

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 23RD DAY OF JULY 2015/1ST SRAVANA, 1937

CRL.A.No. 2122 of 2009 (A)

AGAINST THE JUDGMENT IN SC 207/2008 of ADDL.DISTRICT & SESSIONS COURT
(ADHOC)-II, KOTTAYAM DATED 31.07.2009

APPELLANT(S)/ACCUSED NOS.1, 3 & 4:

1. VADI VELU, AGED 28, S/O. SUBRAHMANIAN,
DOOR NO.22, NEAR CHANDANAMARIYAMMAN KOVIL, BODY TOWN
BODY TALUK, THENY DISTRICT, TAMIL NADU.
2. KARUPPAYAN, AGED 34, S/O.MARIYAPPAN,
RESIDING AT NEAR PARAMASIVAM KOVIL, PUTHUKOLONIYIL
VENNIMALATHOPPU, SUBARAJ NAGAR, PUTHUCOLONY
BODY VILLAGE, THENI DISTRICT, UTHAMAPALAYAM TALUK
TAMIL NADU.
3. PALANI VELU, AGED 26,
S/O.CHURULIYAPPAN, DOOR NO.295
MELECHINTHALASSERY EAST THERUVU, UTHAMAPALAM VILLAGE
THENI DISTRICT, TAMIL NADU.

BY ADVS.SRI.MATHAI VARKEY MUTHIRENTHY
SRI.IEANS.C.CHAMAKKALA

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA
THE CIRCLE INSPECTOR OF POLICE, PONKUNNAM
THROUGH THE PUBLIC, PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
23-07-2015, ALONG WITH CRA. 1662/2010, & CON.CASES,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

acd

'C.R.'

P.D. RAJAN, J.

CrlAppeal.Nos.2122/2009, 1662/2010
& 1005/2013

Dated this the 23rd day of July, 2015

JUDGMENT

The appellants, who are accused 1 to 4 in S.C.No.207/2008 of Additional Sessions Judge, (Adhoc-II), Kottayam, challenge the judgment of conviction u/s.457 and 395 IPC. The trial Court convicted the appellants u/ss.457 and 395 IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of ₹10,000/- each u/s.457 IPC and also to undergo rigorous imprisonment for 10 years and to pay a fine of ₹10,000/- each u/s.395 IPC, in default of payment of fine, to undergo rigorous imprisonment for two years each. Being aggrieved by that, they preferred this appeal.

2. The facts necessary for the indictment were that on 12.05.2008 at 1.30 a.m., the accused 1 to 3 committed house breaking and trespassed into the Kaippakkal House bearing No.III/341 of Vazhoor Grama Panchayat, when PW1 resisted them, the first accused beat with an iron rod which he ward off with his hands and held the first accused, the 2nd accused hit on the forehead with an iron rod, as a result PW1 sustained injury. The 4th accused, who was waiting in the courtyard, encouraged the accused. When PW2 interfered and resisted the blow with his left hand, thereby PW2 sustained injury to his left hand finger, the 3rd accused took a mobile phone worth ₹ 9,000/-. A4 and A5 waiting outside the house guard the scene, thus the accused committed the offences. In this incident, Pallickathodu Police registered a case and after

completing investigation, C.I. of police, Ponkunnam laid charge against the accused before Judicial First Class Magistrate Court-I, Kanjirappally. A5 is absconding and his case was split up, therefore the case of A1 to A4 was committed to Sessions Court for trial.

3. To prove the offence, prosecution examined PW1 to PW12 and marked Exts.P1 to P24 as documentary evidence. The material objects recovered by the Police, were marked as MO1 and MO2 in the trial Court. The incriminating circumstances brought out in evidence were denied by the accused, while questioning them u/s.313 Cr.P.C. They were also heard u/s.232 Cr.P.C. and called upon them to enter on their defence. They did not adduce any defence evidence. After hearing both sides, the trial Court convicted the appellants.

4. Crl.Appeal No.2122/2009 has been filed by Accused 1, 3 and 4. Crl. Appeal No.1662/2012 has been filed by the 2nd accused. Crl.Appeal No.1005/2013 has been filed by A1 to A3. Adv. Sri. Lavaraj M.G. and M.S. Breez are appearing for the appellants in Crl.Appeal No.1005/2013. Adv. Sri. Blaze K. Jose is appearing for the appellants in Crl.Appeal Nos.2122/2009 and 1662/2010.

5. The learned counsel Adv. Sri. Lavaraj and Sri. Balze. K. Jose contended that the oral evidence of PWs 1 and 2 are inconsistent and not sufficient to prove the offence of dacoity. They identified the accused in the Police Station, after 18 days of the arrest without any test identification parade, which is not admissible in evidence. The wife of PW2 is an eye witness, who was

not examined as a witness in the trial Court. Moreover, neighbours were not cited as witness to prove the alleged story. PW2 sustained injury, but no medical certificate was produced before court to substantiate that contention. Hence, the appellants are entitled to get the benefit of doubt. They relied on the decision in Tomaso Bruno v. State of U.P. [2015(1) KLT SN 84 (C.No.104) SC], Ravi @ Ravichandran v. State rep. by Inspector of Police [AIR 2007SC 1729] and State (Delhi Administration) v. V.C. Shukla and another [AIR 1980 SC 1382].

6. The learned Public Prosecutor contended that PW1 identified A1 and A2 and PW2 identified A1 to A4, after their arrest at Pallikkathodu Police Station and thereafter in the Court. MO1 was identified by PW2, who is the owner of the mobile phone. Therefore, separate

test identification parade is not necessary in a case like this. The assault with MO2 iron rod is proved from the direct evidence of PW1 and 2. In such circumstances, it is not necessary to examine other independent witnesses. The incident had occurred in the night inside the house in the odd hours, it is difficult to obtain the evidence of the neighbours. Absence of conducting test identification parade will not affect the credibility of the evidence of PW1 and PW2. He relied the decision in Malkhan Singh and others v. State of MP [2003 (5) SCC 746].

7. In this context, I have verified whether the appellants committed the offence of dacoity as alleged. In order to attract the offence of dacoity, prosecution has to prove that five or more persons conjointly commit or attempt to commit a robbery or whether the whole number

of persons jointly committing or attempting to commit robbery and persons present and aiding such commission or attempt is said to commit dacoity. For ascertaining this fact, I have perused the oral evidence of PW1. His evidence show that on 12.5.2008, at 1.30 am, he heard somebody hitting on the front door, he woke up and his son PW2 also proceeded near to the front door, switched on the light of the front room. At that time, three persons entered into the front room breaking the door. A1 was carrying an iron rod, PW1 caught hold of him, at that time A2 hit with the iron rod on the forehead of PW1 and he sustained injury. A2 again beat PW2 and there was a scuffle between them and he fell down. An iron rod in the possession of A2 was seized by PW2, by this time. A3 snatched MO1 mobile phone from the front room, when he

cried loudly, the neighbours woke up and the appellants ran away from there. Subsequently, PW1 was admitted in the Government Hospital, Kanjirappilly from where Ext.P1 statement was recorded by the Pallikkathodu police. PW1 identified the accused who entered inside the front room and again identified them at the police station.

8. The direct evidence of PW2 shows that on 12.5.2008 at 1.30 am, he heard the hitting sound from the front door, his father also called him and both of them proceeded to the front room, A1 to 3 were found there, A1 hit on the head of PW1, at that time he ward off, A2 hit on the forehead of PW1, as a result he sustained injury. The other accused waiting outside the house told the accused inside to beat on the head, on hearing this, A2 beat and PW2 ward off that beat which resulted in injury

on the left finger. A3 took a mobile phone from the front room. The other accused present outside the house aided A1 to A3 for committing the offence. Subsequently, Pallikkathodu police arrested A1 to 3 and PW2 identified them at the Police Station and identified A4 from Kanjirappilly Police Station, he also identified Mo1 mobile phone. Analysing the oral evidence of PW1 and PW2, it is clear that they sustained injury on the date of the incident and they deposed from their direct knowledge. Even though these witnesses were cross examined by the defence counsel, nothing has been brought out to discredit their direct oral testimony.

9. The medical evidence is corroborating the oral evidence of PW1. According to PW3, he examined PW1 Raghavan, aged 85 years at Taluk Hospital, Kanjirappilly on

12.5.2008 at 2 am and issued Ext.P2 certificate. He noticed contusion in nose, lacerated wound 2 X 5 cm on the centre of the forehead sutured. The alleged cause of the injury was that three persons trespassed into the house and assaulted with an iron rod. MO2 weapon was also shown to the witness. He opined that the injuries found in Ext.P2 could be caused by MO2 weapon. In cross examination, he admitted that there was severe bleeding at the time of examination. Therefore, he could not assess the depth of the injury. The defence counsel asked a suggestive question whether the injury could be possible due to contact with wall, but PW3 categorically negated that suggestion and stated that a contusion is only possible due to the contact with wall.

10. The statement of PW1 was recorded by PW10,

the ASI, Pallikkathodu police station, on 12.5.2008 at 8.30 a.m. at the Taluk Hospital, Kanjirappilly. Ext.P1(a) is the body note. On the basis of Ext.P1, Sub Inspector registered crime No.120 of 2008 of Pallikkathodu police station under Section 457, 394 IPC and Ext.P12 is the FIR. He arrived at the place of occurrence and prepared Ext.P3 scene mahazar and recovered MO2 iron bar from the house of PW2. The independent witness PW4 supported the recovery of MO2 at the time of preparing scene mahazar. With the help of cyber cell, PW11 collected the details of the stolen mobile phone, MO1 and recovered the same by Ext.P9 seizure mahazar from the first accused. PW8 was a witness to Ext.P9 seizure mahazar. The disclosure portion was marked as Ext.P15. The disclosure portion made by A4 was marked as Ext.P16 and after

identifying the name and address of the other accused he filed Ext.P7 report. PW5 attested Ext.P4 mahazar prepared for the seizure of Ext.P5 bill of mobile phone. PW6 attested Ext.P6 mahazar, which was prepared for the seizure of Ext.P7 telephone bill. The Village Officer, Vazhoor PW7 prepared Ext.P8 site plan. PW9 detected the mobile phone with the help of BSNL. A1 and A4 were arrested from Ponkunnam on 31.5.2008 at 7.30 pm by PW11. After realising the involvement of A2, he filed Ext.P8 report and he arrested him on 17.6.2008. Ext.P19 is the report and Ext.P20 is the report identifying the name and address of the second accused. Ext.P21 is the disclosure portion made by A2. PW12 C.I of Police, Ponkunnam arrested A3 and after completing investigation, PW12 laid charge before court.

11. Appellants contended that failure to conduct a Test Identification Parade creates a doubt in the identity of the accused with regard to their participation in the crime. They relied on the decision in State (Delhi Administration) v. V.C. Shukla and another [AIR 1980 SC 1382], in which it is held that "a witness who could go to extent of making intentionally false statement cannot be relied upon for the purpose of convicting the accused." . They relied another decision in Ravi @ Ravichandran v. State rep.by Inspector of Police [AIR 2007 SC 1729], in which Apex Court held that "It is no doubt true that the substantive evidence of identification of an accused is the one made in the Court. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a First Information Report has been

lodged against unknown persons, a test identification parade in terms of Section 9 is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. Such test identification parade is required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the concerned witnesses or with reference to the photographs published in the newspaper." They also relied another decision in Sheo Shankar Singh v. State of Jharkhand and another [(2011) 3 SCC 654] wherein it was held as follows:

"51.The omission of the investigating agency to associate Apurba Ghosh (PW16) with the test identification parade in which Abdul Kudus Ansari (PW1) identified Umesh Singh will not ipso jure prove fatal to the case of the prosecution, although the investigating agency

could and indeed ought to have associated the said witness also with the test identification parade especially when the witness had not claimed familiarity with the appellant-Umesh Singh before the incident.

Here, PW1 identified A1 to A3 and PW2 identified A1 to A4 at the time and place of occurrence. After that PW1 identified A1 and A2 and PW2 identified A1 to 4 at the Police Station. If that be the position, that identification made by PW1 and PW2 is sufficient to identify A1 to A4 and failure of Test Identification Parade will not affect their credibility. But one person, who was present at the time of commission of offence, aided the accused, but was not arrested, which shows that five persons were present at the place of occurrence.

12. The facts which establish the identity of an accused are relevant according to S.9 of the Indian

Evidence Act. The statement made by a witness in Court is considered as the substantive evidence. The evidence of identification of the accused at the trial for the first time in Court is inherently a weak evidence. Therefore, the purpose of identification is to test the trustworthiness of the evidence. In this case, PW1 and PW2 identified A1 to A4 at the Police Station and in the Court.

13. As stated above, it is well settled that the evidence of identification in court is the substantive evidence and the test identification parade, if required, provides corroboration to the identification of the witness in court. However, what weight must be given to the evidence of identification in court, which is not followed by a test identification parade, is a matter for the courts of

fact to examine. In the instant case, the court below has found the evidence of PW1 and PW2 to be reliable and, therefore, there was no need for further corroboration, since their evidence in court is found to be implicitly reliable.

I find no error in the reasoning of the courts below. The crime occurred inside the room where there was electric light. PW1 and PW2 had sufficient opportunity to observe the features of the appellants who had not covered their face with mask. The appellants threatened, intimidated and assaulted PW1 and PW2 and this is not a case where the identifying witness had only a glimpse of the appellants in the darkness. They had a reason to remember their faces as they had committed a serious offence and put them in fear. They had, therefore, abundant opportunity to notice their faces. The faces of the

appellants must have got imprinted in their memory, and there was no chance of them making a mistake about their identity. In these circumstances, if the court below rightly held that the identification of the appellants by PW1 and PW2 in court does not require further corroboration, I find no reason to interfere with the finding recorded by the court below.

14. A Full Bench of the Apex Court explained the importance of test identification parade of the accused and the impact of it's absence. In Malkhansingh and others v. State of M.P. [2003(5) SCC 746], the Apex Court considered the evidenciary value of the identification in Court by the witness and held as follows:

"7. It is trite to say that the substantive evidence is the evidence of identification in

court. Apart from the clear provisions of section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when for example the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of

identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Administration (AIR 1958 SC 350); Vaikuntam Chandrappa and Others v. State of Andhra Pradesh (AIR 1960 SC 1340) ; Budhsen and Another v. State of U.P. (AIR 1970 SC 1321) and Rameshwar Singh v. State of Jammu and Kashmir (AIR 1972 SC 283)

It is true that identification parade is usually conducted during the investigation and there is no provision in the Code of Criminal Procedure to make such identification parade as a right of the accused. Therefore, the test identification parade provides a corroboration to the identification by the witness in the Court. In the circumstances, a separate test identification parade is not required for further corroboration, which was clarified by the trial Court and I do not find any illegality in that

finding. The trial Court considered those legal aspects and convicted the appellants. I do not find any illegality in the conviction of the appellants under Section 395, 457 IPC.

15. However, the learned counsel for the appellants submitted that PW1 sustained only minor injuries and the sentence imposed by the trial Court is disproportionate to the alleged offence committed by the appellants. Therefore, the appellants may be given an opportunity to reform themselves. The question of sentence is a complex problem, which needs a working compromise between the nature of the offence and considering the principle of reformatory, deterrent and distributive theories of punishment. In Sahilesh Jasavant Bhai v. State of Gujarat [2006(2) SCC 359] it was held that "proportion between

crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentence." Therefore, several factors have to be considered while determining appropriate sentence. Apex Court in Ramnarain v. State of U.P. [1973 SCC (Crl) 752] held that "the sentence to be appropriate should, therefore, be neither too harsh nor too lenient." Therefore, considering the magnitude of the offence and the circumstances in which it was committed and the age and character of the offenders, the sentence is modified as follows:

i) Appellants are sentenced to undergo imprisonment for five years u/s.457 IPC and to pay a fine of ₹10,000/- each, in default of payment of fine imprisonment for 6 months each.

ii) The appellants are also sentenced to imprisonment for seven years u/s.395 IPC and to pay fine of ₹5,000/- each, in default of payment of fine, imprisonment for three months.

iii) The sentence shall run concurrently.

iv) The period of detention undergone by the appellants during investigation, inquiry and trial shall be set off against the terms of imprisonment imposed.

The Crl.Appeals are partly allowed.

P.D. RAJAN, JUDGE.

acd