

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 28TH DAY OF JULY 2015/6TH SRAVANA, 1937

CRL.A.No. 2124 of 2009 ()

**AGAINST THE JUDGMENT IN SC 194/2008 of ADDL.SESIONS COURT (ADHOC)-II,
KOTTAYAM**

APPELLANT(S):

1. **KARUPPAYYA, AGED 34 YEARS,
S/O. MARIYAPPAN,
VERNNIMALATHOPPU (SUBRACHI NAGAR),
COLONY, NEAR PARAMASIVAM KOVIL,
BODHINACKANNOOR VILLAGE,
THENI, TAMIL NADU.**
2. **PALANI VELU, AGED 26 YEARS,
S/O.SURULIYAPPAN,
DOOR NO.295, KIZHAKKU THERUVU,
BODHI TALUK, THAMAPALAYAM,
THENI DISTRICT, TAMIL NADU.**

BY ADV. SRI.BLAZE K. JOSE

RESPONDENT(S):

**THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. Appeal No.2124 of 2009

Dated this the 28th day of July, 2015

JUDGMENT

The appellants, who are the accused in S.C.194/2008 of the Additional Sessions Judge (Adhoc-II), Kottayam challenge the judgment of conviction and sentence under Section 457, 461, 397 r/w 34 of IPC. They were convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/- each under Section 457 IPC. They were also sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.1000/- each under Section 461 IPC and rigorous imprisonment for 10 years each under Section 397 IPC.

2. The facts necessary for indictment were that on 25.10.2007 at 1 O' clock in the night, accused committed house breaking by night and trespassed into the Karippapparambil house, No.IX/391A of Kanjirappally Gramma Panchayat, A3 broken the kitchen door with spade handle, A1 to A3 entered into the house through work area, A2 waived chopper towards PW1, when she

ward off that, she sustained injury to her right thumb. Thereafter, he forcibly took her to the room and snatched a gold chain, 3 gold bangles, one gold ring, one pair ear ring and 6 pairs of ear rings and committed robbery of properties worth Rs.75,550/- and thereby committed the offence. In this incident, Kanjirappally Police registered Crime 28/08 and after investigation laid charge before Judicial First Class Magistrate-1, Kanjirappally, from there the case was committed to Sessions Court, Kottayam. To prove the offence, prosecution examined PW1 to 8 and marked Ext.P1 to P10 as documentary evidence and MO1 (chopper) was admitted as material object. The trial court convicted the accused. In this circumstance, A1 and A2 approached this court with this appeal.

3. After filing this appeal, there was no representation from the side of the counsel for the appellant. In this circumstance, legal aid was given to the appellant and Adv, Blaze K. Jose was appointed as the counsel for the appellants.

4. The learned counsel for the appellants contended

that there is no recovery of the gold ornaments from the possession of the appellants. The use of MO1 chopper was not proved this case, but the evidence of PW1 and PW8 are inconsistent. The oral evidence of PW1 shows that the weapon was produced before Police Station and the evidence of PW8 shows that it was seized from the house. When there is no consistent version with regard to the recovery of MO1, appellants are entitled to get the benefit of doubt on that ground.

5. In the light of the above arguments, I have perused the oral testimony of PW1, who is the injured in this case. In order to attract the offence under Section 397 IPC, prosecution has to prove that, the offender used any deadly weapon, or cause grievous hurt to any person, or attempts to cause death or grievous hurt to any person. To bring home the alleged offence, prosecution has to prove the aforesaid ingredients in this case. The evidence of PW1 shows that on 25.10.2007, at 1.00 am, she heard a sound and woke up, at that time, she found the door from dining room to the kitchen was opened, the door from

work area and the door from there to outside were found opened. At that time, two persons came near her with weapons and A2 waved a chopper towards her and she ward off that waving, she sustained injury on her right thumb, she cried loudly, hearing her cry, PW3 came there. A1 detained PW1 and PW3, thereafter, he demanded her ornaments and she gave gold chain of 3 sovereigns, 3 gold bangles of one sovereign each, one ring of one sovereign and one pair of ear rings of half sovereign. Again they took them to the next room, A2 opened the almirah, stolen 6 pairs of ear studs of two sovereigns worth Rs.5,150/- and he entrusted those money and ornaments to another person waiting near the window. She sustained a loss of Rs.75,000/-. On the next day she gave Ext.P1 statement to the Kanjirappally Police, after 6 months, she identified A2 and A3 at the Kanjirappally police and after few days she identified A1 at the same police station. She identified MO1 weapon also. While cross examination, she admitted that she did not disclose about the chopper and about the stick to the police when

she gave Ext.P1 statement. Even though, she was cross-examined, nothing has been brought out to discredit her evidence. PW3, her son also supported the evidence of PW1. Analysing the oral testimony of these two witnesses and it is found that appellants trespassed into the house of PW1, they used weapon while committing the aforesaid activities.

6. The medical evidence is supporting the evidence of PW1. The evidence of the Doctor PW2 shows that he examined PW1 on 25.10.2007 at Taluk Hospital Kanjirappally and issued Ext.P2 wound certificate in which he noticed incised wound 1.5x.5cm over the base of Palmar aspect of right thump. Secondly, Linear abrasion 1 cm. long over palmar aspect of right middle finger proximal phalanx and thirdly, Abrasion 0.5cmx0.5cm over right forearm lower 1/3rd part. The alleged cause of injury was stated by PW1 at the time of her admission. The injuries could be possible with contact with MO1 weapon while defending the attack with sharp weapon and the medical evidence is corroborating the evidence of PW1.

The learned counsel appearing for the appellant contended that three injuries could not be possible with a single attack. Therefore, it may be possible due to a scuffle in some other event. Even though, such a suggestive question was asked, earlier scuffle and scuffle connected incident was not asked to PW1. Therefore, I discard that defence contention.

7. On the basis of Ext.P1 information, PW7 registered crime 419/2007 of Kanjirappally Police Station and Ext.P7 is the FIR. On 31.05.98 at 6 pm, Sub Inspector of Pallikkathode Police Station arrested A2 and A3 in connection with Crime 120/2008 of Pallickathode Police Station. During interrogation, he admitted that he committed offence in this case and Ext.P5 is the true extract of the confession. Since the place of occurrence was within the jurisdiction of Kanjirappally Police Station he sent Ext.P5 extract to the Kanjirapally police. Subsequently, A2 and A3 were also arrested in crime 419/2007 and PW1 identified them. PW6 the Sub Inspector of Police, Kanjirapally informed the matter to PW8 and on

17.06.2008 at 3.40 am, PW6 arrested the first accused from Vagamon. He identified A1 in the police station. PW8 arrived at the place of occurrence prepared Ext.P3 mahazar. MO1 weapon was seized from there after preparing Ext.P4 mahazar. He filed Ext.P8 and P9 report regarding the name and address of the accused. After completing investigation, he laid charge before court.

8. It is pertinent to note that, no recovery was effected by the investigating officer on the basis of information given by PW1. The learned counsel appearing for the appellant disputed that since the place of recovery was not specifically mentioned by the investigating officer, it is presumed that actually the weapon was produced before the Police Station. It is clear from the oral testimony of PW1 that she entrusted the weapon to the police. PW8 at the time of preparing Ext.P4 seizure mahazar, recorded that PW1 produced the weapon at the place of occurrence when he arrived at the house for preparing mahazar. It is clear from Ext.P4 that the weapon was recovered from the house of PW1 on

27.10.07 at 16.15 hours when PW1 produced that weapon before PW8. From the oral evidence of PW8, it is clear that PW1 produced MO1 before him and it was recovered as per Ext.P4. The learned counsel appearing for the appellant submitted that it was produced before police station, even though such an argument was raised by him from the oral evidence of PW8 and from the description in Ext.P4 show that the weapon was recovered from the house of PW1 at the time of preparing Ext.P4, there is no ambiguity in that recovery. PW1 sustained minor injuries which is clear from Ext.P2 wound certificate. For attracting offence under Section 397 IPC, prosecution has to prove that offender used any deadly weapon, or cause grievous hurt to any person, or attempts to cause death or grievous hurt to any person.

9. It is found that the stolen articles were not recovered. If any recovery is effected, it is a good piece of evidence, connecting the appellants with the crime. In the absence of such evidence, it is found that the appellants committed robbery by putting PW1 in fear

while attempting to carry away the properties obtained by them, caused hurt to PW1 which is an offence under Section 392 IPC. Therefore the conviction under Section 397 IPC is liable to be set aside.

10. In the result, the conviction and sentence passed under Section 397 IPC is set aside and the appellants are convicted under Section 392, 457 and 461 IPC and sentenced as follows:

(a) Appellants are sentenced to undergo imprisonment for seven years and a fine of Rs.10,000/- (Rupees ten thousand only) each under Section 392 IPC, in default of payment of fine, imprisonment for six months.

(b) They are also sentenced to undergo imprisonment for 5 years each under Section 457 IPC.

(c) They are also sentenced to imprisonment for one year each under Section 461 IPC.

(d) The sentence shall run concurrently and the period of detention if any, undergone by them during the investigation, inquiry or trial shall be set-off against the term of imprisonment.

A copy of the judgment will be sent to the
Superintendent, Viyoor Central Prison forthwith.

This appeal is partly allowed.

STK

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE