

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

WEDNESDAY, THE 23RD DAY OF SEPTEMBER 2015/1ST ASWINA, 1937

Crl.RC.No. 7 of 2015 ()

CC.NO. 408/2004 OF JUDICIAL FIRST CLASS MAGISTRATE COURT, MATTANNUR
CRIME NO. 515/2002 OF IRITTY POLICE STATION , KANNUR DISTRICT

**SUO MOTU PROCEEDINGS INITIATED ON A COMMUNICATION
RECEIVED FROM DISTRICT JUDGE, THALASSERY.**

AGAINST :

- 1. NOUFAL.V.H., S/O.HAMSA, VALLATH (H),
VALAVUPARA, VILAMANA AMSAM.**
- 2. JOBI V. MATHEW, S/O.MATHEW,
VANAKUZHIL (H), KILIYANTHARA,
VILAMANA AMSAM.**
- 3. DIVAKARAN.P.G., S/O.GOVINDAN, PANAKKAL (H),
KILIYANTHARA, VILAMANA AMSAM.**
- 4. ANIL.M.K., S/O.KRISHNAN, MADATHIPARMABIL (H),
KILIYANTHARA.**
- 5. BINU.M., S/O.ANDREWS, MADATHIL (H), KILIYANTHARA.**
- 6. DENNIS M., S/O.ANDREWS, MADATHIL (H), KILIYANTHARA.**
- 7. BINU MATHEW, S/O.MATHEW, KALADAYIL (H), KILIYANTHARA.**
- 8. STATE OF KERALA.**

**R1,R3,R4 &R7 BY ADVS. SRI.C.KHALID
SMT.K.S.HASEENA
SRI.K.P.MOHAMED SHAFI
SMT.K.REEHA KHADER
SRI.PHIJO PRADEESH PHILIP
SMT.K.K.NESNA**

R8 BY ADDL.D.G.P SRI.TOM JOSE PADIJAREKKARA

**THIS CRIMINAL REVISION CASE HAVING BEEN FINALLY HEARD
ON 23-09-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

ALEXANDER THOMAS, J.

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Crl.Revision Case No.7 of 2015

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Dated this the 23rd day of September, 2015

O R D E R

This matter essentially arises out of Crime No.515/2002 registered by the Iritty Police Station, Kannur district, against eight accused persons for offence punishable under Sec.5 of the Explosive Substances Act, 1908. The case was later taken on file by the Judicial First Class Magistrate's Court, Mattannur, as Calendar Case, C.C.No.408/2004. The brief of the prosecution case is that on 26.9.2002 by about 1.05 p.m., accused 1 to 8 were found in possession of two detonators, safety fuse, etc. near Kililyanthara checkpoint and the accused had gathered in the spot with the intention to commit an offence and that the accused have thus committed the offence punishable under Sec.5 of the Explosive Substances Act. The trial in C.C.No.408/2004 was conducted by the Judicial First Class Magistrate's Court, Mattannur and accused Nos.1, 3, 5 to 8 were tried and acquitted as per the judgment dated 28.3.2009. A-2 was absconding at that time and the case against

A-2 was split up and re-filed as C.C.No.191/2009 and later transferred it to the long pending list as L.P.C.No.12/2010. Later, when A-2 surrendered before the court, his case was re-filed and committed before the Sessions Court as C.P.No.15/2013 and is now pending on the file of the Addl. Sessions Court No.II. It is also reported that A-4 died and the case against him has thus abated. It was conveyed by the learned District Judge, Thalassery as per letter dated 12.6.2014 to the Registry of this Court that Sec.5 of the Explosive Substances Act is an offence, which is exclusively triable by a court of session and that the learned Magistrate had no jurisdiction to try the case and hence the trial and the consequent judgment of acquittal rendered by the learned Magistrate on 28.3.2009 in C.C.No.408/2004 acquitting A-1, A-3 and A-5 to A-8, is vitiated for lack of jurisdiction and as such, the trial and judgment of the court are to be treated as nonest and void. Though the learned Sessions Judge, Thalassery, had initiated revision proceedings in Crl.R.P.No.30/2013, the same was dropped in the light of the judgment rendered by this Court in the case in John Samuel v. State of Kerala reported in 1985 KLT 902, wherein it was held that the Sessions Court is lacking jurisdiction in that regard in

respect of a matter “which otherwise comes to its knowledge” and accordingly, it is pointed out in the aforestated letter dated 12.6.2014 of the learned Sessions Judge, Thalassery that only the High Court has power to exercise revisionary jurisdiction in such a case. It is in the light of these aspects that this Crl. Revision proceedings have been initiated on the file of this Court.

2. Heard Sri.C.Khalid, learned counsel appearing for R-1, R-3, R-4 & R-7 and Sri.Tom Jose Padinjarekkara, learned Addl. D.G. of Prosecution & Addl. State Prosecutor appearing on behalf of the State of Kerala.

3. It is urged by Sri.C.Khalid, learned counsel appearing for the contesting respondents that in view of the judgment of this Court rendered in the case Sabu v. State of Kerala reported in 2007 (2) KLT 516 = 2007 (1) KHC 1040, the offence under Sec.5 of the Explosives Act is triable by the jurisdictional Magistrate's court concerned and therefore, the proceedings initiated on the purported ground that the trial conducted by the learned Magistrate was without jurisdiction, is erroneous and that therefore the Revision is only to be dismissed.

4. Alternatively, it is further urged by Sri.C.Khalid, learned

counsel appearing for the contesting respondents that in case this Court holds otherwise on this aspect regarding the competence of the learned Magistrate in conducting the trial for offence under Sec. 5 of the Explosives Act in this case, then it is to be noted that the accused have not in any way contributed to this mistake and the said mistake was attributable totally to the prosecution agency and at any rate, the accused cannot be penalised with the onerous burden to face the trial once again.

5. It is pointed out that the crime is said to have occurred on 26.9.2002 and the Calendar Case in this regard was registered as early as in the year 2004 and after patiently waiting for the trial, the same was completed and judgment was rendered by the learned Magistrate on 28.3.2009 and that it was not on account of any fault of the accused that the trial was conducted in the Magistrate's court and that it is not in the interest of justice to prolong the agony of the accused any further and that they should not be driven to face a *denovo* trial and that this Court may exercise its wide plenitude powers available under Sec.482 of the Code of Criminal Procedure to hold that the trial need not be held *denovo*, in the facts and circumstances of this case and that the impugned acquittal need not be interfered with.

6. Per contra, Sri.Tom Jose Padinjarekkara, learned Addl. D.G. of Prosecution & Addl. State Prosecutor appearing for the State of Kerala would submit that the contentions made by the contesting respondents/accused on the basis of the decision rendered by this Court in Sabu v. State of Kerala reported in 2007 (2) KLT 516 = 2007 (1) KHC 1040 are absolutely unsustainable and untenable. In this regard, he would point out that a substantive and pertinent amendment has been made in Sec.5 of the Explosives Act on 1.2.2002 and by the combined effect of the provisions contained in Sec.5 of the Explosives Act as well as Sec.26(b) of the Code of Criminal Procedure, read with the provisions in the I Schedule to the Code of Criminal Procedure would lead to the indisputable legal position that the trial for the offence under Sec.5 of the Explosives Act on and after the coming into force of the aforesaid amendment, which came into force on 1.2.2002, is that the court of session alone is competent to try the offence under Sec.5 of the Explosives Act and therefore the trial conducted by the learned Magistrate without committing the case to the Sessions Court is vitiated for want of jurisdiction and therefore is void in view of the provisions contained in Sec.461 of the Code of Criminal Procedure,

etc. Accordingly, it is pointed out, more particularly, with the aid of the decision rendered by this Court in the case Karim v. State of Kerala reported in 2006(2) KLT 874 =2006 KHC 592 that in cases like this, the trial conducted by an incompetent court like Magistrate's court would be void and therefore the case will have to be tried denovo by the Court of Session after completing due process of commitment to the Sessions Court, etc.

7. After hearing both sides, it is to be noted that as is clear from paragraph 5 of the ruling of this Court in Sabu v. State of Kerala reported in 2007 (2) KLT 516 = 2007 (1) KHC 1040 the provisions contained in Sec.5 of the Explosives Act, which was the subject matter of the discussion in that case related to a case where the offence was that committed on 30.1.2010 before the coming into force of the amendment of Sec.5 of the Explosives Act with effect from 1.2.2002. The unamended provision of Sec.5 of the Explosives Act (which was in force at the time of occurrence of the offence in that case on 30.1.2000), reads as follows:

“S.5. Punishment for making or possessing explosives under suspicious circumstances: Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be

punishable with transportation for a term which may extend to fourteen years, to which fine may be added, or with imprisonment for a term which may extend to five years, to which fine may be added.”

8. It was this unamended provision, which provided for punishment with transportation for a term, which may extend to fourteen years, to which fine may be added, or with imprisonment for a term which may extend to five years, to which fine may be added, etc. that the court was concerned on that ruling. It was held in paragraph 6 of Sabu's case *supra* that transportation is not an offence, which can be imposed under law after the amendment of the Indian Penal Code with effect from 1.1.1956 and amendment has been made in Sec.53 of the I.P.C. dealing with punishments and the third clause, which authorised the imposition of punishment of transportation, has been deleted and consequently, Sec.53A of the I.P.C. has been introduced into the I.P.C., which deals with the question as to how references to transportation in the Penal Code and other enactments are to be construed. Accordingly, it was held that what is applicable in that case is the provision under Sec.53A (iii) of the I.P.C. and it was held therein that what follows is that the offence under Sec.5 of the Explosives Act, as per the provisions as it existed at the time, which is punishable with fine or with

imprisonment, which may extend to five years only. Consequently, it was held by this Court that the offence under Sec.5 of the Explosives Act is triable by the jurisdictional Magistrate's court concerned.

9. It is to be noted that there has been a substantial and crucial amendment made in Sec.5 of the Explosives Act with effect from 1.2.2002 as per the Amendment Act 54 of 2001 and the amended provisions now contained in Sec.5 with effect from 1.1.2002 provide as follows:

“5. Punishment for making or possessing explosives under suspicious circumstances.—... ..

- (a) in the case of any explosive substance, with imprisonment for a term which may extend to ten years, and shall also be liable to fine.
- (b) in the case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extent to ten years, and shall also be liable to fine.”

10. In the instant case, the date of commission of the alleged offence is on 26.9.2002, which is after the coming into force of the aforestated amendment with effect from 1.2.2002. Therefore, even going by the provisions contained in clause (a) of Sec.5, the punishment is with imprisonment for a term which may extend to ten years and shall also be liable with fine and as per clause (b)

thereof, in case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine, etc.

11. Sec.26(b) of the Code of Criminal Procedure provides as follows:

“26. Courts by which offences are triable.– Subject to the other provisions of this Code...

(a)

(b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by–

(i) the High Court, or

(ii) any other Court by which such offence is shown in the First Schedule to be triable.”

12. Going by Table II dealing with Classification of Offences Against Other Laws, appended under First Schedule of the Cr.P.C., if the offence prescribed by law other than I.P.C. is punishable with death, imprisonment for life, or imprisonment for more than seven years, then the cases for such offences are triable only by the court of session. Therefore, the legal principle laid down by this Court in the case *Sabu v. State of Kerala* reported in 2007 (2) KLT 516 = 2007 (1) KHC 1040, has no application to the facts of this particular

case, which is governed by the amended provisions in Sec.5 of the Explosives Act. Accordingly, the contentions of the learned counsel for the contesting respondents made on the basis of Sabu's case *supra*, cannot be available to them in the facts of this case.

13. The next contention raised by the learned counsel appearing for the respondents accused is that it was not on account of their fault that the trial was conducted by the learned Magistrate and that they have not in any way contributed to this mistake and that therefore at this long distance of time they should not be forced again to face the ordeal of the *denovo* trial and that otherwise their precious right conferred under Art.21 of the Constitution of India would be detrimentally affected, etc.

14. The point in this regard is no longer *res integra* and is covered against the respondents accused as per the legal principles laid down by this Court in the case *Karim v. State of Kerala* reported in 2006(2) KLT 874 =2006 KHC 592. In paragraph 3 of *Karim's* case *supra* this Court noted that the contention made by the accused on the basis of the decision of the Apex Court in *State of Tamilnadu v. Paramasiva Pandian* reported in 2002 (1) SCC 153 as well as the similar contention raised therein that the accused therein

had faced trial and threat of conviction for last seven years and that too, not for their fault and it is not in the interest of justice to prolong their agony any further and therefore that appellants are to be acquitted and are not to be driven for a denovo trial by the competent court and that the appellants cannot not be made to suffer for the mistake committed by the court in trying the appellants without jurisdiction and therefore the appeals of the accused are only to be allowed. On the other hand, the Prosecutor therein contended that if it is to be found that the trial court had no jurisdiction and the trial is vitiated, the only course open is to send back the records for fresh trial by the competent court and the appellants cannot be acquitted. In paragraph 5 thereof it was noted by this Court that the crucial question to be decided is the consequence of trial and conviction, which is vitiated due to want of the very jurisdiction. Sec.461 of the Cr.P.C. deals with irregularities, which vitiate the proceedings and under Sec.461, if the Magistrate is not empowered by law, in that behalf, does any of the things enumerated in clauses (a) to (q), his proceedings shall be void. As per Sec.461(l) thereof, if any Magistrate not being empowered by law in that behalf, tries an offender, which proceedings shall be

void. Accordingly, it was held that the court which had no jurisdiction to try or convict the accused for offence under the Essential Commodities Act, then the trial and conviction are void as provided under Sec. 461 of the Cr.P.C. Correspondingly, it was held that if the trial itself is void, the legal consequence would be that the accused are not tried for the offences charged and if that be the case, definitely the case has to go back to the competent court for trial and disposal, in accordance with law. It was held therein that if the trial is vitiated and the accused was convicted by a court, which is not empowered to try the same, the evidence recorded in such trial cannot be used for acquitting him and that that when the trial is void as provided under Sec. 461 of the Cr.P.C., there cannot be an acquittal without trial. Accordingly, it was held by this Court in Karim's case supra that the court therein which conducted the trial had no jurisdiction to try the case, then the impugned trials are void and that the only alternative is to declare the trial and conviction is void and to send back the records to the proper court having jurisdiction to try the offences. True that the accused cannot be faulted in the trial having been conducted by an incompetent court. But in a case, where the trial conducted by the learned

Magistrate was without jurisdiction, the same is only to be held as void in view of mandatory provisions contained in Sec.461(l) of the Cr.P.C.

15. In this view of the matter, the impugned judgment dated 28.3.2009 of the Judicial First Class Magistrate's Court, Mattannur, rendered in Calendar Case, C.C.No.408/2004 is set aside and the matter stands remitted to the Judicial First Class Magistrate's Court, Mattannur, who shall take appropriate steps for committal of the case to the Sessions Court concerned in accordance with law. In view of the long pendency of the matter, the jurisdictional Magistrate shall ensure that the committal proceedings in that regard are completed expeditiously without any further delay. On committal of the case, the Sessions Court concerned will ensure that timely and expeditious action is completed in order to ensure that effective steps are taken for commencement and conclusion of the trial without any further delay. It shall be borne in mind that since the crime originated in the year 2002, adequate steps should be taken by the court to ensure that the matter is concluded without any further delay.

16. It has been informed to the Registry of this Court by the

office of the District & Sessions Court, Thalassery, that the case against accused No.2 in the instant Crime No.515/2002 of Iritty Police Station had led to the committal proceedings in C.P.No. 15/2013 and now the Sessions Case has been numbered as S.C.No. 414/2015 before the Sessions Court, Thalassery and that on 16.7.2015, the case has been posted to 18.11.2015 for hearing and framing of charge. Since the accused in Sessions Case No.414/2015 is accused No.2 in Crime No.515/2002 of Iritty Police Station, in which the respondents in this case are also the accused, it would be only in the interest of justice and fairness that both the matters are clubbed together in the sessions trial. Therefore, it is ordered in the interest of justice that the trial in Sessions Case, S.C.No.414/2015 of Sessions Court, Thalassery, will be kept in abeyance, until the committal formalities in respect of accused Nos.1, 3 and 5 to 8 (respondents herein) in the same crime are duly completed so that the sessions case in both these matters are clubbed together for trial.

17. After the expeditious completion of the committal proceedings as directed in this judgment, the Judicial First Class Magistrate's Court, Mattannur, will formally send a report in that

regard to the Registry of this Court. Thereafter, the Sessions Court, Thalassery will also submit a report to the Registry of this Court at the earliest to report about the details regarding the numbering of the sessions case in this matter and the steps taken for clubbing of that case along with S.C.No.414/2015 pertaining to accused No.2 in the crime.

18. The Registry shall ensure that certified copies of this order are transmitted to the Judicial First Class Magistrate's Court, Mattannur as well as the Sessions Court, Thalassery.

With these observations and directions, the Revision Petition finally disposed of.

sd/-
ALEXANDER THOMAS, JUDGE

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Sessions Case number shown as "S.C.No.414/2015" pertaining to accused No.2 in Crime number 515/2002 of Iritty Police Station in the final order dated 23.09.2015 in Crl.R.C. No.7/2015 is corrected and substituted as "S.C.No.414/2013" vide order dated 12.11.2015 in Crl.R.C.No.7/2015.

sd/-
Registrar (Judicial)

///True copy///

P.S. to Judge