

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

THURSDAY, THE 15TH DAY OF OCTOBER 2015/23RD ASWINA, 1937

Crl.Rev.Pet.No. 3136 of 2009 ()

AGAINST THE ORDER IN CMP.4102/2009 IN CC 178/2007
of J.M.F.C.,ALATHUR

REVISION PETITIONER/PETITIONER/IST ACCUSED:

BASHEER, AGED 38 YEARS,
S/O.KUNJUMOIDEEN, KUNISSERY, ALATHUR TALUK
PALAKKAD.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.V.A.JOHNSON (VARIKKAPPALLIL)
SRI.M.REVIKRISHNAN

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR, SHRI.V.S.SREEJITH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
15-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

B.SUDHEENDRA KUMAR, J.

Crl.R.P. No.3136 of 2009

Dated this the 15th day of October 2015

O R D E R

The revision petitioner is the first accused in C.C.No.178 of 2007 on the files of the Judicial Magistrate of First Class, Alathur, who in this revision petition challenges the order passed by the court below declining to discharge the revision petitioner under Section 239 Cr.P.C.

2. Heard the learned counsel for the revision petitioner and the learned Public Prosecutor.

3. The prosecution allegation is that on 15.4.2002 at about 10 p.m., the revision petitioner and the other accused, in furtherance of their common object of

assaulting a person who would be pointed out by the revision petitioner, formed themselves into an unlawful assembly, armed with deadly weapons like swords and wooden sticks and waited in a tempo bearing Reg.No.KL 11 D 6111 at a place on the right side margin of the National Highway of Arangattu parambu, near to the hotel of PW2.

4. Originally, the revision petitioner was the fifth accused. There were 15 accused persons in the case. 13 accused persons faced the trial and they were acquitted by the trial court after the trial. Thereafter, the case of the revision petitioner and the 14th accused was split up and re-filed as CC No.178 of 2007.

5. Subsequently, the revision petitioner surrendered before the Court and filed an application for discharge.

The offences alleged against the revision petitioner are the offences under Sections 143, 147 and 148 read with Section 149 I.P.C. and section 4 read with Sections 25(1)(a) & (b) of the Arms Act.

6. The learned counsel for the revision petitioner relied on the decisions of the Apex Court in **Mohan Singh v. State of Punjab**(AIR 1963 SC 174) and **Ramanlal v. State of Haryana** [2015(2) KLD 360(SC)] and argued that the constructive criminal liability under Section 149 I.P.C., would not arise once 13 of the accused out of 15 accused persons, who were alleged to be the members of that unlawful assembly are acquitted, as the assembly must be deemed to have been composed of only two persons, which cannot be regarded as an unlawful assembly and consequently, the revision petitioner is entitled to be

discharged.

7. The constitution Bench of the Apex Court in **Mohan** (supra) observed thus :

“The true legal position in regard to the essential ingredients of an offence specified by S.149 are not in doubt. Section 149 prescribes for vicarious or constructive criminal liability for all members of an unlawful assembly where an offence is committed by any, member of such an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assemblies knew to be likely to be committed in prosecution of that object. It would thus be noticed that one of the essential ingredients of section 149 is that the offence must have been committed by any member of an unlawful assembly, and S.141 makes it clear that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided, of course, the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. In other words it is an essential condition of

an unlawful assembly that its membership must be five or more. The argument, therefore, is that as soon as the two Piara Singhs were acquitted, the membership of the assembly was reduced from five to three and that made S.141 inapplicable which inevitably leads to the result that S.149 cannot be invoked against the appellants. In our opinion, on the facts of this case, this argument has to be upheld. We have already observed that the point raised by the appellants has to be dealt with on the assumption that only five persons were named in the charge as persons composing the unlawful assembly and evidence led in the course of the trial is confined only to the said five persons. If that be so, as soon as two of the five named persons are acquitted the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly.”

8. In **Ramanlal** (supra), the Apex Court relied on the decision in **Mohan** (supra) and held that the provisions of Section 149 I.P.C. are no longer available to the

prosecution to convict the accused whose number is reduced to four consequent upon the acquittal of the remaining accused persons.

9. It is clear from the above decisions that if the number of membership is reduced to two from fifteen, by acquitting 13 out of the 15 accused persons, the provisions of Section 149 I.P.C. are no longer available to the prosecution for convicting the revision petitioner.

10. However, the court below did not consider the said aspect while passing the order impugned. The court below also did not consider as to whether there is any material before the court to indicate that the revision petitioner was found in possession of any of the arms to attract the offence under Section 4 read with Section 25(1) (a) and (b) of the Arms Act. Since these aspects were not

considered by the court below before passing the order impugned, I am of the view that the order passed by the court below cannot be said to be legal, proper and correct and consequently, the same is set aside.

In the result, this revision petition stands allowed setting aside the order impugned and the matter is remitted to the court below to consider the application for discharge afresh in accordance with law.

The revision petitioner shall appear before the court below, either personally or through the counsel, on 3.11.2015.

Sd/-

**B.SUDHEENDRA KUMAR,
JUDGE**

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PA to Judge