

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 4TH DAY OF AUGUST 2015/13TH SRAVANA, 1937

Cr1.Rev.Pet.No. 3226 of 2006 ()

AGAINST THE JUDGMENT IN CRA 560/2005 of ADDITIONAL DISTRICT &
SESSIONS COURT (ADHOC)-II, KOLLAM DATED 10-07-2006

AGAINST THE JUDGMENT IN CC 737/2002 of J.M.F.C.-I, PUNALUR DATED 19-
08-2005

REVISION PETITIONER(S)/APPELLANTS/ACCUSED:

1. SAJEEV, S/O.VASUDEVAN,
SURYAMANGALATHU VEEDU, EDAMON 34, EDAMAN MURI
EDAMON VILLAGE, PATHANAPURAM P.O.

2. MOHAN, S/O.RAVEENDRAN,
CHARUVILA VEEDU, AYATHIL, EDAMON MURI
EDAMON VILLAGE, PATHANAPURAM P.O.

3. BABURAJ, S/O.DIVAKARAN, ANOOP BHAVAN,
CANAL PURAMBOKE, EDAMON 34, EDAMAN MURI
EDAMON VILLAGE, PATHANAPURAM P.O.

4. ASOKAN, S/O.KUNJIRAMAN,
MEMINAZHIKATHU RAILWAY PURAMBOKE, EDAMON 34
EDAMAN MURI, EDAMON VILLAGE, PATHANAPURAM P.O.

5. PRASAD, S/O.CHELLAPPAN,
AYATHIL VADAKKEKKARA VEEDU, RAILWAY PURAMBOKE
EDAMON 34, EDAMAN MURI, EDAMON VILLAGE
PATHANAPURAM P.O.

BY ADVS.SRI.PIRAPPANCODE V.SREEDHARAN NAIR
SRI.PIRAPPANCODE V.S.SUDHIR

RESPONDENT(S)/RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, OFFICE OF THE, ADVOCATE GENERAL
HIGH COURT BUILDING
ERNAKULAM (ASSISTANT SUB INSPECTOR OF POLICE
THENMALA).

BY PP SMT SEENA RAMAKRISHNAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 04-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.D.RAJAN, J

.....
Crl.R.P.No.3226 of 2006

.....
Dated 4th August, 2015

ORDER

'CR'

The revisional jurisdiction of the High Court under Section 397 and 401 of the Code of Criminal Procedure is a supervisory jurisdiction to call for and examine the records of the inferior courts and satisfy itself the correctness, legality of propriety of any order passed by the lower courts. From the nature of powers granted to the revisional court, it appears that the revisional court can act on its own motion or on the action of a stranger who may bring the matter to the court which the revisional court may not have known otherwise.

2. The revision petitioners were charge sheeted in C.C.737 of 2002 before the Judicial Magistrate of First class I, Punalur for having committed an offence punishable under Section 143, 147, 148, 447, 354, 323, 324, 326 read with 149 IPC. The charge against them was that on 16.5.2002 at 8.30 pm, revision petitioners formed themselves into an unlawful assembly armed with

deadly weapon and in furtherance of their common object, assaulted PW1 and PW2, as a result they sustained serious injuries. To prove the offence, prosecution examined PW1 to PW9 and marked Ext.P1 to P10(a). The incriminating circumstances brought out in evidence were denied by the accused while questioning them. They examined DW1 and marked Ext.D1 in support of their evidence. Trial court convicted the revision petitioners and sentenced them. Against that they preferred criminal appeal 560 of 2005 on the file of Addl. Sessions Judge-II, Kollam which was dismissed by that court. Being aggrieved by that they preferred this revision petition.

3. 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. It is true that appellants were not heard at the time of disposing the appeal. The date on which appeal was posted, the counsel was engaged in another court and he

could not appear in the trial court. The judgment was pronounced on 10.7.2006. However on 6.7.2006, the counsel filed a petition which was not considered. 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 mis reading of evidence, revisional jurisdiction can be exercised to rectify such illegality.

4. The procedure for hearing appeal has been prescribed under Section 385 of the Code. A reading of section 385 makes it clear that a criminal appeal cannot be dismissed for non appearance of the appellants or their counsel, if the court does not dismiss the appeal summarily. The court has either to postpone the case to enable them to appear or consider their appeal on merits and pass appropriate orders. The disposal of the appeal on merits will not be possible unless the reasoning and findings in the impugned judgment are analysed by the appellate court in the light of the lower court's record. After obtaining the records, it is essential that the

Appellate Court should peruse such record, hear the appellant or his pleader, if he appears, and hear the public prosecutor, if he appears. This would indicate that if the appellant or his pleader is not present or if the public prosecutor is not present, there is no obligation to postpone the hearing of the appeal. The Appellate Court has jurisdiction to proceed with the appeal but disposal must be on merits. Therefore the appeal must be disposed of on merits irrespective of the facts whether the appellant or his counsel or the public prosecutor is present or not.

5. The powers of the appellate court in disposing of the appeal has been conferred under Section 386 of the Code. According to that section, before exercising any of the powers the court must peruse the records of the case and hear the appellant or his pleader if he appears and the Public Prosecutor if he appears. A summary dismissal of the appeal will be legal if the appellate Court considers that there is no ground for interference, and such decision shall be a judicial decision. Therefore a rejection

of appeal without giving any reasons the appellant will lose every opportunity for detection of errors in the lower court order. When an appeal raises a serious and substantial point which is prima facie arguable, it is improper for an Appellate Court to dismiss the appeal without giving some indication of its view on the point. The interest of justice and fair play warrant that in such cases an indication must be given by the Appellate Court of its views on the points raised before it. The limitation provided by the section is that the Appellate Court, before disposing of the appeal, must peruse the record. The Section contemplates that in certain cases a criminal appeal might be disposed of without hearing the appellant or any one on his behalf or the public prosecutor. The expression "after perusing such record" in the section 386 of the Code in my opinion, is a condition precedent to a proper disposal of an appeal either by dismissing the same or in any other manner contemplated in the said section.

6. Apex Court in **Shyam Deo Pandey V. State of**

Bihar (AIR 1971 SC 160), explained the manner of disposal of appeal and summary rejection of appeal for default of appearance of the appellant or counsel. The expression "after perusing such records" and its limitation has been explained in detail in the above decision. Therefore the expression "after perusing such record" assumes great importance.

7. It is the duty of the appellant and his lawyer to remain present on the day, time and place posted for hearing the appeal. However a criminal appeal cannot be dismissed on the ground that no one appeared on the date of posting. But when the counsel expresses his inability to appear on the date of hearing on the prescribed day, the appellate court must consider whether there is sufficient ground for his absence. If such judicial consideration presumes that an adjournment is necessary, there is no harm in giving an opportunity on another day. Privy Council in **Galos Hirad and another V. The King** (AIR (31)1944 PC 93) held as follows:-

" The provisions contained in S.3 as regards

the right of a convicted person are not of a merely directory character. Sub-section (2) of that section provides that poor persons, to whom a counsel has been assigned by the Government, having been convicted at the trial are entitled as of right on lodging an appeal to have an advocate assigned to them for the preparation and also for the conduct of such appeal. The necessity for an assignment of counsel for the purpose of 'conducting an appeal' involves the necessity of seeing that it will be possible for the counsel to be present at the hearing. Hence, just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the Government who was unable, without any default on his part to reach the Court in time to conduct the appeal".

8. Here the case was posted for hearing on 5.7.2006 and the revision petitioner could not appear before

appellate court on that date, but the learned Judge pronounced the judgment on 10.7.2006. It is specifically mentioned in paragraph 3 of the judgment of Additional Sessions Court -II that "appellants and the Public Prosecutor had appeared in pursuance of a notice. But neither of them appeared at the time when the matter was called for hearing. I perused the records of the case." In the light of the above observation, appellate court dismissed the appeal. The procedure adopted by the appellate court without giving opportunity amounts to an illegality, which is violation of the provisions of Section 385 and 386 of the code. That is to be rectified. However, on 6.7.2006, the counsel appearing for the petitioner had filed an application before the additional Sessions Court, Kollam and requested the court to hear the appellant. Without hearing the request, the case was posted to 10.7.2006 for orders. He produced the copy of the petition dated 6.7.2006 which was marked as Annexure I.

9. Apex Court in **Swarth Mahto and another V.**

Dharmdeo Narain Singh (AIR 1972 SC 1300) held that where an appeal against acquittal came for hearing nearly 2 ½ years after the issue of notice to the accused and the cause-list of the day of hearing contained only appeal number but not the names of the accused-respondent and his advocate resulting in conviction of the accused without hearing him counsel it could not be said that the accused was given reasonable opportunity of hearing. Hence an application by him for re-hearing of appeal in his presence deserved to be allowed.

10. It is true that learned counsel appearing for the appellant was engaged in another court and he filed an application to hear the matter by the learned Sessions Judge on another day and dispose of the appeal on merit which was not considered by him. On the other hand, the appeal was disposed of on 10.7.2006 after perusing the records. It is clear from the argument raised by the revision petitioner that some arguable points which requires reconsideration in the relevant case have not been considered by the appellate court while disposing

the appeal "after perusing records'. This approach of the appellate court is not justifiable and that court is bound to hear the appellant and appreciate the evidence if there is an arguable case for him. Therefore the judgment passed by the appellate court in Crl.A.560 of 2005 on the file of Additional Sessions Judge II, Kollam is to be set aside. The matter has to be remitted to the appellate court for fresh disposal after hearing both parties.

In my opinion, there was no proper hearing in Crl.Appeal No.560 of 2005 and therefore the judgment of conviction and sentence recorded by the Additional Sessions Judge is set aside. The Additional Sessions Judge, Kollam Adhoc II shall hear the appeal afresh within two months from the date of receipt of a copy of this order and dispose of the appeal as per law.

P.D.RAJAN, JUDGE

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