



**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 1607 OF 2009

JAFAR **... APPELLANT(S)**
VERSUS
STATE OF KERALA **...RESPONDENT(S)**

J U D G M E N T

B.R. GAVAI, J.

1. This appeal challenges the judgment and order dated 16.01.2009 passed by the learned Single Judge of the High Court of Kerala at Ernakulam in Criminal Appeal No. 643 of 2008 thereby dismissing the appeal filed by the appellant herein and confirming the conviction as recorded by the Court of Addl. Sessions Judge (Adhoc-II), Ernakulam (for short, 'trial court') for the offence punishable under Section 397 read with Section 395 of the Indian Penal Code, 1860 (for short, 'IPC') and sentencing him to undergo rigorous imprisonment for seven years, with a fine of Rs.10,000/-; in default of payment of fine, to suffer simple imprisonment for a period of three months.

2. The case of the prosecution in brief is that, on 14.05.2004 at about 1:45 a.m., accused Nos.1 to 8 came in a vehicle bearing registration number KL 4/C 6021 driven by accused No.8 to the building at Perumbavoor, where the retail shops of Kerala State Beverages Corporation were situated in three rooms bearing Door Nos.17/1221, 1222 and 1223, with the intention to commit dacoity. According to the prosecution, accused Nos.1 to 4, 6 and 7 armed with deadly weapons like iron lever and wooden bar, entered into the room No.17/1238. At the said gate, the security guard (PW-1) was posted. The appellant herein (accused No.2) kicked on the naval portion of PW-1. Sijo @ Fijo (accused No.4) beat him with an iron lever on the right leg, which resulted in fracture. Accused Nos.1 to 3 beat him with the wooden bar on various parts of his body. Thereafter, the accused persons tied the legs and hands of PW-1 with bath towels and made him lie on the cot. Following which, they fastened his body on the cot with a piece of bed sheet and the remaining piece of the bed sheet was pushed into his mouth and they manhandled him. Thereafter, they committed robbery of mobile phone, wrist watch and torch belonging to PW-1.

2.1 It is also the prosecution case that they destroyed the light in the building and lock of the shutters of the retail shop of the corporation. On the basis of said allegation, Crime No.345/2004 came to be registered in the Perumbavoor Police Station for the offence punishable under Section 397 of the IPC.

2.2 Upon completion of the investigation, a final report was filed in the Court of Judicial Magistrate First Class, Perumbavoor upon which the Court took cognizance and instituted C.P. No.89/2005. As the accused No.1 was absconding, the case against him was split up and refiled in the committal court. Insofar as accused Nos.3 and 6 are concerned, since they were minors, charge-sheet against them was filed in the Juvenile Court. The case against accused Nos.2, 4, 5, 7 and 8 in the original charge-sheet was committed to the Court of Sessions, Ernakulam wherein S.C.No.723/2005 was instituted. Before the learned trial court, the accused were re-arrayed as accused Nos. 1 to 5. The charges came to be framed for offences punishable under Section 397 read with Section 395 of the IPC and the accused pleaded not guilty. Thereafter, the accused Nos.1

and 4 absconded and hence trial was proceeded only against accused Nos. 2, 3 and 5. The trial court only found accused Nos.2 and 3 guilty and as such convicted them as aforesaid. Insofar as accused No. 5 is concerned, he was acquitted.

3. We have heard Mr. T.N. Singh, learned counsel for the appellant and Mr. Harshad V. Hameed, learned counsel for the respondent/State.

4. Learned counsel for the appellant submits that the conviction is based on no evidence and as such, the appeal deserves to be allowed. As against this, learned counsel for the respondent/State submits that both the Courts have concurrently, upon appreciation of the evidence, found the appellant to be guilty and as such, no interference would be warranted.

5. With the assistance of the learned counsel for the parties, we have scrutinized the evidence. The conviction of the appellant herein is basically based on the deposition of Babu Puttan (PW-1), who was working as a security guard and was sitting in a chair in front of the said room. No doubt that he narrates the version, as per the prosecution case. He has also identified accused No.2-Jafar, appellant herein and

accused no.3-Saneesh in the Court. However, he has clearly admitted that police had shown him these two people and as such, he has identified them.

6. Anil Kumar (PW-8), who is the Investigating Officer (IO), has also admitted that PW-1 identified the accused persons by seeing them at the police station. He has further admitted that no identification parade was conducted. As such, it can be seen that the identification of the appellant herein by PW-1 is quite doubtful as no identification parade has been conducted. PW-1 clearly states that he has identified the accused persons since the police had shown him those two people.

7. In the absence of proper identification parade being conducted, the identification for the first time in the Court cannot be said to be free from doubt. We find that the other circumstance that the Courts relied for resting the order of conviction is with regard to the recovery of an iron rod. An iron rod is an article which could be found anywhere. It is not the case of the prosecution that any stolen article was recovered from the appellant herein.

8. In the result, we find that the judgment and order

passed by the High Court dismissing the appeal and of the trial court convicting the appellant are not sustainable in law.

9. The appeal is therefore allowed. The judgment and order of the trial court convicting the appellant herein and that of the High Court affirming the same are quashed and set aside.

10. The appellant herein is acquitted of all the charges charged with. Since the appellant is on bail, his bail bonds shall stand discharged.

11. Pending application(s), if any, shall stand disposed of.

.....**J.**
(B.R. GAVAI)

.....**J.**
(SANDEEP MEHTA)

NEW DELHI;
MARCH 15, 2024