

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 29TH DAY OF JULY 2015/7TH SRAVANA, 1937

Crl.Rev.Pet.No. 3106 of 2006 ()

**AGAINST THE JUDGMENT IN CRL. APPEAL 276/2004 of ADDL. SESSIONS COURT,
KOZHIKODE-III**

AGAINST THE JUDGMENT IN CC 477/2001 of J.F.C.M, PERAMBRA

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

**DAMODARAN, S/O. KUNHAPPA,
KARUVANTHALAKKAL HOUSE,
KOORACHUNDU AMSOM, ONHIL DESOM,
KOYILANDY TALUK.**

BY ADV. SRI.SUNNY MATHEW

RESPONDENT(S)/RESPONDENT/COMPLAINANT:

**STATE OF KERALA, THROUGH THE
STATION HOUSE OFFICER,
KOORACHUNDU POLICE STATION,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 29-
07-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

STK

(C.R.)

P.D. RAJAN, J.

Crl.R.P.3106 of 2006

Dated this the 29th day of July, 2015

ORDER

The short question that arises for consideration is, whether non-sealing of the seized gun at the place of occurrence will affect the credibility of the seizure and there is possibility of tampering with the weapon seized?

2. The revision petitioner, who is the appellant in Crl.Appeal 276/2004 on the file of the Additional Sessions Judge-III, Kozhikode, challenges the judgment of conviction under Section 3 r/w 25(1)(B)(a) of the Arms Act, 1959 (hereinafter referred to as 'the Act'). He was accused in C.C.477/2001 of the Judicial First Class Magistrat-I, Perambra and convicted under Section 3 r/w 25(1-B) of the Arms Act and sentenced to undergo rigorous imprisonment for six months and fine of Rs.5000/- in default of payment of fine, imprisonment for

three months. Against that he preferred an appeal which was dismissed by the appellate court. Being aggrieved by that he preferred this revision petition.

3. The prosecution case is that on 14.03.2000 at 7.55 pm, the revision petitioner was found in possession of 3 country guns in his house VIII/321 of Koorachundu panchayat without licence. Accordingly, Koorachundu Police registered a case and after investigation, the Assistant Sub Inspector of Police laid charge before Judicial First Class Magistrate-I, Perambra. To prove the offence, prosecution examined PW1 to PW12 and marked Exts.P1 to P5. MO1 series and MO2 were admitted as material objects. Ext.D1 was marked by the accused. The trial court after analysing the evidence, convicted the accused.

4. The learned counsel appearing for the revision petitioner contended that MO1 series and MO2 were not sealed at the place of occurrence and there is delay of 3 months in producing the seized articles before court. Prosecution has not offered any explanation in whose

custody MO1 series and MO2 were kept. PW8 is residing near the Police Station and is a stock witness in several cases, therefore, Ext.P1 seizure is not believable. The search and seizure conducted without following the procedure formalities were not considered by the courts below.

5. Now the ground put forward by the petitioner is that, the seized weapons (MO1 series and MO2) were not sealed at the place of seizure itself, if so, what is the impact of non-sealing. The seizure of MO1 series and MO2 was made by PW1 while he was the Sub Inspector of Police, Koorachund. On the basis of reliable information he reached at the place of occurrence, at that time the revision petitioner ran away with MO1 and 2 through the back side of his work shop. The police party chased him and seized the arms from him. The seizure was made in the presence of independent witness. Reaching at the police station, he registered Crime 29/00. Ext.P1 is the seizure mahazar and Ext.P2 is the FIR. The seized arms were marked as MO1 series and MO2. During cross

examination, he admitted that MO1 and MO2 were not sealed at the place of occurrence. In Ext.P5, it is specifically mentioned that MO1 and MO2 were sealed in the Magistrate Court, and forwarded to PW11 District Armour for mechanical examination. The seizure mahazar was attested by PW8. The oral evidence of PW1 and PW8 show that MO1 series and MO2 were not sealed at the place of occurrence immediately after seizure, which support the case of the revision petitioner. In short, the weapons seized from the possession of revision petitioner were not packed and sealed at the spot and there is every possibility of tampering.

6. The impact of non-sealing of the weapon handed over to the police has been discussed by the apex court in **Amarjit Singh V. State of Punjab (1995 SCC (Cri) 828)**. It was held as follows;

“The non-sealing of the revolver at the spot is a serious infirmity because the possibility of tampering with the weapon cannot be ruled out.”

7. The impact of non-sealing was considered by the apex court in another decision in **Jasbir Singh v. State**

of Punjab AIR (1998 SC 1660) wherein it was held as follows:

“3. What is contended by the learned counsel for the appellant is that the prosecution evidence itself shows that the pistol and the cartridges alleged to have been recovered from the appellant did not have any number or some distinctive mark on them and after their seizure by the police they were not sealed. Thus the identity of the weapon and the cartridges seized and the weapon and cartridges produced before the Court was not established by the prosecution. Having gone through the evidence, we find that the contention raised on behalf of the appellant is correct and therefore, deserves to be accepted. The pistol and the cartridges did not have any mark or any number on them and after seizing the same police had not thought it fit to wrap them and apply a seal over them. No explanation in that behalf was given by the prosecution witness. This aspect was not considered by the trial Court. As the identity of

the incriminating articles has not been established by the prosecution, we allow this appeal, set aside the conviction of the appellant both under Section 5 of the TADA Act and 25 of the Arms Act and acquit him of all the charges levelled against him.”

8. Therefore the primary responsibility of the detecting officer is that, the weapons seized from the possession of the revision petitioner have to be sealed from the place of occurrence itself. When no specific sealing is made by the seized officer and no identification mark were noticed by the detecting officer, the prosecution failed to prove the identity of the weapon produced before the court. When any doubt is raised by revision petitioner with regard to sealing, that has to be accepted by the trial court which was not done in this case.

9. The search and seizure was challenged by the revision petitioner. The oral testimony of PW1 shows that on 14.03.00, while he was conducting patrol duty within his jurisdiction, he got information that revision petitioner

was keeping arms in his work shop. The Sub Inspector of Police, Koorachundu conducted search on the basis of prior information. Now the question is whether the searching officer had complied the statutory provisions contemplated under Section 100(4) of Cr. P.C. relating to search, when he proceeded to the house. Section 100(4) stipulates, search is to be made in the presence of atleast two independent and respectable inhabitants of the locality in which the place to be searched is situate. However, if no such inhabitants of the said locality is available or willing to be a witness to the search, the search can be made in the presence of the inhabitants of any other locality. What is important and emphasized in the Section is the respectability of the witness rather than his locality or independence. The object of the provision is to guard against unfair dealings on the part of the persons to conduct search and to ensure that anything incriminating which may be said to have been found in the premises searched was really found there and not planted by the members of the searching party. Apex Court in

Sahib Singh V. State of Punjab (1996) 11 SCC 685,

held that,

“Having gone through the record we find much substance in each of the above contentions. Before conducting a search the police officer concerned is required to call upon some independent and respectable people of the locality to witness the search. In a given case it may also happen that no such person is available or, even if available, is not willing to be a party to such search. It may also be that after joining the search, such persons later on turn hostile. In any of these eventualities the evidence of the police officers who conducted the search cannot be disbelieved solely on the ground that no independent and respectable witness was examined to prove the search but if it is found - as in the present case - that no attempt was made even by the police officer concerned to join with him some persons of the locality who were admittedly available to witness the recovery, it would affect the weight

of evidence of the police officer, though not its admissibility.

PW8, who is residing near the police station and who attested Ext.P1, is not an independent witness of the locality. The detecting officer himself admitted that there are several inhabitants available at the place of search, without obtaining their presence, he himself conducted such a search. A witness always accompanying the police as witness is not a respectable independent witness as stated under Section 100 (4) of Cr.P.C. The conduct of the Searching Officer shows that no attempt was made by him to join with some persons of the locality who were available to join with the recovery as witness, which will affect the credibility of the evidence of the 'police officer'.

10. The next contention is that PW8 is a stock witness who is residing near the Police Station. According to PW8, while he was standing near Poovathankunnu toddy shop, PW1 directed him to accompany the police party, accordingly he arrived at the place of occurrence, and attested Ext.P1, but he did not see the seizure MO1

series and MO2 and arrest of the revision petitioner. The seized articles were produced before court on 9.6.2000, which is after 3 months of the seizure for which no explanation is offered. When several persons were available at the place of occurrence and prosecution did not accompany such witness to attest Ext.P1, this will affect the credibility of the evidence of PW8. While cross-examination, he admitted that earlier he attested several mahazars in different cases as per the request of the police, such witness is definitely a stock witness and his evidence is worthless. Apex Court in **Hiralal V. State of Haryana (AIR 1971 SC 356)** held that, a person appearing as prosecution witness 4 or 5 times in police cases pertaining to a particular police station, the evidence of such witness does not carry any value. Here, PW8 was taken by PW1 from a distant place where several inhabitants are available at the place of occurrence. Therefore, the recovery evidence is not fully reliable.

11. On a close reading of the evidence, it is found that search and seizure is clouded with several infirmities,

the delay in producing MO1 and MO2 before court is not explained, which force me not to accept the evidence of PW1 as worthy evidence. These infirmities have not been considered by the trial court and the impact of non-sealing was not properly discussed by that court. On a close scrutiny of the evidence, it is found that serious legal infirmities are connected in this case. After analysing the evidence, a reasonable doubt really raises in the mind of the court with regard to the seizure of the weapon and in commission of the crime by the revision petitioner, that doubt must be resolved in favour of the revision petitioner. It is true that the onus of proving all the ingredients to attract the offence against the accused lies upon the prosecution and the evidence must be such as to exclude every reasonable doubt about the guilt of the accused. The revision petitioner cannot be convicted on the basis of suspicion or surmises. In this circumstance, the conviction and sentence passed by the trial court under Section 3 r/w 25(1)(B)(a) of the Arms Act are set aside and revision petitioner is set at liberty.

This revision petition is allowed.

STK

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE