

Jithu Vs. the State of Kerala

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Court : Kerala

Decided On : Jul-03-2014

Judge : Honourable Mr.Justice Thomas P.Joseph

Appellant : Jithu

Respondent : The State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE THOMAS P.JOSEPH THURSDAY, THE 3D DAY OF JULY 2014 12TH ASHADHA, 1936 Bail Appl..No. 3123 of 2014 ()
----- CRIME NO. 498/2014 OF KUTHUPARAMBA POLICE STATION , KANNUR PETITIONERS/ACCUSED NOS.1 AND 2
----- 1. JITHU, AGED 29 YEARS S/O.SIVADASAN, PALAPARAMBU LAKSHAM VEEDU COLONY KOTHUPARAMBU, KANNUR.

2. JIJO AGED 30 YEARS S/O.SIVADASAN, PALAPARAMBU LAKSHAM VEEDU COLONY KOTHUPARAMBU, KANNUR. BY ADVS.SRI.E.RAFEEL SRI.GOKUL DAS V.V.H. RESPONDENT: ----- 1. THE STATE OF KERALA REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA *ADDL R2. UNION OF INDIA REPRESENTED BY HOME SECRETARY MINISTRY OF HOME AFFAIRS NORTH BLOCK, CENTRAL SECRETARIAT NEW DELHI - 110001 (* - ADDL R2 IS IMPEADED VIDE

ORDER

DTD0207.2014 IN CRL.M.A.6218 OF 2014 IN B A - 3123 OF 2014 BY STATE PUBLIC PROSECUTOR: SRI.ASIF ALI THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 03-07-2014, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: 'CR' THOMAS P.JOSEPH, J.

===== B.A.No.3123 of 2014
===== Dated this the 03rd day of July, 2014

ORDER

The Koothuparamba police registered Crime No.498 of 2014 for the offence punishable under Sec.25(1)(a) of the Indian Arms Act, 1959, Act 54 of 1959 (for short, "the Act of 1959") against the petitioners for alleged possession of two swords and a knife without license. The petitioners apprehend arrest and have filed this application under Sec.438 of the Code of Criminal Procedure (for short, "the Code").

2. Following questions are urged for a decision: (i) Whether, in the absence of a notification issued under Sec.4 of the Act of 1959, possession of arms of the category involved in this case is punishable under any provision of the said Act?. (ii) Whether, notification No.222 issued by the (then) Madras Government and published in the Fort St.George Gazette on September 14, 1922 holds good even after repeal of the Indian Arms Act, 1878 (for short, "the Act of 1878") by Sec.46 of the Act of 1959?.

3. Before going into the above questions, it is to be considered whether the offence attributable to the petitioners is B.A.No.3123 of 2014 2 Sec.25(1)(a) of the Act of 1959 or it is under Sec.25(1B)(b) of the said Act?.

4. Sri.T.Asif Ali, the learned State Public Prosecutor has argued that the offence attributable to the petitioners on the facts of the case is Sec.25(1)(a) of the Act of 1959 as the petitioners had in their possession arms in contravention of Sec.4 of the said Act. Sri.V.V.H Gokul Das, the learned counsel for the petitioners in response argued that on the facts alleged the provision that is attracted is only Sec.25(1B)(b) of the Act of 1959. In view of the complexity of the matter involved

and the consequence that might follow, I sought the assistance of Adv. Sri.S Rajeev in the matter. The learned counsel has highlighted before me various aspects of the matter referring to the notification referred supra, relevant provisions of the General Clauses Act, 1897 and various decisions on the point.

5. I proceed for the time being on the basis that two swords and a knife were seized from the possession of the petitioners on the relevant day and time. The Act of 1959 (which came into force on the first day of October, 1962 in view of GSR992dated 13.07.1962) classifies arms dealt with therein B.A.No.3123 of 2014 3 differently as "arms", "fire arms" and "prohibited arms". Sec.2 (1)(c) of the Act of 1959 defines 'arms' as meaning articles of any description designed or adapted as weapons for offences, or defence, and including firearms, sharp-edged and other deadly weapons, and parts of, and machinery for manufacturing arms and excluding the class of weapons referred to therein.

6. Sec.4 of the Act of 1959 deals with prohibition of arms of the nature defined in Sec.2(1)(c). The said provision says that, 'if the Central Government is of opinion that having regard to the circumstances prevailing in any area it is necessary or expedient in the public interest that the acquisition, possession or carrying of arms other than firearms should also be regulated, it may, by notification in the Official Gazette direct that Sec.4 shall apply to the area specified in the notification and thereupon, no person shall acquire, have in his possession or carry in that area arms of such class or description as may be specified in that notification unless he holds in that behalf a license issued in accordance with the provisions of the Act of 1959 and the rules made thereunder'. Sec.25(1B)(b) of the Act of 1959 provides punishment for possession of 'arms' in contravention of Sec.4 referred supra. B.A.No.3123 of 2014 4 The said provision says that 'whoever acquires, has in his possession or carries in any place specified by notification under Sec.4 any arms of such class or description as has been specified in that notification in contravention of that section' shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and shall also be liable to fine'.

7. Another class of arms dealt with by the Act of 1959 is "firearms" which is defined in Sec.2(1)(e) of the said Act. That provision says that 'firearms' means "arms of any description designed or adapted to discharge a projectile or projectiles of any kind by the action of any explosive or other forms of energy, and includes the category of weapons referred to in subclauses (i) to (iv). Sec.3(1) of the Act of 1959 deals with its prohibition and says that no person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds in that behalf a license issued in accordance with the provisions of the Act of 1959 and the rules made thereunder. Punishment for possession of 'firearms' in contravention of Sec.3 is provided in Sec.25(1B)(a). which says that any person who acquires, has in his possession or B.A.No.3123 of 2014 5 carries any firearm or ammunition in contravention of Sec.3 shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and shall also be liable to fine.

8. The last class of weapons dealt with by the Act of 1959 is "prohibited arms" defined in Sec.2(1)(i) which says that 'prohibited arms' means 'firearms so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty or weapons of any description designed or adapted for the discharge of any noxious liquid, gas or other such thing and includes such other prohibited arms as the Central Government may specify by notification. Prohibition for possession of prohibited arms is contained in Sec.7 of the Act of 1959 which says that 'no person shall acquire, have in his possession or carry or use, manufacture, sell, transfer, convert, repair, test or prove or expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof any prohibited arms or prohibited ammunition unless he has been specially authorised by the B.A.No.3123 of 2014 6 Central Government in this behalf'. Punishment for violation of Sec.7 is contained in Sec.25(1A) of the Act of 1959 which says that 'whoever acquires, has in his possession or carries any prohibited arms or prohibited ammunition in contravention of Sec.7 shall be punished with imprisonment for a term which shall not be less than five years, but which may extend to ten years and shall also be liable to fine'. The above classification read along with Rule 3 of the Arms Rules, 1962 (for short, "the

Rules") makes it clear that for the purpose of the Act of 1959 and the Rules made thereunder, arms are differently classified.

9. What is (said to be) seized from the possession of the petitioners is two swords and a knife. Those weapons come within the description of item No.(v) of Schedule I of the Rules which takes in swords, knife etc. What is (allegedly) possessed by the petitioners are arms coming in item No.(v) of Schedule I of the Rules, defined in Sec.2(1)(c) of the Act of 1959 and prohibited by Sec.4 of the said Act in the manner stated therein. Possession of such arms in violation of the prohibition in Sec.4 of the Act of 1959 is made punishable under Sec.25(1B)(b) of the Act of 1959. Sec.25(1)(a) of the Act of 1959 refers to manufacture, sale etc. of B.A.No.3123 of 2014 7 arms and ammunition in contravention of Sec.7, which I said, concerns prohibited arms or prohibited ammunition defined in Sec.2(1)(b) and (i) of the Act of 1959. I am therefore of the view that the offence said to be committed by the petitioners is punishable under Sec.25(1B)(b) of the Act of 1959 (and not under Sec.25(1)(h) of the Act of 1959) with imprisonment for a term which shall not be less than one year but which may extend to 3 years and shall also be liable to fine. In view of Schedule II of the Code, the said offence is triable by the magistrate of the first class.

10. Then, to the more important question. I found that the offences said to be committed by the petitioners is possession of 'arms' defined in Sec.2(1)(c) of the Act of 1959, prohibited by Sec.4 and made punishable under Sec.25(1B)(b) of the said Act. Sec.4 says that possession etc, of arms referred in that section be regulated by the Central Government by notification in the Official Gazette and direct that the section shall apply to the areas specified in the notification. Needless to say that the Central Government has to issue a notification under Sec.4 of the Act of 1959 specifying the area where acquisition, possession, B.A.No.3123 of 2014 8 carrying of arms (other than firearms) are to be regulated.

11. The Supreme Court, in Subhash Ramkumar Bind @ Vakil and Anr. Vs. State of Maharashtra (2003 KHC771 while dealing with Secs.27(3) and 2(1)(i) of the Act of 1959, Rule 3 of the Rules and Schedule I said that a statutory notification is required to attract the offence dealt with thereunder. In that case what was relied

on by the State was an administrative instruction issued by the Central Government. In paragraph 22, the Supreme Court held that requirement of the Statute is sacrosanct as to necessity of a notification issued by the Central Government. A Full Bench of the Punjab and Haryana High Court in State of Punjab Vs. Swaran Singh (2010 KHC413 also considered the scope of Sec.27(3) of the Act of 1959 and held that in the absence of a notification issued by the Government declaring (in that case) .303 rifle as a prohibited arm, the said weapon cannot be treated as a 'weapon' under the Act of 1959. In paragraph 8, the said Court observed that Rules 3 and 4 (of the Rules) and the Schedules referred to therein make it manifest that in the absence of a notification issued by the (Central) Government declaring .303 rifle as a prohibited arm, the said B.A.No.3123 of 2014 9 weapon cannot be treated as the one prohibited under the Act of 1959.

12. The above decisions support the view I have taken, so far as offence under Sec.25(1B)(b) of the Act concerning "arms" which is defined in Sec.2(1)(c) is concerned that as required by Sec.4 of the said Act, a notification issued by the Central Government specifying the area where acquisition, possession or carrying such arms are prohibited is necessary to make such acquisition, possession or carrying such arms an offence. In the absence of such notification, acquisition, possession or carrying of such arms cannot be said to be an offence under the Act of 1959.

13. The next question is whether notification No.222 dated September 14, 1922 issued by the (then) Madras Government and published in the Fort St.George Gazette would hold good even after repeal of the Act of 1878 by Sec.46 of the Act of 1959?. Notification No.222 reads as under: "No.222- The Governor in Council with the previous sanction of the Governor - General Council, resolves under Sec.15, Act IX of 1878 B.A.No.3123 of 2014 10 (The Indian Arms Act) to extend the provision of that section to the whole of the Malabar district.

2. It is therefore hereby notified for general information, that within the limits of the said district no person who is not specified or described in Schedule I of the Indian Arms Rules, 1920, as exempted, shall from the date of this notification have in his

possession any arms of any description except under a license and in the manner and to the extent permitted by it" 14. The said notification was issued by the then Madras Government by virtue of the power conferred on it under Sec.17 of the Act of 1878. Sec.17 of the Act of 1878 says that 'the Governor-General in Council may from time to time, by notification in the Gazette of India make rules to determine the officers by whom, the form in which, and the terms and conditions on and subject to which, any license shall be granted; and may by such Rules among other matters' do the acts referred to in clauses (a) to (f) (of Sec.17).

15. The learned counsel, Sri.V.V.H Gokul Das argued that the aforesaid notification having been issued under provisions of the Act of 1878 cannot hold good now since by Sec.46 of the Act of 1959, the Act of 1878 is repealed and as notifications issued B.A.No.3123 of 2014 11 under the Act of 1878 are not saved expressly or impliedly. According to the learned counsel, therefore the aforesaid notification issued by the (then) Madras Government cannot be taken as a notification coming under Sec.4 of the Act of 1959.

16. Adv.Sri.S.Rajeev has brought to my notice the relevant provisions of the General Clauses Act. According to the learned counsel, even in the absence of a saving clause in the Act of 1959, Secs.6 and 24 of the General Clauses Act would save the situation. The learned counsel also invited my attention to the decision of the Supreme Court in Neel, Niranjana Majumdar Vs. The State of W.B (1972 KHC516).

17. Sec.46 of the Act of 1959 reads as under: "46. Repeal of Act 11 of 1878:- (1) "The Indian Arms Act, 1878 is hereby repealed. (2) Notwithstanding the repeal of the Act of 1878 and without prejudice to the provisions of Secs.6 and 24 of the General Clause Act, every license granted or renewed under the Act of 1878 and in force immediately before the commencement of the Act of 1959 shall, unless sooner revoked, continue in force after such commencement for the unexpired portion of the period for which it has B.A.No.3123 of 2014 12 been granted or renewed." 18. True, the aforesaid provision does not say about notification etc, issued by virtue of the power conferred under Sec.17 of the Act of 1878. Sec.6 of the General Clauses Act deals with the effect of repeal and says as under: " Effect

of repeal - where this Act or any (Central Act) or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not, (a)
. (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder, or (c)
. (d) (e)
. " Sec.24 of the said Act says, "Where any (Central Act) or Regulation, is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided any (appointment notification) order, scheme, rule, form or bye-law, (made or) issued under the repealed Act or Regulation, shall, so far as it is not inconsistent B.A.No.3123 of 2014 13 with the provisions re-enacted, continue in force, and be deemed to have been (made or) issued under the provisions so re-enacted, unless and until it is superseded by any (appointment notification), order, scheme, rule, form or bye-law, (made or) issued under the provisions so re-enacted (and when any (Central Act) or Regulation, which, by a notification under Sec.5 or 5A of the Scheduled Districts Act, 1874 (14 of 1874) or any like law, has been extended to any local area, has, by a subsequent notification, been withdrawn from the re-extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and re-enacted in such area or part within the meaning of this Section." Therefore, acts done by virtue of the Act of 1878 so far as it is not inconsistent with the provisions of the Act of 1959 should stand even in the absence of a specific saving clause in the Act of 1959.

19. I stated that Sec.4 of the Act of 1949 deals with necessity of the Central Government issuing notification as to the area/areas where acquisition, possession and carrying of arms (as defined in Sec.2(1)(c) of the Act of 1959) is prohibited. A similar provision is contained in Sec.15 of the Act of 1878. I do not find B.A.No.3123 of 2014 14 any inconsistency between Sec.15 of the Act of 1878 and Sec.4 of the Act of 1959. On the other hand, the provision in Sec.15 of the Act of 1878 is brought into Sec.4 of the Act of 1959. Reference can be made to Workmen of M/s.Bata Shoe Pvt. Ltd. Vs. Bata Shoe Pvt Ltd. (1972 KHC616. There, the Supreme Court was dealing with Secs.4 and 25(1)(b) of the Act of

1959. The question considered was whether notification No. political (police) department notification No.787 PL dated March 9, 1923 issued under Sec.15 of the Act of 1878 would hold good even after the said Act was repealed by the Act of 1959. The Supreme Court, referring to Secs.6 and 24 of the General Clauses Act answered the question in the affirmative.

20. The decision of this Court in Haji K K Moidu and Ors. Vs. Food Inspector, Kozhikode (1962(1) Cri.L.J647 interpreting Secs.2(h) and 119 of the State Re-organisation Act, 1956 adds strength to my above view. There, it is held that the notification issued under Sec.20 of the Prevention of Food Adulteration Act amounted to law and survived in Malabar district after its integration with Kerala. B.A.No.3123 of 2014 15 21. It follows that notification No.222 issued by the (then) Madras Government so far as it is not superseded by any other notification, order, scheme, rule, form, bye-law issued under Sec.4 of the Act of 1959 should be deemed to continue in force and deemed to be issued under Sec.4 of the Act of 1959 so far as the areas coming under the erstwhile Malabar district is concerned even after the State Re-organisation and formation of the State of Kerala.

22. The last question so far as the facts of this case is concerned is whether request of the petitioners for pre-arrest bail under Sec.438 of the Code should be allowed?.

23. The learned counsel for the petitioners argued that the (alleged) seizure was made from an open shed and hence the petitioners cannot be said to be in "conscious possession" of the arms seized.

24. The learned State Public Prosecutor argued that the shed wherefrom the arms were seized is situated in the property of the petitioners and hence they should be deemed to be in possession of the arms as well. B.A.No.3123 of 2014 16 25. I am not going into the controversial question whether the petitioners had in their possession the arms in question. But, once their possession of the shed wherefrom the arms are said to be seized is proved, it is for them to show that they had no 'conscious possession' of the said arms as that is a matter within their exclusive knowledge and information. The petitioners should show circumstances showing or probalising that notwithstanding their possession of the shed

(wherefrom the arms are said to be seized), they had no 'conscious possession' of the arms.

26. The petitioners are not reported to be involved in any other case from the Koothuparamba Police Station. The weapons are already seized. On the facts of the case I am satisfied that custodial interrogation of the petitioners is not required. In the circumstance, I am inclined to exercise the discretionary jurisdiction in favour of the petitioners but, subject to conditions and without affecting the investigation of the case. The application is allowed as under: (i) Petitioners shall surrender before the officer investigating Crime No.498 of 2014 of the Koothuparamba Police Station on B.A.No.3123 of 2014 17 14.07.2014 at 10 a.m for interrogation. (ii) In case interrogation is not completed that day, it is open to the officer concerned to direct presence of the petitioners on other day/days and time as may be specified by him which the petitioners shall comply. (iii) Petitioners shall co-operate with the investigation of the case. (iv) In case the petitioners are arrested, they shall be produced before the jurisdictional magistrate the same day. (v) On such production the petitioners shall be released on bail (if not required to be detained otherwise) on their executing bond for `25,000/- (Rupees Twenty Five Thousand Only) each with two sureties each for the like sum each to the satisfaction of the learned magistrate and subject to the following conditions: (a) One of the sureties shall be a close relative of any of the petitioners. (b) Petitioners shall report to the officer investigating the case on all alternate Saturday between 10a.m and 12p.m for a period of two months or till final report is filed, whichever is earlier. B.A.No.3123 of 2014 18 (c) Petitioners shall report to the Investigating Officer as and when required for interrogation. (d) Petitioners shall not get involved in any offence during the period of this bail. (e) Petitioners shall not intimidate or influence the witnesses. (f) In case the petitioners violate any of condition Nos.(b) to (e), it is open to the investigating officer to move the learned magistrate for cancellation of the bail as held in P.K Shaji Vs. State of Kerala (AIR 2006 SC100. I record my deep appreciation for the efficient assistance rendered to me by Sri.V.V.H Gokul Das, Sri.S.Rajeev and the learned State Public Prosecutor, Sri.T Asif Ali in deciding the questions raised. Sd/- THOMAS P.JOSEPH, JUDGE. Sbna True Copy P A to Judge