

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 22ND DAY OF MAY 2015/1ST JYAISHTA, 1937

Cr1.Rev.Pet.No. 3039 of 2007 ()

AGAINST THE JUDGMENT IN CRA 490/2004 of ADDL.SESIONS COURT (ADHOC)
III, MANJERI DATED 20-06-2007

AGAINST THE JUDGMENT IN CC 43/1999 of J.M.F.C.,MALAPPURAM DATED
07-09-2004

REVISION PETITIONER/APPELLANT/ACCUSED NO.2:

ALAVIKUTTY, S/O.VEERAN,
KODITHODI HOUSE, KONDOTTY AMSOM, PAZHAYANGADI

BY ADV. SRI.K.M.SATHYANATHA MENON

RESPONDENT(S)/COMPLAINANT/STATE:

1. ASI OF POLICE, KONHDOTTY.

2. STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

R, BY ADV. PUBLIC PROSECUTOR SRI JITHESH R

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 22-05-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.D.RAJAN, J

.....
Crl.R.P.No.3039 of 2007
.....

Dated 22nd May, 2015

ORDER

Revision petitioner was the accused in C.C.No.45 of 1999 of the Judicial First Class Magistrate, Malappuram for offence under Section 447, 379 r/w 34 IPC in which he was convicted by the trial court under the above section and sentenced to imprisonment for one year and to pay a fine of Rs.2000/- under Section 379 IPC and sentenced to undergo simple imprisonment for three months and to pay a fine of Rs.500/- under Section 447 IPC. Against that, he preferred appeal before Sessions Court, Manjeri which was partly allowed.

2. The prosecution allegation is that on 8.9.1993, between 8.15 and 11 am, both accused in furtherance of their common intention trespassed into the properties of Kunnummel paramba comprised in resurvey No.128/8 and the properties in vattaparamba in R.S.No.114/2 and committed theft of 450 and 350 coconuts and thereby sustained a loss of Rs.3500/-. On the basis of information,

Kondotty police registered Crime No.478 of 1998 and after investigation, the Assistant S.I of Police, laid charge before court.

3. To prove the allegation, prosecution examined Pws 1 to 13 and marked Exts.P1 to P10. The incriminating circumstances brought out in evidence were denied by the accused while questioning under Section 313 Cr.P.C. He examined DW1 and DW2 and marked Exts.D1 to D4 in support of his defence. During pendency of the above case first accused died and the charge against him was abated. The trial court convicted A2. Against that order, he preferred Crl.A.490 of 2004 where his contention was partly allowed.

4. Learned counsel appearing for the revision petitioner contended that there was no evidence to prove the dishonest intention to take the property out of the possession of PW2. No evidence has been adduced by PW2 to show that he was appointed as the Receiver in a suit by the Civil Court, Kozhikode. No recovery was effected by the Investigating Officer as alleged by PW2.

Therefore, the conviction and sentence passed by the trial court is without any evidence.

5. Learned Public Prosecutor strongly resisted the above contention and submitted that PW2 was the Receiver and in possession of that property, which was stated by PW8. Even though there is no recovery, several court orders are there in support of PW2 to prove the possession of the property. There was no illegality or irregularity in the findings of the courts below.

6. In order to prove the offence under Section 379 IPC, the prosecution has to prove that the accused with dishonest intention took a movable property out of the possession of any person other than the accused and he took it out from the person in possession of that property with intention to cause wrongful gain to himself or wrongful loss to another person without the consent of the possessor of that movable property. To prove the possession, prosecution examined PW2, who is the alleged Receiver of the disputed property. Even though PW2 deposed that he is the Receiver, no scrap of paper

has been produced before the trial court to show that he was appointed as the Receiver in O.S.108 of 1952 of Sub Court, Kozhikode to prove the possession. In the absence of such evidence, the production of other court orders, such as Ext.P2, P3, P4, P5 and P6 are not relevant. Ext.P7 is the scene mahazar and Ext.P9 is the report of the Village Officer. Ext.P10 is the sketch. An analysis of the oral evidence of PW1 and the documentary evidence produced by PW2, it is seen that the possession of the property was not proved in the trial court.

7. In this context, I have considered whether there is any recovery with regard to the stolen property. According to Section 114A of the Evidence Act, the court may presume that a man who is in possession of the stolen good soon after the theft is either the thief or has received stolen article unless he could account for his possession. PW2 and 3, who are the workers of PW2, deposed that they saw the plucking of coconut by PW7. But as per their evidence, they also have not produced any document to show that PW2 was in possession of that

property. PW2, PW3 and PW4 did not know the boundaries which was admitted by PW2 during cross examination. PW7 denied the fact that he had plucked the coconuts from the disputed property.

8. From the evidence, it is clear that there is a property dispute between PW2 and some others and for that several suits are pending. The boundary of such disputed property and possession of the properties are material while analysing the allegation in this case. No recovery was effected by the Investigating Officer on the basis of the information given by PW2. If that be the position, a vague allegation that the revision petitioner had stolen the alleged articles from the property is unsustainable. Therefore, the courts below failed to appreciate that position and convicted the revision petitioner under section 379 and 447 IPC and sentenced thereunder. When there is no connecting evidence to attract the ingredients of the alleged offence and no recovery, the revision petitioner is entitled to get the benefit of doubt since the possession of the property is

not proved. An accused cannot be convicted of an offence on the basis of conjectures or suspicions. If a reasonable doubt arises in the mind of the court after taking into consideration the entire material before it regarding the complicity of the accused the benefit of such doubt should be given to the accused but the reasonable doubt should be a real and substantial one and a 'well founded actual doubt arising out of the evidence existing after consideration of all the evidence'.

9. In **Assistant Collector of Central Excise V. V.P.Sayed Mohammed** (1983 SC 168), it was held as follows.

“ It is true that the onus of proving the facts essential to the establishment of the charge against an accused lies upon the prosecution and the evidence must be such as to exclude every reasonable doubt about the guilt of the accused. An accused cannot be convicted of an offence on the basis of conjectures or suspicions. If a reasonable doubt arises in the mind of the court after taking into consideration the entire material before it

regarding the complicity of the accused the benefit of such doubt should be given to the accused but the reasonable doubt should be a real and substantial one and a 'well founded actual doubt arising out of the evidence existing after consideration of all the evidence'. "Hence a mere whim or a surmise or suspicion furnishes an insufficient foundation upon which to raise a reasonable doubt, and so a vague conjecture, whimsical or vague doubt, a capricious and speculative doubt, an arbitrary, imaginary, fanciful, uncertain chimerical, trivial, indefinite or a mere possible doubt is not a reasonable doubt. Neither is a desire for more evidence of guilt, a capricious doubt or misgiving suggested by an ingenious counsel or arising from a merciful disposition or kindly feeling towards a prisoner, or from sympathy for him or his family". (See Woodroffe & Ameer Ali's Law of Evidence, 13th Edn, Vol.I, pp.203-04)".

10. In the result, the conviction and sentence passed by the trial court under Section 379, 447 read with 34 IPC is set aside. Revision petitioner is set at liberty.

If any fine amount is remitted, it shall be returned to the revision petitioner forthwith. Crl.R.P is allowed.

P.D.RAJAN, JUDGE

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