

(2013) 07 KL CK 0065

In the High Court Of Kerala

Case No : Criminal R.P. No. 939 of 2013

Ayyappan Pillai and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 18-07-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 248(1)
Penal Code, 1860 (IPC) — Section 141, 143, 147, 148, 149

Citation : (2013) 3 KLJ 561

Hon'ble Judges : Harun-UI-Rashid, J

Bench : Single Bench

**Advocate : R. Padmakumar, P. Aravind and Bindu Sreekumar, for the Appellant;
Viju Thomas, PP, for the Respondent**

Judgement

Harun-UI-Rashid, J.—The appellants are the accused Nos. 1 to 4 & 7 in C.C. No. 307/10 on the file of the Judicial First Class Magistrate-I, Mavelikkara. The prosecution charge sheeted the case against 9 accused alleging offence punishable u/s 143, 147, 148, 447, 448, 427 r/w 149 IPC. The learned Magistrate held that prosecution has successfully established offence punishable u/s 143, 147 and 447 r/w 149 IPC against accused Nos. 1 to 4 & 7. The said accused are found not guilty of the offence punishable u/s 148, 448, 427 r/w 149 IPC and they are acquitted of the said offences u/s 248(1) Cr.P.C. Accused Nos. 1 to 4 & 7 are sentenced to pay a fine of Rs. 1,000/- each for the offence punishable u/s 143 IPC and in default to undergo simple imprisonment for one month, sentenced to undergo imprisonment till the rising of court and to pay a fine of Rs. 3,000/- each for the offence punishable u/s 147 IPC in default the undergo simple imprisonment for two months and they are also sentenced to pay a fine of Rs. 500/- each for the offence punishable u/s 447 IPC in default to undergo simple imprisonment for two weeks. The judgment passed by the learned Magistrate was confirmed by the appellate court by judgment dated 21.3.2013 in CrI.A. No. 378/2012 of the Additional District Judge-Fast Track-(Ad-Hoc) Court, Mavelikkara. Parties hereinafter are referred to as arrayed in C.C.

No. 307/2010. The prosecution case is that the accused persons formed themselves into an unlawful assembly at about 10:35 p.m. on 3.6.2010 with a common object of causing loss to PW 1 and in prosecution of the said common object, trespassed into the house of PW 1, 6th accused destroyed glass of three window panes of the front window of the building by hitting with a stick. The other accused destroyed the glass of four panes of the window fixed on the eastern wall of the northern bed room of the building. The first accused at the same time repeatedly kicked on the front door of the house and caused damage to the door of the house. The learned Magistrate framed charge for the offence punishable under Sections 143, 147, 148, 447, 448, 427 r/w 149 IPC.

2. The evidence consists of oral testimonies of PWs 1 to 3, Exts. P1 to P4, MO 1 and MO 2 series on behalf of the prosecution and Exts. D1 to D3 documents, Exts. D4 to D6 contradictions for the defence.

3. The testimonies of DWs 1 to 3 are relied by the prosecution to prove the allegation against the accused. PW 1 is the defacto complainant, PW 2 is his wife and PW 3 is the investigating officer.

4. PW 1 testified before the court that at 10:35pm he heard some sound of curbing foot steps outside the house. Immediately he and PW 2 when looked outside through window glass, they saw 12 persons standing outside the building. According to him six were standing in the sit out and the remaining six were standing at the courtyard. The first accused was holding a iron rod, additional accused No. 10 was holding a sword stick, 4th accused was holding a chopper and 8th accused was not armed with any weapon. All others were holding sticks with them. The stick which was marked as MO 1 is said to be the stick found in the hands of one Jayasree, who is the wife of the 1st accused. He also testified that accused 1 to 4 and additional accused No. 10 abused him in filthy words shouting to come out of the building. It is deposed that the accused and additional accused 10 forcibly kicked on the main door to destroy it. Accused Nos. 2 to 4 and deceased 6th respondent destroyed the panes of the front window fixed on the wall of the main hall. Accused Nos. 5, 7, 9 & additional accused No. 11 smashed on the panes of the window fixed on the eastern wall of the bed room. He informed the matter to the Kuruthikadu Police Station and the police reached there at about 11:00 p.m. PW 2 deposed in tune with the testimony of PW 1. PW 3 is the investigating officer. Exts. P2 & P3 are the FIR & scene mahazar prepared by PW 3. He deposed that there were no damages to the main front door and therefore he did not mention the same in Ext. P3 scene mahazar. He also deposed that out of the 4 panes on the window fixed to the bed room, only two were damaged in the incident. He also deposed that only the glass of the window panes were damaged and there were no damages any portion of the wooden frame. The learned Magistrate examined the question as to whether the damages to the window frames of PW 1's house were caused by accused Nos. 1 to 4 and 7 company with others. The learned Magistrate found that PWs 1 & 2 were giving highly exaggerated versions about the incident

allegedly taken place in their house. Referring to the deposition regarding damage, the learned Magistrate noticed the versions of PWs 1 & 2 that they have no case that the statement in Ex. D1 plaint was false or incorrect. The said facts were not mentioned in Ext. P1. The trial court also noticed the fact that in Ext. P1 FI statement and Ext. D1 plaint in the civil suit, the case of PW 1 is that the damage was caused only by the 6th accused. The trial court also noticed that during examination PW 1 completely deviated from FI statement and made heavy improvement as to the over act of each accused who allegedly destroyed the window glasses of the bed room. Referring to their testimonies, regarding the damage caused to the main door the trial court observed that Ext. P3 scene mahazar and testimony of PW 2 clearly establish that there were no damage to the front door of the building. The court after evaluating the evidence on record concluded that PWs 1 & 2 have no consistent case as to the exact incident took place in their house. The trial court found that the prosecution could not prove beyond reasonable doubt that the damage seen to the window panes were caused by the accused now facing trial. Therefore, it was concluded that the offence u/s 427 IPC is not proved beyond doubt against accused Nos. 1 to 4 & 7.

5. The trial court also at length examined the question as to whether the accused persons committed offence u/s 448 IPC. The allegation is that the accused persons committed criminal trespass into PW 1's house. On an analysis of the evidence on record, the court below found that the allegation against the accused regarding commission of a mischief is too weak to prove the offence. The trial court held that there is no case for PWs 1 & 2 that any of the accused have committed trespass by entering into the house building. The version of PWs 1 & 2 were disbelieved and the trial court found that the prosecution failed to prove that the accused have committed offence u/s 448 IPC. The trial court also on appreciation of evidence found that the evidence of PWs 1 & 2 is not sufficient to prove that accused 1 to 4 and 7 are armed with any dangerous weapons. The investigating officer has recovered MO 1. It is nothing but a piece of firewood. PW 3 had seized MO 1 wooden piece under Ext. P3 mahazar. In fact there was nothing to suggest in Ext. P3 that MO 1 was used by the accused. The trial court also found that MO 1 was seized on 4.6.2010 and the same was produced in the court only on 30.6.2010 without offering any explanation for the delay. Thus the court also held that offence u/s 148 is also not proved. Thus, the court below found that the prosecution has failed to establish offence punishable under Sections 148, 448 and 427 r/w 149 IPC beyond shadow of doubt. At the same time, the court below found that the accused 1 to 4 & 7 are found guilty for the offence under Sections 143, 147, 447 r/w 149 IPC. The whole discussion in the judgment is regarding the issue as to whether the accused have committed offence under Sections 148, 448 and 427 r/w 149 IPC. There is no discussion or findings recorded with respect to the offence punishable under Sections 148, 448 and 427 r/w 149 IPC. In paragraph 17 the learned magistrate observed that though the allegation against the accused regarding commission of mischief is too weak to prove the offence, that does not mean that the accused never

entered into the property of PW 1. Relying on the depositions of PWs 1 & 2 the learned Magistrate found that the accused entered into the courtyard of the house. On the basis of the said findings the trial court held that the offence of criminal trespass u/s 447 is proved against accused 1 to 4 & 7 and further held in the same paragraph that there is no case for PWs 1 & 2 that any of the accused have committed house trespass by entering into the house building. The versions of PWs 1 & 2 that the accused entered into the sit out and committed mischief was disbelieved and the court found and convinced that offence u/s 448 is not proved.

6. The simple fact that they entered into the compound of PW 1 alone is found to be proved. Section 441 defines criminal trespass. As per Section 441 Criminal Trespass means "whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property". To attract the ingredients of Section 441, the offender shall enter into or upon any property with an intention to commit an offence or to intimidate or insult or annoy any person in possession of such property. Section 447 is the punishing section. The court below after appreciating the entire evidence on record found that prosecution has failed to prove beyond reasonable doubt that the damage caused to the window were not caused by the accused now facing trial and therefore, offence u/s 427 is not proved. The court also found that the prosecution has failed to prove that accused persons entered into the sit out and committed mischief and therefore offence u/s 448 IPC is also not proved. The court further found that the prosecution failed to prove that the accused 1 to 4 & 7 were armed with any dangerous weapon and held that offence punishable u/s 148 IPC is also not proved. In the aforesaid circumstances there is no proof to show that accused persons entered into the property of PW 1, with an intention to commit offence or to intimidate or insult or annoy any person in possession of any such property. The essential requirement to attract Section 441 and 447 is the entry with an intention to commit offence or to intimidate, insult or annoy. Since those ingredients are absent in this case the prosecution failed to prove the offence punishable u/s 447 IPC r/w 149 IPC. This Court in the decision reported in *Krishnan Moothan Vs. V.K.A. Krishnankutty Moothan*, : *Krishnan Moothan Vs. V.K.A. Krishnankutty Moothan*, held that for attracting offence u/s 447, there shall be criminal force or show of force or criminal intimidation and of dispossession having been effected by such means, is not present. Since prosecution failed to prove the commission of criminal force or show of force or criminal intimidation, the offence u/s 447 is not attracted. In the decision reported in *Kunjan Ammini v. State of Kerala* (1967 KLT 621) : 1967 ICO 568 this Court again held that justify a conviction of criminal trespass it must be proved that some criminal intent was present in the mind of the accused, and it does not at all follow that because an act is unlawful and is one that the civil law will restrain, or for which it will compensate the injured party in damages, it is necessarily criminal. Even if the entry is unlawful and might sustain a civil action for damages it cannot be treated as criminal and in the

absence of evidence to show that the intention of the accused was to intimidate, insult or annoy the complainant the prosecution will not lie. It was also held that mere unlawful entry in another man's house without proof of intention to commit an offence and mere knowledge that such action would cause insult or annoyance to the inmates of the house are not sufficient to constitute criminal trespass. The punishment recorded by the trial court u/s 148 IPC is unsustainable. Section 143 prescribes punishing a member of unlawful assembly. Section 141 defines unlawful assembly. There shall be common object of five or more persons composing the assembly to commit any mischief or criminal trespass or other offence or to commit over tact mentioned as stated in 1, 2, 4 & 5 of Section 141. Here the court below found that the accused have not committed mischief or other offence or criminal trespass. The finding regarding criminal trespass is found to be wrong. In such circumstances, the offence u/s 143 is not also established. The only offence remained is the offence coming within the purview of Section 147. For attracting Section 147, the accused shall use force or violence and only in cases where force or violence is used by the assembly or a member of the assembly in common object of causing any such assembly. So long as there was no commission of offence as defined u/s 141 punishment u/s 147 is also cannot be sustained. The appellate court also in Crl.A. No. 378/2012 did not examine the question now discussed in the judgment in the right perspective. The said court also simply confirmed the findings recorded by the learned Magistrate.

In the result, the Crl.R.P. is allowed. The judgment passed in C.C. No. 307/2010 on the file of the Judicial First class Magistrate-I confirmed in Crl.A. No. 378/2012 of the file of the Additional District Judge-Fast Track (Ad-Hoc) Court, Mavelikkara, is set aside. The accused are found not guilty of the offence punishable u/s 143, 147, 447 r/w 149 IPC and are acquitted. They are set at liberty. The bail bond, if any, executed by them shall stand cancelled.