IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

TUESDAY, THE 20TH DAY OF JUNE 2023 / 30TH JYAISHTA, 1945

CRL.A NO. 99 OF 2007

[AGAINST THE JUDGMENT DATED 20.09.2006 IN S.C.NO.1179/2005 ON THE FILE OF THE ADDITIONAL DISTRICT & SESSION'S JUDGE (ADHOC), COURT-III, KOLLAM]

APPELLANTS/ACCUSED NOS.3 AND 5

1 KOCHU MANI, S/O.BALAN,
CANALPURAMBOKKE, SIVAGIRI DESOM, VARKALA VILLAGE.

2 JINU, S/O. ILABIBULLAH
KUMAR HOUSE, (A5), NEAR S.N.COLLEGE, SRINIVASAPURAM DESOM, VARKALA VILLAGE.

BY ADV.POOJA PANKAJ, AMICUS CURIAE

RESPONDENT/COMPLAINANT:

STATE OF KERALA REPRESENTED BY
THE DIRECTOR GENERAL OF PROSECUTION, HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. RANJIT GEORGE, SR.PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22.05.2023, THE COURT ON 20.6.2023 DELIVERED THE FOLLOWING:

JUDGMENT

The appellants are the accused numbers 3 and 5 in S.C.No.1179/2005 on the files of the Court of Additional Sessions Judge(Adhoc)III, Kollam. The aforesaid case arises from Crime No.96/2004 of Paravur Police Station. As per the final report submitted therein, six persons were implicated as accused persons alleging offences punishable under section 395 of the Indian Penal Code (IPC).

2. The prosecution case is as follows:

On 10.3.2004 at about 1.30 p.m. accused persons came in an autorickshaw bearing registration No. KL01 J 3930, driven by the 5th accused near the house of CW1 taking building No.13/134 of Paravur Municipality. Thereafter, accused Nos.1,3,4 and 6 trespassed into the residence of CW1 after breaking open the door at the eastern side and keeping the 2nd and 5th

accused outside the house to guard them. Thereafter, they committed theft of 44 sovereigns of gold ornaments and currency note worth Rs.1,000/- kept locked in a suitcase on the table placed in the bedroom, including two sovereigns of gold bangles and three sovereigns of gold chain with locket kept inside the almirah in the dining room thereby committed theft of gold ornaments and currency notes worth Rs.1,55,000/-. The investigation was conducted by the Sub Inspector of Police, Paravur and the final report was submitted before the Judicial First Class Magistrate Court, Paravur, where it was taken into file as C.P.No.58/2005. Later, the matter was committed to the Sessions Court, Kollam, and the same was made over to the Additional Sessions Court (Adhoc)III, Kollam, where it was tried as S.C.No.1179/2005. Even though the offence

alleged against the accused persons in the final report was under section 395 IPC, the learned Sessions Judge framed the charge against the accused persons for the offences punishable under Sections 380,454 and 461 r/w. Section 34 of the IPC.

3. In support of the prosecution case, PWs.1 to 15 were examined, Exhibits P1 to P23 were marked, and material objects 1 to 4 were identified. After completion of the prosecution evidence, the accused persons were examined by the court under section 313 of the Code of Criminal Procedure Code (Cr.PC) and incriminating materials brought out during the trial were put to them. All of them denied the same and pleaded not guilty.

4. After appreciating the materials placed on record, the learned Sessions Judge arrived at the finding that the appellants herein, who

are accused Nos.3 and 5, are guilty of the offences, whereas the other accused were found not guilty. Consequently, the appellants herein were sentenced to undergo simple imprisonment for four years under section 380 of the IPC and two years under section 454 and 1 year under section 461 r/w section 34 of the IPC. This appeal is submitted in such circumstances challenging the aforesaid conviction and sentence.

5. The learned counsel for the appellants has relinquished the vakkalath; consequently, notices were issued to the appellants. However, service of notice to the 1st appellant was not returned after service of notice, whereas notice to the 2nd appellant returned unserved with a postal endorsement 'not known'. In such circumstances, as per the order dated 25.11.2021, this Court appointed Advocate Pooja

Pankaj as Amicus Curiae to assist the court in considering the appeal on merits. Accordingly, Advocate Pooja Pankaj placed her arguments before this Court in support of the contentions raised by the appellants. Sri.Ranjit George, Senior Public Prosecutor, appeared for the State.

6. The learned Amicus Curiae contended that the conviction and consequential sentence imposed upon the appellants are without any justifiable reasons and are liable to be interfered with. It is pointed out that the conviction was ordered by the learned Sessions Judge by merely placing reliance upon the disclosure statements allegedly made by the appellants, which led to the recovery of gold from PW2, PW4 and PW11. It is further contended by the learned Amicus Curiae that apart from the evidence of PWs.10 and 13, the police

officers who affected the respective recoveries, no other independent evidence are available. All the persons from whom the alleged recovery was affected have clearly stated that the recovery was not affected in the manner as claimed by the prosecution. Besides the same, it was also contended that the conviction is only based on the recovery effected under section 27 of the Evidence Act, and it is not at all safe to rely upon the same in the absence of any other evidence linking the article recovered with the commission of the crime. It is pointed out that, as far as the disclosure statements under section 27 of the Evidence Act are concerned, the evidentiary value of the same is confined to the knowledge of the accused as to the concealment of the object recovered and unless it is established the link between the article recovered with the

crime by adducing other evidence, no conviction could be possible. The learned Amicus Curiae places reliance upon **Pulukuri Kottaya and Ors. v. Emperor [MANU/pr/0049/1946] and Rajeesh v. State of Kerala [ILR 2022(1) Kerala 569] and Muhammed Yousaf v. State of Kerala [2022(2) KLT SN 18(C.No.16].**

7. On the other hand, the learned Public Prosecutor would oppose the aforesaid contention. It is pointed out that even though independent witnesses have turned hostile to the prosecution, the evidence of the official witnesses, such as PW10 and PW13, is sufficient to hold the appellants guilty of the offences.

8. It is further contended that the recovery affected based on the disclosure statement of the accused Nos.3 and 5 would clearly indicate the culpability of the accused herein, which was properly appreciated by the

learned Sessions Judge. In such circumstances, the dismissal of the appeal was sought.

9. I have gone through the records. On examining the materials placed before me, it can be seen that as rightly pointed out by the learned Amicus Curiae, the learned Sessions Judge arrived at the conclusion that the appellants are guilty of the offences by merely placing reliance upon the fact that the recovery of gold ingots was affected based on the disclosure statements. When coming to the factual aspects of the case, it is to be noted that the crime was registered based on the information furnished by PW1, the owner of the house from which the gold ornaments and the amount were stolen. The evidence of PW1 is in the manner as follows:

She was working as Postmistress during the relevant period, and on that day, when she came

back to her house from her office and on opening the front door of the residence, the door on the eastern side of her house found opened by breaking the iron bolt. On further examination, she could find that the gold ornaments kept in the suitcase, which was locked in an almirah in the bedroom, were found broken, and articles were taken away. Immediately, the matter was informed to the Police and Exhibit P15 FIR was registered after recording Exhibit P1 F.I. statement of PW1. On the next day, she came to know that one gold chain of three sovereigns and one gold bangle of two sovereigns kept by her in the cupboard in the dining hall were also stolen. An additional statement was also recorded by the Police.

10. When going through the evidence of PW1, it can be seen that, even though the act of

burglary was revealed from her statement, there is nothing in her deposition to connect the accused persons with the aforesaid offence. It is discernible from the materials placed on record that after registering the FIR based on the information furnished by PW1, an inspection was conducted by PW10 in the premises immediately thereupon, along with the police party, dog squad and fingerprint experts. Exhibit P3 is the mahazar prepared by PW7 after inspection of the house of PW1 and recovery of MO1 small tin box, MO2 star screw driver and MO3 key. Thereafter, even though an investigation was conducted, the Police could not find out the accused persons, and thereupon a UN report was submitted by PW10 showing the same as undetected. Thereafter, accused Nos.1 to 5 were arrested by PW13, the Sub Inspector of Police, Paravur station, at a later point of

time and during the course of interrogation, the accused made a confession statement to the effect that they committed the crime, which is the subject matter of this case. Immediately PW13, based on Ext.P17(a) disclosure statement given by the 5th accused, recovered 172 ½ grams of gold ingots from PW2, who was conducting a jewellery shop. Thereafter, accused persons were produced before the jurisdictional court, and a request for re-opening the investigation was submitted. Further investigation was conducted by the PW10 Circle Inspector of Police, and during his investigation, further recovery of gold ingots was affected. Based on Exhibit P2(a) disclosure statement made by the 3rd accused, who is the 1st appellant herein, 28 grams of gold ingots were recovered from the possession of PW4. Similarly, based on Ext.P7(a) disclosure statement made by the 5th

accused, the 2nd appellant herein, 40 gms of gold ingots were recovered from the possession of PW11. After completing the investigation, the final report was submitted, and the trial in the manner as mentioned above was conducted.

11. When coming to Exhibit P17(a) disclosure statement allegedly given by the 2nd appellant/5th accused, which led to the recovery of 172½ gms of gold ingots from PW2, the crucial evidence in this regard is the deposition of PW13. Even though PW13 deposed in tune with the prosecution case and Exhibit P17 seizure mahazar was marked through him., the two other witnesses who were examined to prove such recovery viz. PW2 and PW8 turned hostile to the prosecution. PW2 is the owner of the jewellery shop from whom the recovery of the gold ornaments was allegedly affected, as evidenced by Ext.P17. He

denied the recovery of gold ingots in the manner as contained in Ext.P17. According to him, as per the prosecution case, recovery as per Ext.P17 was affected on 9.3.2005. However, PW2 had stated that, on 8.3.2005 at 9 a.m., the Sub Inspector of Police came to his shop along with two other police officers and required him to appear before the Circle Inspector of Police. Based on the same, he, along with PW8, went to the police station. Thereupon, the C.I. of Police informed him that the theft of gold ornaments had occurred and accused persons had sold a portion of the gold stolen by them in his shop. Thus, the C.I. of the Police required PW2 to surrender the said gold. According to him, he denied the fact that he purchased the stolen articles from the 5th accused. However, according to PW2, he was detained at the police station in the evening and upon becoming fed

up, as he was denied food and water and food, he required PW8 to go to the shop and get the gold to be produced before the C.I. of Police. Accordingly, his brother's son Manaf and another staff had taken two chains, 8 bangles, 10 pairs of studs and one bracelet, melted and converted into gold ingots with 171 ½ gms. The same was handed over to Paravur Police at 9 p.m. However, the C.I. of Police insisted that 176 gms should be given, and thereupon 4½ gms of gold ingot was provided to the Circle Inspector of Police on the next morning. PW8 is the person who accompanied PW2 to the Police station when all the incidents narrated by PW2 occurred. He also stated in his deposition the sequence of events which is exactly as stated by PW2 in his testimony.

12. Exhibit P7 is the mahazar evidencing recovery of gold ingots weighing 40gms

recovered by PW10 on the basis of Ext.P7(a) disclosure statement of the 2nd appellant/5th accused. CW7 was the attestor to Ext.P7 mahazar, but the prosecution did not examine him as he was given up in view of the fact that he was in the Gulf country. The recovery, as per Ext.P7, was allegedly affected from PW11, and he denied the said recovery from him. He denied the recovery of 40 gms of gold from his possession, as evidenced by Ext.P7. According to him, as the Circle Inspector of Police required him to surrender gold which he allegedly purchased from the 5th accused, his mother made available to the police 80 gms of gold. According to him, at the relevant time, PW11 was in Pune. Similalry, 28 gms of gold ingots was allegedly recovered as per Ext.P2(a) disclosure statement made by the 3rd accused, the 1st appellant herein. The aforesaid recovery

was affected from PW4, and the said mahazar was witnessed by PW3. Both the said witnesses have turned hostile to the prosecution. PW4, from whose possession the recovery was allegedly affected, stated that he made available 28 grams of gold as the police insisted on the production of the same. He denied the recovery of the gold in the manner as narrated in Ext.P2.

13. Thus, on going through the evidence adduced by the prosecution as regards the recovery of MO1 series, which are the gold ingots weighing 172½ gms, 28 gms and 40 gms, respectively, it can be seen that the only evidence available for the prosecution is the deposition of PW10 and PW13. All the independent witnesses examined by the prosecution to prove the aforesaid recovery have not only turned hostile to the

prosecution. All of them have specifically denied that they have not purchased any articles from the accused persons and that the gold was made available by them to the police as they insisted on the production of the same. The learned counsel for the appellants places reliance upon the decision rendered by a Division Bench of this Court in **Rajeesh's** case **(supra),** wherein it was observed that it is unsafe to act upon recovery under section 27 based on the sole testimony of the investigating officer. In paragraph 29 of the said decision after referring to the precedents in this regard, it was observed by this Court in the manner as follows:

> *" 29. ……. we have to caution ourselves that the evidence in the form of recovery under Section 27 of the Evidence Act is a weapon in the armoury of the investigating agency, often misused, and such evidence can be taken stock of and relied upon only when clinching evidence is adduced as regards its requirements. We shall also remind ourselves that Section 27 is only an exception to the general rule under Section 25 of the Evidence Act and, therefore, liable to be*

> *analysed and appreciated strictly. Therefore, we repel the evidence regarding recovery of M.O.1 knife under Section 27 of the Evidence Act."*

When the factual circumstances under which the recoveries were affected in this case are considered by keeping the principles in **Rajeesh's** case **(supra)** in mind, I find some force in the contention put forward by the learned Amicus Curiae appearing for the appellants. When considering the evidence of PW10 and PW13 in the light of the depositions of PW2, PW4, PW8 and PW11, I am of the view that placing a conviction by merely relying upon the evidence of the investigating officer or the officer who affected the recovery is not at all safe. In other words, the probable conclusion that can be drawn from the appreciation of materials available on record is that there is a shadow of a doubt as to the manner in which the recovery of the MO1 series of gold ingots was affected. One of the crucial

aspects that fortify the view is that what was stolen from the residence of PW1 were gold ornaments, and what was recovered on the basis of the disclosure statements of the appellants are gold ingots. The recovery was affected after almost one year of the theft. Thus, when all these aspects are taken into consideration, I am of the view that it is not safe to rely upon the recovery alone to hold the appellants guilty of the offence.

14. There is yet another aspect which justifies the view taken by me as above. As rightly pointed out by the learned Amicus Curiae, the evidentiary value of the disclosure statements made by the accused under Section 27 of the Evidence Act and the article recovered consequent to such disclosure statement are categorically considered by the **Privy Council in Pulukuri Kottaya's** case **(supra).** The

relevant observations made in the said decision in paragraphs 10 and 11 are extracted hereunder:

> *"10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is*

required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to Section 26, added by Section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

"11. High Courts in India have generally taken the view as to the meaning of Section 27 which appeals to their Lordships, and reference may be made particularly to Sukhan v. The Crown (1929) I.L.R. 10 Lah. 283, F.B. and Ganu Chandra v. Emperor (1931) I.L.R. 56 Bom. 172, s.c. 34 Bom. L.R. 303 on which the appellants rely, and with which their Lordships are in agreement. A contrary view has, however, been taken by the Madras High Court, and the question was discussed at length in a Full Bench decision of that Court, Athappa Goundan, In re, [1937] Mad. 695, F.B. where the cases were referred to. The Court, whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under Section 27. In that case the Court had to

> *deal with a confession of murder made by a person in police custody, and the Court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag, which, according to the confession, had been used in, or were connected with, the commission of the murder, and the objects were in fact produced. The Court was impressed with the consideration that as the objects produced were not in themselves of an incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into Section 27 something which is not there, and admitting in evidence a confession barred by Section 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law."*

Thus it is evident that as far as the recovery effected based on the disclosure statement under section 27 of the Evidence Act is concerned, the admissibility thereof is confined to the knowledge of the accused as to its concealment and the objects which were recovered on the basis of such disclosure. Merely because of the reason that the material

object was recovered, it cannot be concluded that the accused are guilty of the offences alleged against them unless there are materials connecting the object so recovered with the commission of the offences. Thus, the recovery based on such disclosure statements by itself is not a ground to hold the appellants guilty of the offences unless there are other materials indicating that the article recovered was used for the commission of the crime or the same was obtained by the accused through the commission of the said crime. In this case, even if it is assumed for the sake of the argument that the MO1 series was duly recovered based on the disclosure statements given by the appellants herein, there are no other materials indicating that MO1 series were the gold stolen from the residence of PW1 and that act of stealing of the articles was done by the

appellants. In **Muhammed Yousaf's** case (supra), it has been categorically held by this Court that no inference can be drawn against the accused under Section 27 of the Evidence Act only based on the recovery of material object pursuant to the disclosure statement made by the accused to the Police Officer. It is the burden of the prosecution to establish a close link between the recovery of material objects and their use in the commission of the offence. In this case, even after scanning through the entire materials produced by the prosecution, I am unable to find any link between the material object with the commission of the crime. PW1, in her cross-examination, had clearly mentioned that the articles stolen from her residence were gold ornaments, and she further deposed that she could not say that the gold ingots recovered by the police were made by using the

gold ornaments taken away from her residence. No other evidence is forthcoming to establish the link between the material object and the commission of the crime. In such circumstances, the finding of the learned Sessions Judge holding the appellants guilty of the offences by placing reliance only upon the recovery of MO1 series of articles effected based on disclosure statements given by the said accused is not at all proper, and therefore it is liable to be interfered with. As observed above, apart from the aforesaid disclosure statement, there is nothing to connect the accused persons with the commission of the offences, and since I have found that the disclosure statements are inadequate for holding the appellants guilty, the only irresistible conclusion possible is that the prosecution miserably failed in establishing

the guilt of the accused. In such circumstances, I find merits in the contentions raised by the learned Amicus Curiae, and the findings entered by the learned Sessions Judge are not legally sustainable.

In the result, this appeal is allowed. The judgment rendered by the Court of Additional Sessions Judge (Adhoc) III, Kollam on 20.9.2006 in S.C.No.1179/2005 is hereby set aside. The appellants/accused Nos.3 and 5 are found not guilty of the offences and are acquitted of all charges accordingly. This Court is happy to acknowledge the efforts of the learned Amicus Curiae, Smt.Pooja Pankaj, in ably assisting this Court to dispose of this appeal, which were valuable and highly appreciable.

Sd/-
ZIYAD RAHMAN A.A.
JUDGE

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