

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

Cr1.Rev.Pet.No. 2591 of 2006 ()

AGAINST THE JUDGMENT IN CRA 90/2004 of ADDL.SESIONS COURT (ADHOC)-
II, KALPETTA DATED 12-06-2006

AGAINST THE JUDGMENT IN CC 485/2002 of J.M.F.C.-II, MANANTHAVADY
DATED 05-03-2004

REVISION PETITIONER(S)/APPELLANTS-ACCUSED::

1. ARAVIND @ VAIDYAR
CHERIYAKKEN SMARAKA MARMA CHIKILSALAYAM, THAYANGADI
MANANTHAVADY.

2. SANDEEP,
NELLINADA VEEDU, VARADI MOOLA, MANANTHAVADY.

3. NALINAKSHAN,
KAKAMCHERY VEEDU, AARATTUTHARA, WYNAD DISTRICT.

4. SUJITH,
THENGUM KANDI VEEDU, KALLUVAYAL, KANIYAMPETTA
WYNAD.

BY ADV. SRI.V.G.ARUN

RESPONDENT(S)/COMPLAINANT::

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, KOCHI-31.

R1 BY ADV. PUBLIC PROSECUTOR SRI DHANESH MATHEW MANJOORAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 14-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.D.RAJAN, J

.....
Crl.R.P.2591 of 2006

.....
Dated 14th October, 2015

ORDER

'CR'

The revisional power conferred under Section 397 and 401 of the Code of Criminal Procedure on the High Court is a special jurisdiction to correct the miscarriage of justice arising from the erroneous orders, which may arise from the misconception of law, irregularity of procedure or order and misreading of evidence. This revisional power is discretionary one and one cannot claim it as a vested right, when there is vested right in an appeal. The appellant has a statutory right in an appeal to demand adjudication upon a question of law or question of fact or of both. While exercising revisional jurisdiction, the petitioner has no such right, but he has the right to bring the case to the notice of the court and it is for the court to interfere in exceptional cases when it feels that substantial injustice has been done.

2. The revision petitioners were charge sheeted in C.C.485 of 2002 of Judicial First Class Magistrate-II,

Mananthavady for having committed offence punishable under Section 143, 147, 353, 506(i) r/w with 149 IPC. The charge is that on 4.9.2002 at 6.30 pm, accused 1 to 4 and five others formed themselves into an unlawful assembly and in furtherance of their common object, they prevented the Advocate Commissioner appointed in O.S.98 of 2002 of the Munsiff Court, Mananthavady from inspecting the property and threatened him, the second accused snatched the letter pad and the court order and ran away, thereby committed the offence.

3. During trial, prosecution examined PW1 to 6 and marked Ext.P1 to P5. The learned Magistrate found the revision petitioners guilty under Section 143, 147, 353, 506(i) read with 149 IPC and sentenced to simple imprisonment for three months under Section 143 IPC, simple imprisonment for six months under Section 147 IPC, to simple imprisonment for one year and to pay a fine of Rs.1000/- each under Section 353 IPC with a default sentence of simple imprisonment for one month and simple imprisonment for six months under Section

506(i) IPC. Against that, they preferred Criminal appeal No.90 of 2004 in the Additional Sessions Court, Kalpetta (Adhoc II) in which it was observed that A3 committed an offence punishable under Section 353 IPC and also observed that offence under Section 147 IPC will not lie against him. The appellate court also reduced the punishment imposed under Section 143 IPC to simple imprisonment for one month and reduced sentence under Section 506(i) IPC to simple imprisonment for two months. The sentence on the second accused was also reduced to simple imprisonment for three months and fine of Rs.1000/- under Section 353 IPC with a default clause of simple imprisonment for one month and again observed that A1, A2 and A3 were acquitted under Section 353 IPC. Being aggrieved by that judgment, accused preferred this revision petition.

4. I have heard both sides and perused the oral and documentary evidence. A close scrutiny of the evidence makes it clear that both courts below did not consider the relevant evidence and made a wrong appreciation in this

case. Both courts created an impression that there was an unlawful assembly for committing the aforesaid offence but the members of the unlawful assembly were not identified by the witnesses. This shows that many things which were found in the evidence are wrongly appreciated and several factors which would have favoured the accused were omitted by both the courts. When there is misreading of evidence, revisional jurisdiction can be exercised in such cases.

5. PW1 to PW4 are the occurrence witnesses of which PW1 is the Advocate Commissioner appointed by the Munsiff Court, Mananthavady. According to PW1, he arrived at the petition schedule property on 4.9.2002 at 5 pm and he was inspecting the property. A1 to A4 and six others came there and stated that plaint schedule property belongs to Sri Hanuman temple and if it is inspected, the consequence will be dangerous and they told him that he cannot inspect the property. PW1 informed them about the warrant issued from the Munsiff Court, while inspecting the main gate, the way to the

temple, A1 to A4 and six others prevented him from inspecting the property, A2 snatched the letter pad and court order from him and ran away. Therefore he could not complete the inspection and filed Ext.P3 report in the Munsiff Court, which was forwarded to Judicial First Class Magistrate II, Mananthavady. PW1 was cross examined by the defence counsel and nothing has been brought out to discredit his evidence. PW2 stated that A1 to A4 prevented PW1 while he was discharging his official duty. PW3 and PW4 also gave similar evidence of PW2. Analysing the evidence, it is clear that A1 to A4 were present at the place of occurrence, caused alarm to PW1 and no unlawful assembly as stated by PW1.

6. In order to attract an offence under Section 506(i) IPC, the prosecution has to prove that the accused intimidated PW1 as defined under Section 503 IPC. The essential ingredients are (1) there should be a threat of injury to a person (i) to his person, reputation or property (ii) to the person or reputation of any person in which the person is interested (2) that the threat must be with

intend to (i) cause alarm to that person or (ii) to cause that person to do an act which he is not legally bound to do as the means to avoiding the accused of such threat (iii) to cause that person to omit to do any act which that person is legally entitled to do as means of avoiding the causing of such threat. If one person threatening another person, in a particular set of action however a mere threat without causing any alarm does not amount to a criminal intimidation. But if the threat is made with intend to cause alarm to another person threatened, the offence will automatically come into play. It is immaterial whether the recipient of threat caused alarm or not. Therefore, the soul of the definition of criminal intimidation is the intention which has to be gathered from the surrounding circumstances and the words used by the person intimidating. On a close scrutiny of the evidence of PW1 and 2, it is clear that the accused 1 and 2 threatened PW1 that if he enters into the property of Hanuman temple, the consequence will be dangerous. This threat is made with intend to cause alarm to PW1,

which is clear in his words and it amounts to criminal intimidation as stated under Section 506(i) IPC. The immediate purpose is to induce the person threatened to cause alarm and abstain from doing something which he was legally bound to do.

7. The word 'alarm' has been considered and examined by Orissa High Court in **Amulya Kumar Behera V. Nabaghana Behera @ Nabina and others** (1995 CrLJ 3559). In that case, the complainant admitted that he was not alarmed by threat given by the accused. Hence the main ingredient to attract causing alarm was absent and the accused was rightly acquitted. In **In re A.K.Gopalan**(AIR 1949 Madras 233) it was held that if a speaker at a public meeting threatened the members of the police force stationed in Malabar with injury to the person, reputation or property, then he was said to have committed the offence of criminal intimidation which shows that threat may not always be direct and may not be in the presence of the complainant. This court in **Jose V. Subramanyan and another** (ILR

2015(3) Kerala 1127) held that mere expression of words without any intention to cause alarm would not be sufficient to attract the ingredients of Section 503. Here there is specific threat coupled with action from the side of the accused which caused alarm to PW1 which is clear from his oral evidence and reported the matter to the Munsiff Court which resulted in registering the crime.

8. The next allegation is that the petitioner assaulted or used criminal force to deter public servant from discharge of his official duty and committed offence under section 353 IPC. The evidence of PW1 shows that there was no assault from the side of the accused, but criminal force was used. Using assault or criminal force against a police servant is defined under Section 353 IPC. The ingredients of the offence are (i) the victim must be a public servant (ii) when assaulted or used criminal force he must have been acting (a) in execution of his official duty (b) the assault was intended to deter him from discharging his duty or © it was in consequence of anything done or attempted to be done by him in the

lawful discharge of his duty. Criminal force is defined under Section 350 IPC as follows:

“Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other”.

The essential ingredients of the section are (i) there must be use of force as defined by Section 349; (ii) such force should be used intentionally; (iii) the force must be used against a person, and (iv) it should have been used without the consent of the person against whom it is used.

9. Assault is defined under Section 351 IPC as follows:-

“ Assault - Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that

he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation - Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault”.

The evidence of PW1 and PW2 show that A2 snatched the letter pad and other documents from PW1 while inspecting the property. A public servant while discharging his duty is often exposed to considerable risk and law protects his official act and any obstruction made towards him is an offence. Apex Court in **Durgah Charan Naik and others V. State of Orissa** (AIR 1966 SC 1775) had occasion to answer identical incident. In that case the complainant obtained a decree against the accused and in execution of the decree, the peon went with the warrant of attachment to seize the movable articles. The accused obstructed him with lathis. It was held that accused committed offence under Section 353 IPC. The

Advocate Commissioner was discharging his official duty, A2 snatched his letter pad and court order from him and ran away. Therefore an Advocate Commissioner acting as per the direction of Munsiff Court is a public servant and use of criminal force against him was with intend to deter him from discharging his official duty and accused committed an offence under Section 353 IPC.

10. What is seen from the evidence of PW1 is that A1 to A4 and six unidentified persons obstructed him and intimidated him. But the evidence of PW2, 3 and 4 show that A1 to A4 who were present there intimidated PW1. In order to attract an offence under Section 149 IPC, prosecution has to prove that there was an assembly of five or more persons and their common object of composing the assembly is to do any act stated under Section 141 of IPC. If any member of the unlawful assembly in furtherance of the common object of that assembly, committed any offence, every person is liable. The first essential condition of an unlawful assembly is that it should consist at least of five or more persons who

should meet for a common object. Apex Court in **Prabhakar Sankar Sawant V. State of Maharashtra** (AIR 1979 SC 1265) held that prosecution has to prove that accused were part of the unlawful assembly at the time when the assembly became unlawful. Apex Court in **Bhudeo Mandal V State of Bihar** (1981(2) SCC 755) held that "there must be clear finding regarding the nature of the common object and such object is unlawful. In the absence of such finding, any overt act on the part of the accused, the mere fact that the accused were armed would not be sufficient to prove common object". Here the involvement of A1 to A4 was identified and disclosed by the witness, but the participation of others were not proved. The mere fact that six others were present there unarmed without any overt act would not be sufficient to prove common object. Therefore, the offence under Section 149 IPC is not proved, on the other hand the criminal act of A1 to A4 amounts to an offence under Section 34 IPC alone.

11. In my opinion both courts below violated the

fundamental principles of appreciation of evidence of PW1 to PW4 who are the occurrence witnesses in this case. Both courts failed to consider the relevant circumstances in connection with the alleged overt act and reached at a conclusion on the basis of materials not in evidence and not warranted by evidence. The evidence shows that A1 to A4 threatened PW1 with injury to his person, which caused alarm to that person, and they committed an offence under section 506(i) read with 34 IPC. But offence under Section 353 IPC was committed by the second accused and others never shared that common intention. But the appellate court observed that second accused committed an offence punishable under Section 353 IPC and also observed that offence under Section 147 IPC will not lie against him. The appellate court also reduced the punishment imposed under Section 143 IPC to simple imprisonment for one month and reduced sentence under Section 506(i) IPC to simple imprisonment for two months. The sentence on the second accused was also reduced to simple imprisonment

for three months and fine of Rs.1000/- under Section 353 IPC with a default clause of simple imprisonment for one month and again observed that A1, A2 and A3 were acquitted under Section 353 IPC. The learned Additional Sessions Judge convicted A2 under Section 353 IPC and subsequently acquitted him under Section 353 IPC in the same judgment is an illegality. This approach resulted in miscarriage of justice and I am of the opinion that this is a fit case to invoke revisional jurisdiction to rectify that illegality.

12. In the result, the conviction and sentence passed by the courts below under Section 143, 147 read with 149 IPC are set aside and A1 to 4 are acquitted thereunder, but A1 to A4 are convicted under Section 506(i) read with 34 IPC and A2 is convicted under Section 353 IPC and A1, A3 A4 are acquitted thereunder. Considering the nature of the offence and the circumstances under which it was committed, the imprisonment imposed by the courts below is reduced into fine.

Hence A1 to A4 are sentenced under Section 506(i) read with 34 IPC and A2 is sentenced under Section 353 IPC as follows.

(a) Accused 1 to 4 are sentenced to imprisonment till rising of court and fine of Rs.15,000/- each under Section 506(i) read with 34 IPC, in default of payment of fine, simple imprisonment for two months each.

(b) The second accused is sentenced to fine of Rs.25,000/-, in default of payment of fine, simple imprisonment for six months.

(c) Revision petitioners are directed to surrender in the trial court to undergo the modified sentence failing which the Judicial First Class Magistrate-II, Mananthavady shall issue non bailable warrant against them forthwith.

Crl.R.P is disposed of as above.

P.D.RAJAN, JUDGE

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