

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

Crl.Rev.Pet.No. 3780 of 2006 ()

**AGAINST THE JUDGMENT IN CRL. APPEAL 135/2005 of ADDL. SESSIONS COURT
(ADHOC)-II, MANJERI**

AGAINST THE JUDGMENT IN CC 532/2003 of J.M.F.C., NILAMBUR

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

**KONNADAN ABDUL GAFOOR
KONNADAN HOUSE, MUNDA, EDAKKARA
PALATHINGAL, NILAMBUR, MALAPPURAM DISTRICT.**

BY ADV. SRI.BABU S. NAIR

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

**THE STATE OF KERALA
REPRESENTED BY THE SUB INSPECTOR OF POLICE
VAZHIKKADAVU POLICE STATION - THROUGH THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM
KOCHI-31.**

BY PUBLIC PROSECUTOR SRI. N. SURESH

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
15-12-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

STK

(C.R.)

P.D. RAJAN, J.

Crl.R.P.3780 of 2006

Dated this the 15th of December 2015

ORDER

This revision petition is preferred by the accused against the judgment in Crl. Appeal 135/05 of the Additional Sessions Adhoc II, Manjeri. He was charge-sheeted in C.C.532/03 before the Judicial First Class Magistrate, Nilambur for offence punishable under Section 292(2)(a) of IPC and under Section 7(a)(i)(ii) of Cinematographic Act 1952. The charge against the accused is that on 25.08.02, at 7.00 pm., the Sub Inspector of Police, Vazhikadavu searched the shop 'Shajahan Videos', door No.1/101 of Vazhikadavu Grama Panchayat and seized 7 obscene Compact Discs from that shop. He registered a case against the accused and after completing investigation, he laid charge before Judicial First Class Magistrate Nilambur.

2. During trial, prosecution examined PW1 to PW9 and marked Exts.P1 to P6 as documentary evidence and

admitted MO1 in evidence. The learned Magistrate convicted the accused under Section 292 (2)(a) of IPC and sentenced to undergo simple imprisonment for one month and fine of Rs.1000/- with a default sentence of one month and acquitted under Section 7(a)(i)(ii) of Cinematographic Act 1952. Against that, he preferred Crl. Appeal.135/05 before Additional Sessions Court (Adhoc-II), Manjeri, where the conviction and sentence passed by the trial court were confirmed and dismissed the appeal. Being aggrieved by that, he preferred this revision petition.

3. Heard both sides and perused the records, which includes the oral and documentary evidence. It appears that both courts did not consider and appreciate the evidence with regard to possession of property. Both courts misread the evidence and had gone under the impression that the revision petitioner was in possession of the shop buildings, which was not established with cogent and convincing evidence. Many facts which ought to have been considered in favour of the revision

petitioner were not properly considered and this is a good reason for invoking revisional jurisdiction.

4. The occurrence was stated by PW1, then Sub Inspector, Vazhikkadavu Police Station. The evidence of PW1 shows that on 25.08.02, he got information that revision petitioner was conducting sale of obscene Compact Discs in his shop. On the basis of that information, he prepared Ext.P1 search memorandum and arrived at the place of occurrence and conducted a search in the presence of independent witnesses. He detected MO1 series obscene articles and seized it after preparing Ext.P2 search list. The accused was arrested and reaching at the police station, he registered a crime, Ext.P3 is the FIR. The seized C.Ds. were marked as MO1 in the trial court. The revision petitioner in his defence contended that he is not conducting that shop as alleged by PW1.

5. Another occurrence witness PW3, Head Constable of the Vazhikkadavu, Police Station who accompanied PW1 supported the evidence of PW1. According to his evidence, PW1 prepared search memorandum at 19.00

hours and conducted search in the presence of independent witnesses. The occurrence witnesses PW2 and PW4 did not support the evidence of PW1, but they admitted their signature in Ext.P2. Analysing the evidence of PW1, PW2, PW3 and PW4, it is clear that the possession of the shop is very relevant while considering the allegation against the revision petitioner.

6. Possession of the shop means the continuing exercise of a claim to the exclusive use of it. It requires two aspects, the thing and a mental feeling. It is the conscious feeling of the custodian to exclude others from the control of the shop. To prove the possession of the shop, prosecution examined PW5, the Secretary of Vazhikadavu Grama Panchayat. He deposed that he issued Ext.P4 certificate and as per the certificate, Secretary, Mufthal Islam Madrassa, Munda is the owner of the building. The owner of the building was examined as PW6 in the trial court and he deposed that revision petitioner never conducted any shop in that building. This witness was declared as hostile by the prosecution. PW7

attested Ext.P5 mahazar and PW8 attested Ext.P6 seizure mahazar. The investigation was conducted by PW9, the Head Constable, who prepared Ext.P6 seizure mahazar. What is seen from the evidence of the occurrence witness as well as the witness present at the time of preparing mahazar is that the possession of the shop at the time of seizure of MO1 obscene articles was not properly proved by the prosecution.

7. Apex Court in **Mohan Lal V. State of Rajasthan**

2015(5) SCALE 330 held as follows;

"8. When one conceives of possession, it appears in the strict sense that the concept of possession is basically connected to "actus of physical control and custody". Attributing this meaning in the strict sense would be understanding the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word possession. The classical theory of English law on the term "possession" is fundamentally dominated by Savignyan "corpus" and "animus" doctrine. Distinction has also been made in "possession in fact" and "possession in law" and sometimes between "corporeal possession" and "possession of right" which is called "incorporeal possession". Thus, there is a degree of flexibility in the use of the said term and that is why the word possession can be usefully defined and understood with reference to the contextual purpose for the said expression. The word possession may have one meaning in one connection and another meaning in another.

9. The term "possession" consists of two elements. First, it refers to the corpus or the physical control

and the second, it refers to the animus or intent which has reference to exercise of the said control. One of the definitions of possession given in Black's Law dictionary is as follows:

“Having control over a thing with the intent to have and to exercise such control. *Oswald v. Weigel* 219 Kan. 616, 549 p. 2d 568, 569. The detention and control or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.”

8. On a perusal of the oral and documentary evidence, it is clear that the revision petitioner had no control over the alleged shop when PW1 was conducting search and seizure. If the revision petitioner was

conducting any sale of prohibited and obscene materials, it is the primary responsibility of the prosecution to prove the possession of the shop. When petitioner is in possession of the room, the connected aspects such as physical control and custody is to be proved by the prosecution. While explaining the various situation relating to the possession, the functional and relative concepts have to be examined in a wider sense. The degree of physical control exercised by the revision petitioner is very relevant and knowledge of the person claiming such possessory right over the thing has to be proved.

9. The probative information stored in digital form in a compact disc can be used before court as digital evidence or electronic evidence. The digital evidence is highly fragile and can be easily altered, damaged or destroyed and also time sensitive. Therefore special precaution should be taken to this document to collect preserve and examine this evidence. No analysis of the compact disc (hereinafter referred as CD) was made by

the investigating officer to discover the files in it. This includes normal files, deleted files and encrypted files. Therefore, for identification of the files in the CD digital evidence is necessary. Identification of the type of information stored in the disc is necessary, for this appropriate technology can be used to extract it. Without examining the digital data in a scientific manner, viewing of the CD by the Magistrate, Assistant Public Prosecutor and the Sub Inspector is unsustainable in law and their satisfaction is not an appreciation of electronics evidence in law. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, the same shall be accompanied by a certificate in terms of Section 65B obtained at the time of taking the documents, without which, the secondary evidence pertaining to that electronic record, is inadmissible. Moreover the expert opinion under Section 45A of the Evidence Act was not obtained relating to the stored data in electronic form. In the absence of such a certificate and opinion, the oral

evidence to prove existence of such electronic evidence is not sufficient to prove authenticity thereof.

10. However, while considering the offence under Section 292(2)(a), the prosecution has to prove that the accused sold, distributed and publically exhibited the obscene materials. Simply certain CDs were seized from a shop on the basis of information, it cannot be taken for granted that the revision petitioner was guilty of such crime. It is the primary responsibility of the prosecution to prove that the accused was in possession of the shop and the seized articles are obscene articles. In a case for offence under Section 292 of the IPC, prosecution has to prove that the accused sells, let to hire, distribute, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper drawing, painting, presentation or figure or any other obscene object whatsoever as alleged by the prosecution. There must be direct evidence with regard to the possession or sale of

the obscene books or articles. There is no presumption with regard to possession, mere fact that some books were seized from a particular shop by a police officer. There may be exceptional cases, where the rule of presumption applies. In such cases, the proved facts and circumstances may speak for themselves and court may be justified in reaching a conclusion in the light of available evidence.

11. In the absence of any evidence, the conviction under Section 292 IPC is unsustainable in law. In my opinion, both courts violated the fundamental rules of appreciation of evidence and observed that obscene articles were seized from the possession of revision petitioner, which was not proved in by evidence. Such an approach followed by the court below resulted in miscarriage of justice. Therefore, in my opinion, this is a fit case to invoke revisional jurisdiction and at any rate the accused/revision petitioner is entitled to get the benefit of doubt which was available to him. From the plain reading of the afore said evidence, it is clear that the prosecution

utterly failed to prove the possession satisfactorily and accused is entitled to get the benefit of doubt.

In the result, the conviction and sentence passed by the court below under Section 292 IPC are set aside and the revision petitioner is acquitted and set at liberty.

STK

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P.A. TO JUDGE

Sd/-
P.D. RAJAN,
JUDGE