



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.03.2023

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

Crl.R.C(MD)No.687 of 2016:-

Durai @ Durai Raj

... Revision Petitioner/
1st Appellant/1st Accused

Vs.

The Inspector of Police,
Bhoothapandy Police Station,
Kanyakumari District.
(Crime No.931 of 2000)

... Respondent/
Respondent/Complainant

PRAYER: Criminal Revision Case filed under Section 397 r/w 401 of the Code of Criminal Procedure, to call for the records relating to the Judgment passed by the learned Sessions Judge/Mahila Fast Track Court, Nagercoil, dated 13.07.2016 in C.A.No.35 of 2013, modifying the Judgment passed by the learned II Additional Assistant Sessions Judge, Nagercoil in S.C.No.35 of 2009, dated 15.04.2013 and set aside the same and thus allow this Revision Petition.

For Petitioner : Mr.N.Dilip Kumar

For Respondent : Mr.K.Sanjai Gandhi
Government Advocate (Crl. Side)



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

Crl.R.C(MD)No.806 of 2017:-

1.Ramasamy
2.Raj

... Revision Petitioners/
Appellants/Accused Nos.2 & 3

Vs.

The Inspector of Police,
Bhoothapandy Police Station,
Kanyakumari District.
(Crime No.931 of 2000)

... Respondent/
Respondent/Complainant

PRAYER: Criminal Revision Case filed under Section 397 r/w 401 of the Code of Criminal Procedure, to call for the records relating to the Judgment passed by the learned Sessions Judge/Mahila Fast Track Court, Nagercoil, dated 13.07.2016 in C.A.No.35 of 2013, modifying the Judgment passed by the learned II Additional Assistant Sessions Judge, Nagercoil in S.C.No.35 of 2009, dated 15.04.2013 and set aside the same and thus allow this Revision Petition.

For Petitioners : Mr.B.Charmurugan

For Respondent : Mr.K.Sanjai Gandhi
Government Advocate (Crl. Side)

COMMON ORDER

These revisions have been filed to set aside the Judgment passed by the learned Sessions Judge/Mahila Fast Track Court, Nagercoil, dated 13.07.2016 in C.A.No.35 of 2013, modifying the Judgment passed by the learned II Additional Assistant Sessions



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

Judge, Nagercoil in S.C.No.35 of 2009, dated 15.04.2013, thereby convicted Accused Nos.1 to 3 for the offence under Section 5 of the Explosive Substances Act, 1908, r/w Section 34 of I.P.C and sentenced them to undergo five years Simple Imprisonment and to pay a sum of Rs.10,000/- each towards fine.

2.The case of the prosecution is that on 07.12.2000 at about 17.00 p.m., at Kadukkai Thittai Sappathu, the accused persons illegally possessed 1 kg of Karuvedi Marunthu (Gun powder) and 1/2 Kg Sulphur in a plastic bag without any valid licence. After completion of the investigation, the respondent filed a final report and the same has been taken cognizance by the trial Court in S.C.No.35 of 2009 for the offence under Section 5 of the Explosive Substances Act, 1908, r/w Section 34 of I.P.C.

3.On the side of the prosecution, they had examined P.W.1 to P.W.13 and marked Exs.P.1 to P.8 and on the side of the accused, no one was examined and no materials were produced.



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

4. On perusal of both the oral and documentary evidence, the trial Court found the accused guilty for the offence under Section 5 of the Explosive Substances Act, 1908, r/w Section 34 of I.P.C and sentenced them to undergo five years Simple Imprisonment and to pay a sum of Rs.10,000/- each. Aggrieved by the same, the petitioners preferred an appeal in Crl.A.No.35 of 2013 and the Appellate Court also partly allowed the appeal thereby confirming the conviction under Section 5 of the Explosive Substances Act, 1908, r/w Section 34 of I.P.C and reduced the sentence from five years to two years Simple Imprisonment. Aggrieved by the same, the present Revisions.

5. Mr.N.Dilip Kumar, learned counsel appearing for the petitioner in Crl.R.C(MD)No.687 of 2016 would submit that the prosecution failed to prove their case since there are serious contradictions and lacuna in the case of the prosecution. Those material contradictions in the prosecution witnesses are vital to the case of the prosecution. That apart, there is absolutely no material to connect the first accused to the occurrence. Originally, the first complaint was lodged by P.W.4 and another complaint was lodged by P.W.5 and the same had all been suppressed by the prosecution and the complaint which was marked as Ex.P.1 and the F.I.R which



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

was marked as Ex.P.3, lodged by P.W.1, are fabricated and concocted documents created by the respondent. He also pointed out that the deposition of P.W.12 would prove that P.W.4 lodged a complaint before the respondent and P.W.5 had also lodged a complaint. P.W.13 also admits the availability of the complaint given by P.W.4. Therefore, the respondent suppressed the earlier complaints lodged by P.W.4 as well as P.W.5. He further submitted that all the case documents including Ex.P.2-'H' memo, dated 07.12.2000, were prepared in the police station. Ex.P.3-F.I.R is evident from the material contradictions in the statement of the prosecution witnesses. P.W.1 stated that after securing A2 to A5 along with the recovered explosives, they brought the accused to the forest office and thereafter, made an enquiry. Later, they were handed over to the respondent at 07.00 p.m. However, P.W.2 stated that the accused with recovered materials were directly taken to the Police Station. Therefore, these material contradictions would affect the entire case of the prosecution. He further submitted that in order to prove the offence under Section 34 of I.P.C., no material was produced by the prosecution and no one was examined. No material was produced about the sharing of a common intention or doing anything with such common intent is available anywhere.



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6.The learned counsel appearing for the petitioner further submitted that, even according to the case of the prosecution, the first accused, namely, the petitioner in Crl.R.C(MD)No.687 of 2016, flood away after seeing the forest officials. There is also a material contradiction in the statement of prosecution witnesses. According to P.W.1, he stated that after seeing the Forest Officials, A.1 flooded away from the scene of the crime, whereas, P.W.4 stated that after the seizure of explosives from all the accused persons, the first accused alone flooded away from their hands. The prosecution also failed to prove the ingredients as contemplated under Section 5 of the Explosive Substances Act, 1908. The prosecution also failed to obtain any sanction as contemplated under Section 7 of the Explosive Substances Act, 1908. That apart, no independent witness deposed in favour of the prosecution. Since P.W.2 and P.W.3 were examined as Mahazar witnesses, they also turned hostile and failed to support the case of the prosecution. In order to substantiate his contention, the learned counsel appearing for the petitioner in Crl.R.C(MD)No. 687 of 2016 relied on the following Judgments:-



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

"(i) *Mohammad Usman Mohammad Hussain Maniyar and others Vs. State of Maharashtra* reported in (1981) 2 SCC 443.

(ii) *Virendra Singh Vs. State of Madhya Pradesh* reported in (2010) 8 SCC 407."

7.Per contra, the learned Government Advocate (Criminal Side) would submit that the eyewitnesses, namely P.W.1, P.W.4 and P.W.5, categorically deposed that all the accused persons were in possession of explosives and as such, the prosecution proved their case beyond doubt. He drew the attention of this Court to the findings recorded by the Appellate Court that on verification of records, the sanction obtained by the prosecution is very much available with the records. However, the accused failed to cross-examine the Investigating Officer so as to obtain sanction and non-marking of the sanction before the trial Court. Therefore, non-marking of sanction would not cause any prejudice to the accused. Hence, the Courts below rightly convicted the petitioners and sentenced them to undergo two years Simple Imprisonment and he prayed for dismissal of the Revisions.



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

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8.Heard the learned counsel appearing on either side and perused the materials available on record.

9.There are totally five accused, in which, the petitioner in Crl.R.C(MD)No.687 of 2016 is arrayed as Accused No.1 and the petitioners in Crl.R.C(MD)No.806 of 2017 are arrayed as Accused Nos.2 and 3. The other two accused persons did not appear before the trial Court and as such, the trial Court split up the case as against Accused Nos.4 and 5. On 07.12.2000 at about 17.00 p.m., at Kadukkai Thittai Sappathu, the accused persons illegally possessed 1 kg of Karuvedi Marunthu (Gun powder) and 1/2 Kg Sulphur in a plastic bag without any valid licence. Therefore, on the statement given by the Forest Officials, the respondent registered the F.I.R in Crime No.931 of 2000 for the offence under Section 5 of the Explosive Substances Act, 1908, r/w Section 34 of I.P.C. After completion of the investigation, the respondent filed a final report and the same has been taken cognizance for the said offences by the trial Court.



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

10.The learned counsel appearing for the petitioner in Crl.R.C(MD)No.687 of 2016 vehemently contended that the prosecution failed to prove the offence under Section 34 of I.P.C., since they failed to examine any witness so as to prove that all the accused persons with common intention had possessed the alleged explosives. They also failed to produce any material evidence to show that they intended to use the explosives illegally. In this regard, he relied upon the Judgment in **Virendra Singh Vs. State of Madhya Pradesh** reported in **(2010) 8 SCC 407**, in which the Honourable Supreme Court of India held as follows:-

“Section 34 is not a substantive offence. It is imperative that before a man can be held liable for acts done by another, under the provisions of this section, it must be established that there was common intention in the sense of a pre-arranged plan between the two and the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply.”



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

11.The vicarious or constructive liability under Section 34 of I.P.C can arise only when two contradictions stand fulfilled, i.e., the mental element or the intention to commit the criminal act conjointly with another or others; and the other is the actual participation in one form or the other in the commission of the crime.

12.Admittedly, the prosecution failed to produce any material to connect the petitioners to each other in order to prove the offence under Section 34 of I.P.C. No one had spoken that A.1 to A.3 are connected to each other, and they were under constructive possession of explosives. Even according to the prosecution, the first accused, after seeing the Forest Officials, had flooded away from the scene of the crime. They recovered the explosives from A.2 to A.5. In this regard also, there is a contradiction between P.W.1 and P.W.4, who are the Rangers of the Forest Department. According to P.W.1, he stated that after seeing the Forest Officials, A.1 flooded away from the scene of the crime, whereas, P.W.4 stated that after the seizure of explosives from all the accused persons, the first accused alone flooded away from their hands. He did not even depose that they had taken steps to



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

trace the first accused. Therefore, the prosecution first of all failed to prove the offence under Section 34 of I.P.C.

13.In order to prosecute the accused for the offence under Section 5 of the Explosive Substances Act, 1908, the prosecution has to obtain consent from the District Magistrate. It is relevant to extract the provision under Section 7 of the Explosive Substances Act, 1908, which reads as follows:-

*"7. Restriction on trial of offences.—
No Court shall proceed to the trial of any person
for an offence against this Act except with the
consent of the 1[District Magistrate]."*

Thus, it is clear that no Court shall proceed with the trial of any person without getting consent from the District Magistrate, namely, the District Collector.

14.In this case, the respondent failed to obtain any consent from the District Collector in order to prosecute the accused persons. Though the Appellate Court recorded that consent obtained from the District Collector is very much available in the case



records, it was not marked by the prosecution. Further, Section 5 of the Explosive Substances Act, 1908 reads as follows:-

[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 or special category 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 punished,—1[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 or special category 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 punished,—"

'(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;



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

(b) in the 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.]”

15.In order to bring home the offence under Section 5 of the Explosive Substances Act, 1908, the prosecution has to prove (i) that the substance in question is explosive substance (ii) that the accused makes or knowingly has in his possession or under his control any explosive substance and (iii) that he does so under such circumstances as to give rise to a reasonable suspicion that he is not doing so for a lawful object. Therefore, the prosecution must prove that the accused persons were under possession of explosives on suspicion that they are possessing explosives to do the unlawful object.

16.In the case on hand, there is absolutely no iota of evidence to show that the accused persons were in possession of explosives in order to do the same unlawful object. Therefore, the prosecution failed to prove the basic ingredients in order to bring home the charge under Section 5 of the Explosive Substances Act, 1908, to home.



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17.That apart, as rightly pointed out by the learned counsel appearing for the petitioner in Crl.R.C(MD)No.687 of 2016, there were full of contradictions between P.W.1 and P.W.4. In fact, both the Investigating Officer viz., P.W.12 and P.W.13 had categorically admitted that there were two complaints from P.W.1 and P.W.4 and both are Rangers of Forest Department. Further, there were contradictions in respect of lodging the complaint and recording of statements from the accused persons. Further, in order to bring the charge to home, the prosecution had examined P.W.2 and P.W.3, but both were turned hostile and there were contradictions between other witnesses also. Both the Investigating Officers deposed that they did not prepare any of the documents. Therefore, it is vital to the case of the prosecution, and this Court is of the considered opinion that the prosecution failed to prove the case beyond any reasonable doubt. Therefore, the benefit of the doubt goes in favour of the accused persons, and they are liable to be acquitted for the offence under Section 5 of the Explosive Substances Act, 1908, r/w Section 34 of I.P.C.



Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

18. Accordingly, both the Criminal Revision Cases are allowed and Judgment passed by the learned Sessions Judge/Mahila Fast Track Court, Nagercoil, dated 13.07.2016 in C.A.No.35 of 2013, modifying the Judgment passed by the learned II Additional Assistant Sessions Judge, Nagercoil in S.C.No.35 of 2009, dated 15.04.2013, are set aside. The petitioners/accused are acquitted. Bail bond if any executed by the petitioners/accused shall stand cancelled and fine amount if paid is ordered to be refunded to the appellant/accused forthwith.

10.03.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes
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To

1. The Sessions Judge/Mahila Fast Track Court,
Nagercoil.
2. The II Additional Assistant Sessions Judge,
Nagercoil.
3. The Inspector of Police,
Bhoothapandy Police Station,
Kanyakumari District.
4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

G.K.ILANTHIRAIYAN, J.

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Order made in
Crl.R.C(MD)Nos.687 of 2016 & 806 of 2017

10.03.2023