

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937

CRL.A.No. 286 of 2006 ()

**AGAINST THE ORDER/JUDGMENT IN SC 249/2005 of ADDITIONAL SESSIONS COURT
(ADHOC)-I, KOTTAYAM DATED 24-01-2006**

CP 13/2005 OF JUDICIAL FIRST CLASS MAGISTRATE, KOTTAYAM

APPELLANT(S)/ACCUSED::

- 1. BIJU, (ACCUSED NO.1)
S/O. RAMAKRISHNAN, MALLUROTU HOUSE, NATTASSERI KARA
(VASUDEVA VILASAM VEEDU, PERLOOR KARA, PERLOOR VILLAGE.**
- 2. BIJU. K. CHACKO, (ACCUSED NO.2)
S/O. CHACKO, KOTTAKANDATHIL HOUSE, VIJAYAPURAM VILLAGE
MANGANAM KARA.**

BY ADV. SRI.BECHU KURIAN THOMAS (SR.)

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA, REPRESENTED
BY C.I. OF POLICE, KOTTAYAM EAST POLICE STATION
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 286 of 2006

Dated this the 09th day of December, 2015

J U D G M E N T

Three persons faced prosecution for the offences punishable under Sections 379 and 413 read with Section 34 of IPC. Among them, the third accused was fortunate enough to be acquitted, while A1 and A2 were less fortunate and they were found guilty of the offence punishable under Section 379 read with Section 34 of IPC. Consequently, each of them were sentenced to undergo rigorous imprisonment for one year each and to pay a fine of ₹11,000/- each with a default clause of rigorous imprisonment for six months each. If the fine amount was collected, ₹20,000/- was directed to be paid to PW2 under Section 357(1) of Cr.P.C. Set off as per law was allowed.

2. The prosecution case in brief is that on 05.07.2003 at about 1.45 in noon, while PW2 was on her way to the temple, two persons came on a motor bike and asked her

some queries and while she was engaged in that process, her chain was snatched. Going by Ext.P1 First Information Statement, she seemed to have chased the accused persons before she fell down. Hearing that his mother-in-law has been lying unconscious, PW1 went to the place and took her to the hospital and thereafter he went to the Station and laid Ext.P1 First Information Statement. PW4 recorded the same and registered crime as per Ext.P1(a) FIR. Since the assailants could not be traced at that point of time, an undetected report was filed before court.

3. Subsequently, PW3 had the good fortune to arrest the accused in Crime No.248/2003 of Karukachal Police Station and when they were questioned, they disclosed their involvement in the present case. Therefore, a formal registration of the crime was done and the records were sent over to Kottayam East Police Station. Ext.P2 is the FIR that was transferred to the Station where PW4 was working at the relevant time. He would say that along with FIR, there

was a confession statement of the accused also. PW4, the Investigating Officer in this case, after getting the FIR without even bothering to get the accused identified by PW2, laid final report before court.

4. The court before which the final report was laid, took cognizance of the offence and finding the offences under Section 413 read with Section 34 of IPC to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Kottayam under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court (Adhoc)-I, Kottayam, for trial and disposal.

5. The latter court, on receipt of records and appearance of the accused before the said court, framed charges for the offences punishable under Sections 379, 413 read with Section 34 of IPC.

6. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to

4 examined and had Exts. P1 to P3 marked. Exts. D1 and D2 were marked on the defence side.

7. After the close of prosecution evidence, the accused were questioned under Section 313 Cr.P.C. They denied all the incriminating circumstances brought out in evidence against them and maintained that they were innocent. They pointed out that the motor bike on which they were travelling collided with a jeep in which the SI was travelling and that had annoyed the SI and they were falsely implicated in several cases. This is one among them.

8. Finding that the accused could not be acquitted under Section 232 Cr.P.C., they were asked to enter on their defence. The accused however chose to adduce no evidence.

9. The court below, on an appreciation of the evidence in the case, found the evidence of PWs 1 and 2 to be convincing enough and the identification made by PW2 to be proper and just and held the accused Nos. 1 and 2 guilty

of the offence punishable under Section 379 read with Section 34 of IPC. Accordingly, conviction and sentence as already mentioned followed.

10. The learned counsel for the appellants brought to the notice of this Court that this Court, in a similar case involving the very same accused persons, had occasion to consider such identification in considerable detail and found that such identification is to be deprecated and cannot be accepted in law. The learned counsel relied on the judgment of this Court in Crl.A.661/2006 disposed of by judgment dated 24.11.2015. The learned counsel appearing for the appellants contended that the description given in Ext.P1 is hardly sufficient to identify the persons and also pointed out that there is absolutely no iota of evidence to connect the accused in the incident in question. A very vague description of the assailants alone is given. The learned counsel for the appellants pointed out that the occasion for PW3 to arrest the accused is not discernible from the

evidence of PW3 and more strange is the version given by PW3 is that the accused confessed about their involvement in crime No. 297/2003. There was no occasion for them to make confession and that was only a cooked up one. It is significant to notice that there was no test identification parade conducted. The learned counsel then went on to point out that it is based on this frivolous and brittle evidence that A1 and A2 have been sentenced by the court below.

11. The learned Public Prosecutor tried to support the finding of the court below.

12. Test identification parade is not a must. It is a process during investigation. But it is necessary in cases where the assailants are total strangers and also where it is not possible for the victim to have a proper glimpse of the accused persons so as to assimilate their features, which would enable them to identify the assailants at a later point of time. It is true that the substantive evidence is the

identification in court. But to ensure that the Investigating Officer is proceeding at the right direction, test identification parade is given importance.

13. In the case on hand, the prosecution version spoken to through PW3 is that when A1 and A2 were arrested in a different case, they simply blurted out their involvement in the case on hand. PW3 arrested them and on confession being made with the accused, transferred the records to PW4. How the involvement of the accused in the present case came to light is not discernible from the records and even more strange is the identification said to have been made by PW2.

14. Apart from the fact that the occasion under which A1 and A2 had made confession about their involvement in the present case, the identification made for the first time in court is open to serious doubt. What is significant is that there is no recovery and no attempt in that regard is also seen made.

15. The learned counsel for the appellants pointed out that in fact, the accused had in their defence marked two documents namely Exts. D1 and D2, which according to the learned counsel, is given by the same person, that is the person who had given Ext.P1, and Ext.D1 is said to be an Additional CD statement of PW2. They do not go hand and hand. The documents had two different versions of the same incident.

16. The evidence of PW2 is a miserable reading. The identification stated to have been made by her is an identification not known to law. One could have understood had the identification being soon after the incident. Here the identification said to have been made by PW2 is long after the incident and she herself had no definite idea about the features of the assailants. What is interesting is that as per her version, one of the assailants were dark in colour. But at the time of examination in court, she has to concede both of them were fair.

17. The result is that there is no recovery and no proper identification and there is nothing to show that the appellants were involved in the incident which gave rise to Crime No.297/2003 before the Kottayam East Police Station. This Court is unable to accept the finding of the court below in this regard.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and it is held that the accused are not guilty of the charges levelled against them. They stand acquitted. Their bail bond shall stand cancelled and they are set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge