meet for an unlawful purpose. The illegality was thus transferred from the assembly to the object of the assembly and these are enumerated in the five clauses which form part of the section. If there is absence of evidence from the prosecution that the common object of the assembly was not for one of the purposes mentioned in section 141, conviction cannot be sustained under section 143 or for that matter section 158 of the Indian Penal Code. There has to be evidence on record of the unlawful assembly having reached a consensus of purpose of achieving any of the various objects enumerated in section 141 of the Indian Penal Code.

23. As can be seen from the evidence let in by the

prosecution, they have no case that the petitioners were hired or engaged or offered for that purpose or that that the object of the petitioners were to assist in doing any of the five acts provided under section 141. The investigating officer has not even ascertained the relationship between the occupants inside the Jeep and it is evident from the records that the 4th petitioner, who is the father of Petitioners 2 and 3 was aged 53 years when the offence was committed. Neither the detecting officer nor the investigating officer addressed this issue to ascertain whether the object of such persons while traveling in the Jeep was for those prohibited activities mentioned in section 141 of the Indian Penal Code.

24. It is the burden of the prosecution to establish beyond reasonable doubt that the accused has committed the offence. The essential ingredients of the offence is to be proven by legal evidence, either in the form of oral evidence or by other means recognized under law. The same is

palpably absent in this case. In other words, the evidence let in by the prosecution miserably falls short of the basic ingredients of the penal section and hence conviction recorded on that ground cannot be sustained.

25. Now question is whether the conviction under section 48 (a) can be sustained.

*Section 48 - Penalty for being found armed between sunset and sunrise intending to commit an offence, etc.,
Whoever is found, between sunset and sunrise-
(a) armed with any dangerous instrument with intent to commit an offence;*

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shall be liable on conviction to imprisonment for a term not exceeding three months.

26. I had earlier discussed the evidence let in by PWs 1 to 3 and PW 8 and according to me they have not succeeded in convincing the court that the accused were traveling in the Jeep driven by accused No 9 with intent to commit an offence. Failure on the part of the prosecution to

prove this essential aspect is fatal according to me. An appraisal of the evidence let in by the prosecution would reveal that the official witnesses have not been able to bring home the essential ingredients of the offence even at the stage of trial. Of course, the act of the petitioners, in traveling in a Jeep in which some sticks and stones could lead to suspicion, but such suspicion is not proof upon which the accused can be convicted.

27. In **Ramakrishnan V State of Kerala [1991 (1) KLT 870]**, this Court had observed thus while considering section 48 of the Kerala Police Act, 1960.

The section, it appears, applies to persons who intend to commit an offence and has made preparations therefor under cover of darkness. Merely because a person was found between sun set and sunrise in any dwelling house or other building or on board any vessel or boat, without being able satisfactorily to account for his presence there, an offence under section 48 cannot be said to have been committed. Besides physical presence, in the premises mentioned in sub-section (c) of section 48, the prosecution must also show that the person had taken precaution for concealment and also made preparation for committing an offence. The question whether he had or not satisfactorily explained his

presence, is not a matter to rest only on the subjective satisfaction of the officer who apprehends him. Subjective satisfaction of the officer may not always be safe to accept. It may some times amount to his whim or fancy or sheer arbitrariness and therefore there should be safeguards to ensure that the officer had not misused his power or authority. It is, therefore, proper and desirable that the questions put to the person and the answers which were obtained should find a place in the records. This would help the court to decide whether his presence was reasonably explained or not. Allowance should certainly be given to individual stances and marginal discrepancies in the answers. The court should be alive to social problems. Interference with individual liberty should not be permitted except for justifying reasons.

28. The observations in Ramakrishnan (supra) will squarely apply to the facts of the instant case as well. In the facts and circumstances, I am also of the considered view that it will be unsafe to accept the subjective satisfaction of the detecting officer in view of the inconsistent nature of the evidence let in.

29. Though the contours of exercise of revisional jurisdiction is limited and defined in well demarcated parameters, this court will be justified in interfering when

the lower courts have erred in their inferences from the facts as found, and have held the petitioners guilty of offences, which are not constituted by such facts.

30. I therefore, hold that the conviction entered and sentence passed by the courts below cannot be sustained under law.

The revision petition is allowed and the conviction and sentence passed against the petitioners is set aside and the accused are acquitted.

Sd/-

**RAJA VIJAYARAGHAVAN V,
JUDGE.**

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[True copy]

P.A to Judge