

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 24TH DAY OF NOVEMBER 2015/3RD AGRAHAYANA, 1937

CRL.A.No. 661 of 2006 ()

AGAINST THE JUDGMENT IN SC 248/2005 of ADDITIONAL SESSIONS COURT, (ADHOC-I), KOTTAYAM DATED 06-03-2006

IN CP 12/2005 OF JUDICIAL FIRST CLASS MAGISTRATE-I, KOTTAYAM

APPELLANT(S)/ACCUSED:

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

**BY ADVS.SRI.BECHU KURIAN THOMAS (SR.)
SRI. P. RAVINDRAN BABU
SRI.M.P.MADHAVANKUTTY**

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. S. HYMA

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 661 of 2006

Dated this the 24th day of November, 2015

J U D G M E N T

Three persons were prosecuted for the offences punishable under Section 379, 413 read with Section 34 of the IPC. Among them A3 was acquitted of all charges. A1 and A2 were found guilty of the offence punishable under Section 379 read with Section 34 of IPC and they were therefore convicted and sentenced to undergo rigorous imprisonment for two years each and to pay a fine of ₹25,000/- with a default clause of one year each. It is also directed that if the fine amount was realized, a sum of ₹35,000/- would be paid to PW1 as compensation.

2. The incident in this case is alleged to have occurred on 05.03.2003 at about 6.45 p.m.. PW1 was returning to her house at Kottayam from Alleppey where she had gone to visit her sister. When she reached in front of a house by name, Panaparambil to go to her house, two

persons, who came on a motor bike, snatched away the chain worn by her. According to PW1, they passed her initially and then they returned to ask her about the house of a person and then snatched away the chain. She laid Ext.P1 FIS before the Kottayam Police Station, which was recorded by PW4, who registered Crime No. 89/2003 of the said Police Station. PW3, the Sub Inspector of Police, Karukachal on 10.09.2003 while on duty, happened to see the first and the second accused under suspicious circumstances on their failure to account for three gold chains which they had with them and arrested them. He then speaks about the two accused persons having confessed about the incident which led to registration of Crime No.89/2003. Further investigation in the case was done by PW5. He says that on 13.09.2003, he preferred a refer report to the court with regard to Crime No. 89/2003 which is Ext.P10. Since the accused were already in judicial custody in another case, after obtaining formal sanction of the court, they were

arrested. After getting their custody, during investigation, he happened to go to a shop by name Gold Trade Links run by the third accused, which was found locked at the relevant time. He then conducted a search of the house of the third accused which yielded nothing. According to PW5, the enquiries revealed that the 3rd accused is a person who is the habitual receiver of stolen property and therefore he was also arrayed as an accused for the offence under Section 413 of IPC. He says, he had the accused identified and then after completing investigation, laid charge before court.

3. The Judicial First Class Magistrate Court-I, Kottayam, before whom the final report was laid, took cognizance of the offence. On finding that the offence under Section 413 of IPC is exclusively triable by a Court of Sessions, the learned Magistrate 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, (Ad hoc-I),

Kottayam for trial and disposal.

4. 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 and 413 read with Section 34 of IPC.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore examined PWs 1 to 5 and had Exts.P1 to P11 marked.

6. After the close of prosecution evidence, the accused was 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 stated that they had been falsely implicated. They have a case that it so happened that the jeep in which PW3 was travelling collided with the motor bike on which they were travelling and there was an altercation between the two which resulted in PW3 became agitated and annoyed and falsely implicated the accused.

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

8. On an appreciation of the evidence in the case, the court below found no incriminating material against the third accused and acquitted him of all charges. However, based on the evidence of PWs 1, 3 and 5, the court below came to the conclusion that offence under Section 379 read with 34 of IPC has been established against A1 and A2 and accordingly convicted and sentenced them as already mentioned.

9. Assailing the conviction and sentence, Sri. Bechu Kurian Thomas, the learned senior counsel appearing for the appellants contended that there is absolutely no evidence at all to connect the accused to the incident spoken to by PW1. A reading of Ext.P1 hardly gives any indication of the physical features of the accused so that we are able to identify them at a later stage. A very vague description is

given in Ext.P1. More strange, according to the learned senior counsel, is the occasion for PW3 to arrest A1 and A2. It can be seen, according to the learned senior counsel, that it is nothing but a cock-and-bull story. According to PW3, he happened to see them walking along the road carrying chain with them and he questioned them and feeling suspicious, they were arrested. It is then according to the learned senior counsel that they are said to have confessed about the incident in which PW1 was involved. The learned senior counsel pointed out that there was no occasion for A1 and A2 to mention about this incident at all for, the prosecution has no case that any articles were recovered on the basis of that confession statement related to the one involved in Crime No.89/2003. Further, the identification said to have been made by PW1 at the instance of PW5 is no identification at all. Admittedly, no test identification parade was conducted. The learned senior counsel fairly conceded that a test identification parade may not be a must in all

cases. But it is necessary in cases where the accused are total strangers and the occasion for the victim to note their features is rather very very little. In the case on hand, the learned senior counsel pointed out that even going by the evidence of PW1, it is very difficult to believe that she could have a clear view of the accused and if one goes through the evidence of PW1, the identification made is a total mockery. The learned senior 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.

10. Well, there seems to be considerable force in the submissions made by the learned senior counsel for the appellants. It is difficult to understand as to what was the occasion for A1 and A2 to have confessed about their involvement in Crime No.89/2003 and admittedly, the property involved in that case was not recovered from their possession or recovered at their instance. Further, PW1 has no case that either she was familiar to the accused or

accused were familiar to her. Then again, it escapes one's understanding how they could have pointed out PW1 as their victim on a particular day.

11. Even assuming for argument sake that A1 and A2 were found in possession of chain which they could not properly explain and they were taken into custody, the story of identification made by PW1 does not have the sanction of law. One must remember here that the prosecution has no case that based on the confession statement made by the accused, the property involved in Crime No.89/2003 has been recovered. Nor do they have a case that the property was converted into gold.

12. If one goes by the evidence of PW5, PW1 was called to the Police Station and shown A1 and A2 sitting in a lockup room and she says she identified them. That is not the mode of identification known to law. It must be also remembered that it was long after the incident that the said identification was made.

13. PW3, the Sub Inspector of Police, who had occasion to arrest A1 and A2, in cross examination, in no less terms admits that he was not questioned by the Investigating Officer. He is unable to remember whether he was questioned by the Investigating Officer with regard to the reason for arresting A1 and A2.

14. However, PW5 has a different case. He would say he had taken the statement of PW3. Whatever that be, the fact remains that there was no recovery of the property involved in Crime No.89/2003 and evidence regarding identification is too brittle to inspire confidence in the mind of court. Such identification has been deprecated by the Apex Court in several cases which need no mention.

15. Of course, if there was occasion for the victim to note the features of the accused, probably, one could say an identification parade could be dispensed with. There is no such case in the case on hand. It surprises one as to how A1 and A2 could have pointed out the victim when they had no

earlier familiarity with PW1 so as to be arrayed as an accused in this crime at all. These vital aspects have been omitted to be noticed by the court below and the court below simply accepted the evidence of PW1 of identification of the accused in the lockup without even ascertaining whether the identification was properly done or is legally done.

For the above reasons, this Court is unable to uphold the conviction and sentence passed against A1 and A2. This appeal is allowed. The conviction and sentence passed by the court below are set aside. Accused stand acquitted of all charges levelled against them. Their bail bond shall stand cancelled and they are set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge