

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

TUESDAY, THE 11TH DAY OF AUGUST 2015/20TH SRAVANA, 1937

Crl.Rev.Pet.No. 157 of 2005 (D)

**AGAINST THE JUDGMENT IN CRL.A.NO.135/2002 of ADDL.SESIONS COURT, NORTH
PARAVUR DATED 25-11-2004**

**AGAINST THE JUDGMENT IN C.C.NO.967/2001 of JUDICIAL FIRST CLASS MAGISTRATE
COURT-I, ALUVA DATED 17-01-2002**

REVISION PETITIONER(S)/(APPELLANT/3RD ACCUSED):

**JINSON, AGED 26 YEARS,S/O. THOMAS,
PUTHUSSERY VEEDU, ALUVA WEST KARA,
ALUVA WEST VILLAGE, ALUVA TALUK.**

BY ADV. SRI.S.RAJEEV

RESPONDENT(S):

**STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM
(CRIME NO.442/2001 OF ALUVA POLICE STATION)**

BY PUBLIC PROSECUTOR SMT.M.G.LISHA

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 11-08-
2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

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RAJA VIJAYARAGHAVAN V, J.

Crl.R.P.No.157 of 2005

Dated this the 11th day of August, 2015

O R D E R

In this revision petition filed under section 397 read with section 401 of the Code of Criminal Procedure, the petitioner who is the 3rd accused in C.C.No.967/2001 on the file of the Judicial First Class Magistrate Court-I, Aluva for an offence under section 380 read with section 34 of the Indian Penal Code challenges the conviction entered and the sentence passed against him for the aforementioned offence.

2. The prosecution case falls in small compass :-

PW2 - the Police Constable attached to the Aluva Police Station was on duty in the Government Hospital, Aluva on 13.06.2001. After duty, he came out through the front gate of the Hospital and he chanced across an auto rickshaw parked outside the hospital compound. 3 persons were

sitting inside the auto rickshaw which included the driver. The persons who were sitting in the back were holding a bag. On questioning, they were not able to provide satisfactory answers. As directed by the officer, the bag was opened and it was revealed that it contained alloy pieces. Suspecting that the materials were stolen, the accused were arrested and the items were seized. The vehicle as well as the materials seized were taken to the police station with Ext.P1 report and Ext.P2 seizure mahazar. Thereafter, investigation was conducted by PW5, the Sub Inspector of police, Aluva Police Station. He prepared a mahazar and questioned the witnesses and submitted Ext.P5 report showing particulars of the accused. Later, final report was filed before court on completion of investigation. Accused Nos. 2 & 4 did not appear before court, case against them was split up and refiled as C.C.No.31/2002 and trial proceeded against A1 and A3.

3. The gist of the allegation in the final report is that, on 13.06.2001 at 1.p.m., the accused Nos.1 , 2 and 4 committed theft of machine parts weighing 20 Kgs from the Kathai Cotton Mills in Aluva West Village and the petitioner, who was arrayed as the 3rd accused, carried the same in his autorickshaw knowing the same to be stolen articles and thereby committed offence punishable under section 380 read with section 34 of Indian Penal Code.

4. In order to prove the case of the prosecution, PWs 1 to 5 were examined and Exts. P1 to P6 were marked. On the close of the prosecution evidence, incriminating materials arising out of the prosecution evidence were put to the accused under section 313 (1) (b) of the Code of Criminal Procedure. The accused refuted the circumstances against him and maintained that he was innocent. No defence evidence was adduced. The learned magistrate on an appreciation of the evidence let in, came to the

conclusion that the prosecution had succeeded in proving the charge as against A1 and A3 and found both of them guilty under section 380 r/w section 34 of the Indian Penal Code and convicted them accordingly. Crl.A.No.135/2002 preferred before the Court of Sessions, North Paravur was dismissed as per judgment dated 25.11.2004 confirming the conviction and sentence. The above concurrent findings are challenged in this Criminal Revision Petition.

5. I have heard the learned counsel appearing for the petitioner as well as the learned public prosecutor.

6. The learned counsel appearing for the petitioner has raised the following contentions in support of his plea for an acquittal. According to the learned counsel, the petitioner herein is an auto rickshaw driver and no materials have been produced by the prosecution at the stage of evidence to prove his complicity. The petitioner was

waiting at the pump junction with his auto rickshaw when the police had come and took him to the police station and a crime was registered. Inviting the attention of this Court to the evidence let in by the prosecution by examining PWs 1 to 5, it was submitted that there was not even a whisper in the evidence connecting the petitioner with the crime. It was pointed out that in the 313 statement of the petitioner, aspects which are not borne out from the evidence have been put to the accused which has resulted in grave prejudice. It is also pointed out that only 6 questions were put to the petitioner in his 313 statement and none of these questions incriminated the petitioner in any manner.

7. Per contra, the learned Public Prosecutor has contented that both the courts below have evaluated the evidence let in by the prosecution through PWs. 1 to 5 in a proper manner and there was no reason for interference in revision. According the learned Public Prosecutor, the

evidence let in by PW2 - the Police Constable and PW5 - the Sub Inspector of Police revealed in unmistakable terms the complicity of the petitioner.

8. I have evaluated the contentions raised by the learned counsel for the petitioner as well as the learned Public Prosecutor.

9. The prosecution seeks to bring home the charge as against the petitioner through the evidence of PWs 1 to 5.

10. PW1 is the Security attached to the Kathai Cotton Mills from where MO1 machinery parts were allegedly stolen. In his version before court, he has specifically stated that the incident of theft alleged by the prosecution had taken place in the Kathai Cotton Mills 3 days prior to him taking charge. According to him, the company was on

lock out. Nevertheless, he has identified MO1 series as the stolen articles and MO2 as the bag containing those articles. The star witness examined by the prosecution to prove the incident is PW2 - the Police Constable attached to the Aluva Police Station. The said officer had chanced across the auto rickshaw of which, the petitioner herein was the driver. The auto rickshaw was parked outside the gate of the Aluva Government Hospital at 5.15 a.m on 13.06.2001 and according to him, 3 persons including the driver were sitting in the auto rickshaw. PW2 specifically says that the petitioner was sitting in the driver's seat and Accused 1 and 2 were sitting in the back side. According to PW2, he felt some suspicion on seeing the parked auto rickshaw and when he questioned the persons found inside the auto rickshaw, they did not give him satisfactory answers. The MO2 sack containing MO1 metal pieces were found in the possession of the persons sitting on the back seat of the auto rickshaw. When the bag was opened, the pieces of

alloys were found and it was owing to the failure on the part of the persons sitting inside the auto rickshaw to provide satisfactory answers that they were arrested and taken to the Aluva Police Station. The learned counsel for the petitioner has highlighted the aspect that the said witness who had detected the offence had specifically stated before court that the petitioner was sitting in the driver's seat of the auto rickshaw and the 2 other persons who were found carrying the bag were sitting on the back side. This aspect was pointed out by the learned counsel for the petitioner to bring out the discrepancy in the 313 statement recorded to the effect that the petitioner was also sitting in the back seat.

11. The next witness who was examined by the prosecution is PW3, but, he turned hostile to the prosecution and did not support the prosecution version.

12. PW5 is the Sub Inspector of Police who conducted the investigation and he is the person who arrested the 4th accused. He took over investigation on 13.06.2001 itself. According to him, he went to the scene of occurrence and prepared Ext.P4 scene mahazar. After investigation, he submitted a report incorporating section 380 r/w section 34 of the Indian Penal Code. In cross examination, PW5 has stated that he did not check any of the records kept inside the Kathai Cotton Mills. According to him, the Mill was in a locked out condition and there were only security personnel stationed there. The stolen articles were seen and identified by the security personnel. He also stated in cross examination that he had not received any complaint from the company personnel about the theft that was committed from inside the company premises. During cross examination he has admitted that he had not conducted any investigation with regard to the place where the petitioner had parked his auto rickshaw on the relevant

date. Though he stated that he had questioned certain auto rickshaw drivers of the local area, he has not recorded their statement.

13. The learned magistrate, on an evaluation of the evidence, came to the conclusion that the accused Nos.1 to 3 who were found sitting inside the auto rickshaw, when they were intercepted by PW2, were found in possession of MO1 articles and as they were not able to explain its possession, the legal presumption under section 114(a) of the Indian Evidence Act will apply. The learned magistrate has also held that the evidence tendered by the prosecution would reveal that they had succeeded in proving that MOs 1 & 2 were seized from the possession of accused Nos. 1 to 3. It was on its basis that it was held that the prosecution has succeeded in proving the case against the accused Nos. 1 & 3.

14. I have anxiously considered the evidence tendered

in view of the contention raised by the learned counsel that it was a case of no evidence in so far as the petitioner was concerned. I have also perused the 313 statement of the petitioner to ascertain whether any illegality has been committed while seeking for explanation from the accused with regard to the incriminating materials arising from the prosecution evidence.

15. After going through the evidence in detail, the role of the petitioner in so far as the incident in question is concerned is subtly different. Admittedly, he is an auto rickshaw driver and from his version in the 313 statement and the tenor of cross examination, his auto rickshaw was parked near to the petrol pump. When PW2 entertained suspicion, the petitioner was sitting in the driver's seat and accused No 1 and 2 were sitting on the back seat with MO2 bag containing MO1 alloys. Though the petitioner had given an explanation with regard to his presence in the area, it

was not accepted by the courts below. The evidence let in by the prosecution through PWs 2 & 5 if accepted in its entirety would only reveal that MO1 series alloys were seized from the possession of accused Nos.1 & 2 on the relevant day and that the petitioner was sitting in the front seat of the auto rickshaw as he was the driver. No further evidence was let in by the prosecution to show that the petitioner was in conscious possession or that he had a part to play along with the other accused in the theft of MO1 series alloys.

16. In a case of this nature when the allegation is that the petitioner being the driver of an autorikshaw had actively assisted the persons who had committed the theft in transporting the items, it is for the prosecution to prove prima facie that the petitioner was having a culpable mental state. No such evidence is seen let in by the prosecution other than asserting in evidence that the petitioner was

found sitting in the front seat of the autorikshaw. Further more, an in depth perusal of the evidence also does not reveal that the prosecution has a case that the petitioner was having constructive possession of the stolen articles.

17. In **Jawar Arjan v. State of Gujarat [AIR 1979 SC 1500]** , the appellant, who was an autorikshaw driver was proceeded against for having carried illicit liquor. Both the Courts below concluded that the accused had conscious knowledge of the fact that the articles contained illicit liquor. This was on the inference of the police which was inadmissible in evidence and could not have been made against the accused. It was held that the autorickshaw driver cannot be imputed with knowledge of the possession of the articles merely because the passenger put those articles in the dicky of that rickshaw. In the same manner, in the instant case, the prosecution has no case that the petitioner was aware of the fact that the closed bag held by

accused No 1 and 2 contained stolen articles and that he had the requisite culpable mental element while he had transported the accused in his vehicle.

18. Another very pertinent aspect was pointed out by the learned counsel, Shri. Dheerendra Krishnan, who appears for the petitioner. According to the learned counsel, the charge against the petitioner is that he had assisted the accused Nos.1 , 2 and 4 in transporting the stolen articles . According to the learned counsel, while being examined under S.313 of the Code, no question was put to the petitioner, with respect to conscious possession of the stolen articles. The evidence of the prosecution would only reveal that the petitioner was sitting in the front seat and the accused Nos.1 & 2 were sitting in the back side holding MO2 sack containing MO1 alloys. But, question No.2 put by the learned trial magistrate in the 313 statement to the petitioner is as follows:

On 12.06.2001 at 9 p.m., while the prosecution witness No.2 had come out from the Government Hospital after completing his duty at 5.15 a.m., and when he reached in front of the hospital, he had seen auto rickshaw bearing Reg.No.K.L.7/R/2650 and you were found sitting in the back side with a sack and there was no one in the driver's seat and when the officer had put question with regard to the sack, no satisfactory answers were given by you. Thereafter, you were arrested and the items were seized and Ext.P1 report and Ext.P2 mahazar was prepared and submitted before the superior officer. This was duly denied by the petitioner.

19. In other words, the petitioner has not been questioned with respect to his conscious possession or with regard to the culpable mental state under S.313 of the code of Criminal Procedure. Instead, he was questioned with respect to materials and circumstances which did not arise

from the prosecution evidence. Ext.P1 report and the evidence of PW2 would only reveal that the petitioner was sitting in the driver's seat and that accused Nos.1 & 2 were sitting in the back seat holding the MO2 sack. It is thus apparent that the question put by the learned trial magistrate to the petitioner while being examined under S.313 of the Code is not borne out from the evidence let in. Only 6 questions have been put by the learned magistrate to the accused and none of those questions are of incriminating nature. Examination of the accused under S.313 (1) (b) is not an empty formality and I am of the considered view that it was incumbent to put on specific terms as regards his culpable mental state and as regards his conscious possession of the stolen article.

20. In the case of **Asraf Ali Vs. State of Assam, [(2008) 16 SCC 328]**, the Apex Court has held thus :-

"21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to

the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudice.

22. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in S. Harnam Singh vs. State (Delhi Admn.) (1976) 2 SCC 819 while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

21. An analysis of the evidence reveals that there was total lack of evidence in so far as the petitioner is concerned

and no investigation was conducted by PW5, the investigating officer to connect the petitioner, who apparently is an auto rickshaw driver. Though it will be difficult to obtain evidence with regard to the complicity of the petitioner, the investigating officer was bound to ascertain whether the petitioner had in fact a role to play in transporting the stolen items. Though the presence of the petitioner outside the hospital in the early hours of morning will raise suspicion, the same cannot take the place of proof. In view of the above, I am of the considered view that the evidence let in by the prosecution cannot be said to be conclusive enough to convict the petitioner.

22. I have perused the judgment rendered by the courts below and these aspects of the matter is not seen adverted to in the Judgments rendered by the courts below. The trial court has held that MO1 was found in the possession of the petitioner as well. It was on its basis the

courts below have concluded that the presumption under s 114 illustration (a) would operate against the petitioner . It is by now settled that the inference under 114 illustration (a) should never be reached unless from the circumstances of a given case, the necessary inference is that of the guilt of the accused. From the facts of the instant case, the guilt of the accused cannot be said to be established by the prosecution.

23. Though ordinarily this court keeps away from re-appreciating the evidence while exercising revisional jurisdiction, when glaring defects and manifest error on a point of law is pointed out which would result in flagrant miscarriage of justice, this court cannot but interfere and upset the concurrent findings. I am of the considered view that the conviction and sentence passed against the petitioner cannot be sustained under law.

The Revision Petition shall stand allowed. The conviction and sentence passed against the petitioner is set aside. The petitioner is set at liberty.

Sd/-

**RAJA VIJAYARAGHAVAN V,
JUDGE.**

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[True copy]

P.A to Judge