IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

FRIDAY, THE 28TH DAY OF MARCH 2025 / 7TH CHAITHRA, 1947

CRL.A NO. 484 OF 2006

AGAINST THE JUDGMENT DATED 27.02.2006 IN SC NO.132 OF 2002 ON THE FILE OF THE COURT OF SESSION, KOTTAYAM.

APPELLANTS/ACCUSED 2, 3, 4 & 6:

1 BIJO, S/O.KUNJOONJUKUTTY,
THUNDIPARAMBIL VEEDU, ENNACKACHIRA BHAGOM,
MANDIRAM KAVALA, KURICHI KARA AND VILLAGE,
CHANGANACHERRY TALUK.

2 SUDHEESH @ KUTTAN, S/O.JANARDHANAN,
VALIYATHARAYIL VEEDU, PALLIKUTTUMMA KARA,
RAMANKARY VILLAGE, ALAPPUZHA DISTRICT.

3 JOHNYKUTTY, S/O.JOSEPH,
KARIMPUMTHARA VEEDU, ENNACKACHIRA BHAGOM,
KURICHI KARA & VILLAGE.

4 JOSE BHOPAL JOSE, S/O.YOHANAN,
THAKIDIYEL VEEDU, KUZHIPURAIDOM KARA,
MANARCAD VILLAGE.

BY ADV SHRI.M.V.S.NAMPOOTHIRY

RESPONDENT/COMPLAINANT:

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

BY ADV.VIPIN NARAYAN, SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26.03.2025, THE COURT ON 28.03.2025 DELIVERED THE FOLLOWING:

C.S.SUDHA, J.

Crl.Appeal No.484 of 2006

Dated this the 28th day of March 2025

J U D G M E N T

In this appeal filed under Section 374 (2) Cr.P.C., the appellants, who are accused nos.2, 3, 4 and 6 in S.C.No.132/2002 on the file of the Court of Session, Kottayam, challenge the conviction entered and sentence passed against them for the offences punishable under Sections 395, 397, 399 and 120(b) IPC.

2. The prosecution case is that the accused persons, 6 in number, entered into a conspiracy at the residence of the 6th accused (A6) bearing no.6/787, Vijayapuram panchayat to commit dacoity and robbery and in pursuance of the said conspiracy on 26/07/1997 at 10:30 p.m. waylaid PW1 and PW2 who were on their way back home after work. The accused persons arrived at the scene of occurrence in an autorickshaw bearing registration no.KL-

5/6632 and wrongfully restrained PW1 and PW2. The 1st accused (A1) restrained PW1 by catching hold of his shirt. The 5th accused (A5) held him at knife point, causing an injury on the nape of his neck and took away an amount of ₹690/- from his shirt pocket. A1 took the tiffin box and umbrella in his possession. The 2nd accused (A2), the 3rd accused (A3) and the 4th accused (A4) caught hold of PW2 and in the scuffle that ensued, the dhothi of PW2 came off, at which time the bag containing ₹15,000/- kept inside the vest of PW2 fell down. The bag was taken away by A3. A4 snatched the bag containing vegetables in the possession of PW1. Thus, as per the final report/charge sheet, the accused persons are alleged to have committed the offences punishable under Sections 395, 397 and 399 read with Section 120 (b) IPC.

3. Crime no.156/1997, Manarcadu police station, that is, Ext.P11 FIR was registered by PW14, the then Sub Inspector, based on Ext.P1 FIS of PW1. The initial investigation

was conducted by PW15, Circle Inspector, Pampadi. The investigation was thereafter taken over by PW19, Circle Inspector, Pampadi who on completion of the investigation submitted the final report/charge sheet alleging the commission of the offences punishable under the aforementioned Sections by accused persons 1 to 6.

4. A2, A3, A4 and A6 appeared before the jurisdictional magistrate. A1 and the 5th accused (A5) were reported to be absconding. Hence, the jurisdictional magistrate after complying with all the necessary formalities contemplated under Section 209 Cr.P.C. committed the case against A2, A3, A4 and A6 to the Court of Session, Kottayam. The case was taken on file as S.C.No.132/2002. Thereafter, the case was made over to the Additional Assistant Sessions Judge for trial and disposal. When A2, A3, A4 and A6 appeared before the trial court, a charge under Sections 395, 397, 399 and 120(b) IPC was framed, read over and

explained to the accused persons to which they pleaded not guilty.

5. On behalf of the prosecution, PW1 to PW19 were examined and Exts.P1 to P15 and MO.1 to MO.7 series were marked in support of the case. After the close of the prosecution evidence, A2, A3, A4 and A6 were questioned under Section 313(1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against them in the evidence of the prosecution. The accused persons denied those circumstances and maintained their innocence.

6. As the trial court did not find it a fit case to acquit the accused persons under Section 232 Cr.P.C., they were asked to enter on their defence and adduce evidence in support thereof. No oral evidence was adduced by the accused persons. Exts.D1 to D4 are the contradictions brought out in the testimony of the prosecution witnesses and Ext.D5 is the copy of the remand application.

7. On consideration of the oral and documentary evidence and after hearing both sides, the trial court by the impugned judgment found A2, A3, A4 and A6 guilty of the offences punishable under Sections 395, 397, 399 and 120(b) Cr.P.C. Hence they have been sentenced to rigorous imprisonment for 10 years each and to a fine of ₹5000/- each and in default to simple imprisonment for 3 months each for the offence punishable under Section 395 read with Section 120(b) IPC; to rigorous imprisonment for 8 years each and to a fine of ₹5000/- each and in default to simple imprisonment for 3 months each for the offence punishable under Section 399 read with Section 120(b) IPC and to rigorous imprisonment for 8 years each for the offence punishable under Section 120(b) IPC. No separate sentence has been imposed for the offence punishable under Section 397 IPC. The substantive sentences of imprisonment have been directed to run concurrently. Out of the fine amount, if realised, an amount of ₹20,000/- has been

directed to be paid to PW2 and an amount of ₹10,000/- to PW1 as compensation under Section 357(1)(b)Cr.P.C. Set off under Section 428 Cr.P.C. has been allowed. Aggrieved, A2, A3, A4 and A6 have come up in appeal

8. The only point that arises for consideration in this appeal is whether the conviction entered and sentence passed against the appellants / A2, A3, A4 and A6 by the trial court are sustainable or not.

9. Heard both sides.

10. It was submitted by the learned counsel for the appellants / A2, A3, A4 and A6 that the prosecution case as per Ext.P1 FIS is that the incident took place on 26/07/1997 at 10:30 p.m. PW1 and PW2 who are alleged to have been subjected to robbery and dacoity also deposed that the incident took place on 26/07/1997. However, the court charge says that the incident took place on 25/07/1997 at 10:30 p.m. The accused persons are liable

only to answer the specific charge framed against them. In the FIS there is no reference to MO.3 bag which is a subsequent development/improvement. Ext.P2 scene mahazar does not refer to the presence of light at the place of occurrence. When the neighbours heard the cries of PW1 and PW2, they switched on their lights and came out of the house by which time the accused had already left the place. Therefore, there was no possibility or chance of identification of the robbers by PW1 and PW2 as the scene of occurrence is stated to be near a rubber plantation, and hence pitch-dark. The FIS does not refer to the identification marks or features of the robbers. PW1 and PW2 have no prior acquaintance with the accused persons. No Test Identification Parade (T.I.P.) has also been conducted. The time of incident has not been proved. The prosecution case is that the incident took place at 10:30 p.m. However, the testimony of PW1 and PW2 show that PW2 had closed his shop at 10:30 p.m. and that they had walked some

distance to their house when the incident happened. Therefore, the incident could not have occurred at 10:30 p.m. Further, PW1 deposed that initially he suspected one Ajimon, who used to help him in his shop to be one of the robbers. The said person was never questioned by the police or his role in the crime investigated. There is absolutely no evidence to prove the offence of conspiracy alleged against the accused. On these grounds, an acquittal of the appellants/accused persons was canvassed.

10.1. *Per contra*, it was submitted by the learned Public Prosecutor that PW1 had clearly identified A3, A4 and A6. PW1 spoke of the presence of light at the place of occurrence. He also deposed that 40 days after the incident, he had seen the accused persons. It was not a fleeting glance that the witnesses had of the accused persons. On the other hand, they had clearly seen the robbers and therefore there is no infirmity in the identification of the accused persons in the box even in the absence of T.I.P. It was

also submitted that even though the offences under Section 395, 397 and 399 IPC may not be made out, the offence under Section 394 IPC is clearly made out. Therefore, it was submitted that there is no infirmity in the findings of the trial court calling for an interference by this Court.

11. I briefly refer to the evidence relied on by the prosecution in support of the case. Ext.P1 FIS of PW1 is seen recorded on 27/07/1997 at 08:00 a.m. In the FIS PW1 states that on 26/07/1997 at 10:30 p.m. when he and PW2 were on their way back home, three persons whom he can identify on sight came in an autorickshaw and attacked them causing injury. The autorickshaw stopped near them and from the vehicle three persons got down. One of them, caught hold of PW1 and took away ₹690/- from his shirt pocket as well as MO.1 tiffin box and MO.2 umbrella. They also took away ₹15,000/- of PW2 which was kept inside his vest.

11.1. PW1, a bus driver, when examined deposed that

on 26/07/1997 at about 10:30 p.m. after work, he reached the shop of PW2, his cousin. He normally buys provisions from the said shop. On the said day also, he purchased provisions. Thereafter, he and PW2 closed the shop and they were on their way home. They walked through the old K.K. Road for a distance of about 1½ furlong and reached the road near the rubber estate of one Attarvayalil A.O.Cheriyan. An autorickshaw passed by, went ahead and then came back and stopped near them. From the autorickshaw, three people jumped out and two of them wrongfully restrained him. One of the said persons held him at knife point. Another person took the amount of ₹690/- in his pocket. The third person caught hold of PW2 who was in possession of about ₹15,000/-, which was kept in a black bag inside the vest worn by the latter. When they were attacked, PW2 took to his heels, at which time his dhothi came off. Then the bag containing the money, kept inside his vest fell down. The robbers took away the

bag. PW2 was also in possession of a sack containing vegetables which was also taken away by the robbers. The accused persons also took away his umbrella and tiffin box. Thereafter the accused left in the autorickshaw in which they arrived at the spot. PW2 during the course of the incident had cried out loudly. The people in the houses nearby came out of their houses. They went to a house nearby and got a piece of cloth for bandaging his wound on the neck. At the time of the incident, there was light from the headlight of the autorickshaw and from the light that had been switched on from the houses situated nearby. He was taken to the St.Mary's hospital, Manarcaud, for treatment. PW1 identified MO.1 and MO.2 as his tiffin box and umbrella that had been taken away by the robbers on the said day. He also identified MO.3, the black bag that was in the possession of PW2. PW1 identified A6. According to him, it was A4 Johnykutty who had caught him by his hand. PW1 deposed that the accused who had placed a knife on his

neck is not present in the court. He can identify the said person on sight. He identified A3 as the person who had caught hold of PW2. PW1 also deposed that out of the three persons he had seen on the date of the incident, one of them was not present in the court. According to PW1, 40 days after the incident when he had seen A2, A3, A4 and A6 in the police station, he had identified them. In the cross examination PW1 admitted that there was no street light at the place of occurrence and that he has no prior acquaintance with the accused persons. He also admitted that he had not stated any identifying marks or identifying features of the culprits/robbers. He also deposed that the police was informed about the incident on the very same day itself.

11.2. PW2 also supports the prosecution case. According to him, three people got out of the autorickshaw. In addition, two more people were standing near the autorickshaw. A3 had robbed him and A4 had caught hold of PW1. He has prior

acquaintance with A6. But A6 was not present at the scene. He can identify the person who had held PW1 at knife point. However, the said person is not present among the accused persons in the box. PW2 identified MO.2 bag. In the cross examination he deposed that one Ajimon used to help him in his shop. On the date of the incident, Ajimon was not present when he closed the shop. PW2 further deposed that A3 looks like Ajimon and so initially he thought A3 to be Ajimon. He realised that A3 was not Ajimon on the very same day itself. PW2 admitted that he had not stated about MO.3 bag to the police. He had only stated that the packet containing the money had fallen down on the road on the said day. PW2 admitted that there was no street light and that it was dark at the scene of occurrence. However, he deposed that there was light from the nearby houses. According to him, the houses were situated about 50 ft. away from the place of occurrence.

11.3. There is only the testimony of PW1 and PW2 to

establish the prosecution case. The amount of ₹15,000/- alleged to have been stolen from PW2 has not been recovered. The investigating officer was only able to recover MO.1 tiffin box, MO.2 umbrella and MO.3 bag. The prosecution story of recovery of these articles is difficult to believe in the facts and circumstances of the case. MO.1 to MO.3 are not of much value and hence it is unlikely for the accused persons to have retained them in their possession and kept it concealed. The testimony of PW1 only refers to the presence of three persons at the spot. However, the testimony of PW2 refers to the presence of five persons at the spot. PW1 deposed that A6 was not present at the spot. There is no clear evidence as to how many people were present at the scene of occurrence. Therefore the case of dacoity is doubtful.

11.4. Now coming to the identity of the persons involved in the incident. The materials on record do show that PW1 and PW2 had been waylaid and attacked and an amount

₹15,000/- stolen from PW2. But the question is who are the culprits in the case ? It is admitted by PW1 and PW2 that they have no prior acquaintance with the accused persons. It has also come out in evidence that there was no street light at the place of occurrence. PW2 admitted that the houses situated nearby were about 50 ft away from the scene of occurrence. Whatever light was available was only the light that is alleged to have been available in the said houses. Therefore, it is highly doubtful whether there was any source of light at the place of occurrence. The investigating officer has also not conducted any T.I.P. It is true that conducting a T.I.P. is not mandatory in all cases. In all cases, identification of the accused persons for the first time in the dock will also not be viewed with suspicion. In the case on hand, the presence of light at the scene of occurrence is highly doubtful. PW1 and PW2 have no prior acquaintance with the accused persons. The money stolen has also not been recovered from the accused persons. In addition,

the testimony of PW2 shows that initially he had doubts as to whether one of the robbers was one Ajimon, a helper in his shop. The police does not seem to have conducted any sort of investigation into the said aspect. The evidence on record does not inspire confidence in the mind of the court regarding the role of the accused in the crime. That being the position, I find that the appellants/accused persons are entitled to the benefit of doubt.

In the result, the appeal is allowed and the conviction and sentence imposed against the appellants by the trial court for the offences punishable under Sections 395, 397, 399 and 120(b) IPC is set aside. The appellants, that is A2, A3, A4 and A6 are acquitted under Section 235(1) Cr.P.C. They are set at liberty and their bail bond shall stand cancelled.

Interlocutory applications, if any pending, shall stand closed.

Sd/-

C.S.SUDHA
JUDGE

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