IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 28TH DAY OF FEBRUARY 2023 / 9TH PHALGUNA, 1944

CRL.A NO. 690 OF 2020

AGAINST CP 74/2015 OF JUDICIAL MAGISTRATE OF FIRST CLASS, ADIMALI

SC 64/2016 OF ADDITIONAL SESSIONS COURT-III, THODUPUZHA

APPELLANT/ACCUSED:

SABU @ EETTY SABU
AGED 48 YEARS, S/O.JOSEPH,
PALAKKATHADATHIL HOUSE,
IRUMPUPALAM KARA, PADIKKAPPU BHAGOM,
MANNAMKANDAM VILLAGE,
IDUKKI DISTRICT.

BY ADVS.
SRI.P.MOHAMED SABAH
SRI.LIBIN STANLEY
SMT.SAIPOOJA

RESPONDENT/STATE & COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM-682 031.

BY SRI.C.N.PRABHAKARAN, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17.02.2023, THE COURT ON 28.02.2023 DELIVERED THE FOLLOWING:

"C.R."

BECHU KURIAN THOMAS

Crl.A. No.690 of 2020

Dated this the 28th day of February, 2023

JUDGMENT

When an attempt to commit theft is prevented by a witness who gets injured in the process, will the offence of robbery lie? Can the identification of the accused in court after four years of the incident be relied upon in the absence of a test identification parade? These questions have been raised for consideration by Adv.Saipooja in this appeal challenging the conviction and sentence of the appellant for the offences under sections 394 and 450 of the Indian Penal Code, 1860 (for short 'IPC').

2. Prosecution alleges that on 10.09.2015 at about 01.00 am, the accused intruded into the house of PW1 after breaking open the window grills with the intention to commit theft and in the said process, voluntarily caused hurt to PW1 and his wife and daughter by using a deadly weapon and thereby committed the offences alleged.

3. The crime was registered based on the statement given by PW1. The three main witnesses i.e., PW1 to PW3, were not only eyewitnesses but had also been injured in the alleged attempt of the accused to commit theft. After attacking and seriously injuring the three inmates of the house,

the accused escaped. However, within hours, he was apprehended by the police. To prove its case, the prosecution examined PW1 to PW9 and marked exhibits P1 to P11, apart from material objects MO1 to MO5. Though the defence did not adduce any evidence, exhibits D1 and D2 were marked.

4. After analysing the prosecution case, the learned Sessions Judge found the accused guilty and sentenced him to undergo imprisonment for 10 years under section 394 IPC and imprisonment for 5 years under section 450 IPC, apart from fine of Rs.25,000/- each, under both the above sections.

5. Adverting to the questions mentioned at the beginning of this judgment, Adv.Saipooja, vehemently contended that without any previous acquaintance with the accused, a test identification parade was essential and without such a procedure, the identification in court, that too, after a lapse of four years, is not reliable. The learned counsel also argued that the statement that led to the recovery of the knife was inadmissible under section 27 of the Indian Evidence Act, 1872 since the place where the alleged knife was concealed was easily accessible to the public apart from there being nothing to connect the weapon with the crime. The learned counsel further argued that the offence under section 394 IPC is not attracted since there was no evidence of any actual theft or even any attempt to commit theft.

6. Controverting the contentions, Sri. C.N.Prabhakaran, the learned Public Prosecutor argued that evidence of PWs 1 to 3 is very categoric, and their identification of the accused leaves no room for any doubt. It was also contended that the requirement of a test identification parade is not an inviolable rule and that what is material is the identification of the accused in court, which alone is the substantive evidence. Learned Public Prosecutor also contended that the statement that led to the recovery of the knife was admissible, and therefore there was nothing to disbelieve the said evidence.

7. I have considered the rival contentions and have also carefully perused the evidence that the learned counsel for the appellant took me through in detail.

8. PW1 to PW3 are the eyewitnesses and the injured. PW1 and PW2 have, in unmistakable terms, deposed that on noticing the presence of a stranger inside their bedroom at night, PW2 switched on the lights and both saw the accused under the said light. It has further come out in evidence that when PW1 caught hold of the accused, he was attacked and serious injuries were inflicted on him and when PW2 intervened, the accused turned his ire against her and she was also seriously wounded. PW3 mentions in her evidence that hearing the hue and cry of her parents, she came out of her room and saw the accused assaulting her parents and in a bid to flee the scene, the accused did not spare her from the

attack and she too suffered injuries.

9. PW1 to PW3 had unhesitatingly identified the accused in court. All three of them, in emphatic terms, identified the accused and stated that he was the one who had criminally trespassed into their house and attempted to commit theft and also inflicted serious injuries on them. PW1 had given identifying features of the accused while giving his first information statement. On the next day of the incident itself, the accused was arrested and brought in front of PW1, who identified him while at the hospital. Therefore, I find no reason to disbelieve the deposition of PW1 to PW3.

10. The identification of an accused in the witness box is the substantive evidence. The acceptability of such an identification depends upon the trustworthiness and reliability of the evidence of the witnesses. If the testimony of the eyewitness relating to the identity of the accused inspires confidence in the mind of the court, the absence of a test identification parade by itself will not denigrate the identification of the accused in court. The object of a test identification parade is to test and ascertain the trustworthiness of the evidence regarding the identification of the accused. Test identification parade is only a rule of prudence. It is intended to be a measure of corroboration of the identification of the accused by the witnesses in court, especially when the accused are strangers. However, if the ocular evidence and the identification of the

accused by the witnesses in court are impressive, nothing restricts the court from relying upon the said identification, as recognising the accused in court is the substantive evidence, while test identification parade is not an evidence of that character. As held by the Supreme Court in **Dana Yadav alias Dahu and Others v. State of Bihar** [(2002) 7 SCC 295], the previous identification in a test identification parade is a check valve to the evidence of identification in a court of an accused by a witness and it is only a rule of prudence and not law. Reference to the decision in **State of H.P. v. Lekh Raj and Another** [(2000) 1 SCC 247] is also appropriate in this context.

11. In the decision referred to by the learned counsel for the appellant in **Raju alias Rajendra v. State of Maharashtra** [(1998) 1 SCC 169], the identification of one of the accused in court was not accepted in the absence of a test identification parade. However, in the said decision, the said witnesses had never mentioned to any person earlier that they had either seen the incident or the accused. There is a factual distinction with the present case, especially since the injured witnesses who had occasion to see the accused at close quarters, had identified the accused. In the decision in **Rameshwar Singh v. State of Jammu and Kashmir** [(1971) 2 SCC 715], the Supreme Court had observed that the identification during police investigation is not substantive evidence in law

and it can only be used for corroborating or contradicting evidence of the witnesses concerned as given in court and that the identification procedure must be conducted so that evidence concerning them, when given at the trial, enables the court to safely form an appropriate judicial opinion about its evidentiary value to corroborate or contradict the statement in the court of the identifying witness. The said decision though observes the importance of a test identification parade, it is mentioned that ultimately the procedure is required to enable the court to form a safe opinion.

12. In the instant case, the evidence of PW1 to PW3 identifying the accused in court is inspiring and totally reliable for four reasons; (a) PW1 had identified the accused on the next day of the incident itself, (b) All three witnesses had occasion to see the accused at close quarters that too under the lights (c) PW1 even caught hold of the accused in front of PW2, and (d) one of the witnesses had given identifying features of the accused to the police while giving the First Information Statement. In view of the above discussion, this Court is of the view that the absence of a test identification parade does not erode the reliability of the identification of the accused by the witnesses in this case.

13. The knife allegedly used by the accused for inflicting injuries on PW1 to PW3 was recovered based on the statement given by the

accused, which is marked as Ext.P2(a). The accused had given a statement that the knife was hidden beneath a vegetable plant where he sat and that if taken there, he would identify the spot. Based on the aforesaid statement, the knife was recovered from the private property of one Nellikunnel Jose.

14. Evidence in the form of Ext.P2 and Ext.P2(a) and that of PW8 reveals that the knife was recovered from a private property. Further, on a reading of the cross-examination of PW8, the Investigating Officer, it is evident that the accused had not seriously disputed the recovery of the knife or the statement of the accused, which led to the recovery. Except for a vague question that no such statement was given, no serious dispute was raised on the statement that led to the recovery of the knife.

15. Even though Adv.Saipooja relied upon the decision in **Subramanya v. State of Karnataka** (AIR 2022 SC 5110) to contend that the statement that led to the recovery is not admissible since the manner in which the statement was recorded is not in compliance with law, I am afraid I cannot accept the said contention. In the said decision, the basic infirmity noted by the Supreme Court was that none of the prosecution witnesses had deposed the exact statement said to have been made by the appellant which led to the discovery of a fact relevant under section 27 of the Evidence Act. In such a circumstance the court came to the

conclusion that evidence was deficient in respect of the statement that led to the recovery of the weapon of offence. However, in the present case, Ext.P2(a) is the document where the statement of the accused that led to the recovery of the weapon of offence was taken down and the same was specifically deposed to by the investigating officer when he was examined as PW8. Further, no questions were put to the witness regarding the procedure of taking down the statement that led to the recovery of the knife. In the above circumstances, the contention of the learned counsel for the appellant regarding the inadmissibility of the statement that led to the recovery of the knife is untenable.

16. It is true, as canvased by the learned counsel for the appellant, that there is no forensic evidence adduced regarding any blood on the knife and in the absence of such evidence, the knife cannot be treated as the weapon of offence used in the crime. Though the said contention is impressive on first blush, I notice that the three witnesses, PW1, PW2 and PW3, had specifically identified the knife and as mentioned earlier, the statement that led to the recovery of the knife is also admissible. The doctor who was examined as PW9 has also deposed that the injuries can be caused with the knife produced. In such circumstances, merely because the knife was not subjected to forensic analysis is not fatal to the prosecution case.

17. The argument of Adv.Saipooja regarding inapplicability of section 394 IPC is also not legally tenable. Section 394 is the penal clause that punishes any person causing hurt while committing robbery. The section deals with voluntarily causing hurt on two occasions; (i) while committing robbery or (ii) while attempting to commit robbery. The word 'robbery' is defined in section 390. In all robbery there is either theft or extortion. Theft becomes robbery when in committing theft or in order to commit theft or while attempting to carry away property obtained by theft the accused causes death, hurt or wrongful restraint or fear of instant death, or of instant hurt or of instant wrongful restraint. Of course, theft is defined as moving property to take such a thing dishonestly out of the possession of any person. An analysis of section 378 and section 390 will reveal that when hurt is caused or injuries are inflicted in order to commit theft, that would also fall within the definition of robbery. Actual theft is not a necessary concomitant of robbery. If in order to commit theft, actual hurt is caused or a person is put to instant fear of hurt or wrongful restraint, still it amounts to robbery.

18. When for the purpose of committing theft or in the commission of theft, the accused actually causes death or hurt or wrongful restraint, the theft turns into robbery punishable under section 394 IPC. If in order to commit theft or while committing theft, the accused puts another person

only in instant fear of death or fear of hurt or fear of wrongful restraint, then the offence becomes punishable under section 392 IPC. The distinction between section 392 and section 394 thus lies on whether actual death or hurt or wrongful restraint occurred or not. As mentioned earlier, it is not essential that there should be actual taking away of property. An attempt to take away property alone is sufficient and if in that process hurt is caused or the person is put in fear of hurt it would amount to robbery and when actual hurt is inflicted, the offence falls under section 394 of the IPC.

19. In the instant case, the witness had deposed that the accused had broken the window of the house and entered inside in the middle of the night wearing only an underwear and was searching inside the house with a lighter in order to commit theft. A perusal of the evidence adduced by the prosecution clearly establishes the offence of robbery committed by the accused punishable under section 394 IPC since injuries were inflicted upon PW1 to PW3. Therefore, I am satisfied that the accused has committed the offences under section 394 as well as under section 450 IPC.

20. As regards the sentence of imprisonment imposed upon the accused, considering that injuries were inflicted upon three persons and that too one of the injuries inflicted is on the neck of PW1, I am of the view that no leniency can be shown to the accused.

21. In the above circumstances, I find no merit in this appeal. The finding of guilt of the accused and the sentence of imprisonment and fine imposed upon the accused under sections 450 and 394 of the IPC are affirmed.

The appeal fails and is dismissed.

Sd/-

BECHU KURIAN THOMAS
JUDGE

vps

APPENDIX

PETITIONER'S/S' ANNEXURES:

ANEXURE A1: **COPY OF THE MARRIAGE INVITATION CARD OF THE DAUGHTER OF THE APPELLANT**

ANNEXURE A2: **CERTIFICATE ISSUED FROM THE PRIEST OF THE CHURCH DATED 03.12.2020 SHOWING THE MARRIAGE OF THE DAUGHTER OF THE APPELLANT**