IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 15TH MARCH 2005 / 24TH PHALGUNA 1926

Crl.Rev.Pet.No. 608 of 1996()

CRA.257/1993 of V ADDL.SESSIONS COURT, ERNAKULAM
CC.347/1991 of JUDL.MAGISTRATE OF FIRST CLASS-I, ERNAKULAM

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REVN. PETITIONER:

HASHIM, S/O.MUHAMMEDALI, AGED 36 YEARS,
H.NO.V.230, PUTHIYA ROAD, MATTANCHERRY.

BY ADV. SRI.K.S.MADHUSOODANAN
SRI.C.P.PEETHAMBARAN

RESPONDENTS:

STATE OF KERALA TO BE REPRESENTED BY
CIRCLE INSPECTOR OF POLICE, ERNAKULAM TOWN.

BY PUBLIC PROSECUTOR SRI.K.THAVAMONY

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 15/03/2005, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

CRL.R.P.No.608 OF 1996

Dated this the 15th day of March, 2005

O R D E R

The revision petitioner is the first accused in C.C.No.347 of 1991 on the file of the Judicial Ist Class Magistrate's Court-I, Ernakulam. He was convicted and sentenced to undergo rigorous imprisonment for one year for the offence under Section 379 IPC. The second accused was acquitted of the alleged offence. The petitioner moved an appeal as Crl.A.No.257 of 1993 before the Session's Court and, it was heard and disposed of as per judgment dated 25.6.1994 by the Fifth Additional Session's Judge, Ernakulam. The conviction and sentence passed against the petitioner were confirmed and the appeal was dismissed. Hence this revision.

2. According to prosecution, petitioner along with second accused, who was acquitted by the trial court, committed theft of a motor bike bearing No.KBF 1976 while it was parked by the side of the road near the Medical Trust Hospital, Ernakulam. The bike belonged to PW2, and it was used by PW1 who had parked the vehicle by the side of the road. PW1 lodged a complaint, after exhausting all the attempts to trace out the vehicle, before the police on 9.2.1991. The incident occurred on 8.2.2001 at about 8.45 p.m. A crime was registered as Crime No.46 of 1991 before the Town South Police Station, Ernakulam.

3. In the course of investigation, first accused was allegedly arrested on 23.4.1991 by the Circle Inspector of Police, Ernakulam Town Police Station, in connection with Crime No.128 of 1991. When petitioner was questioned, he gave information that number of the motor bike was changed to KED 1796 from KBF 9876 and that petitioner along with co-accused were proceeding on the bike, while AMVI apprehended them and that the vehicle was kept in the A.R.Camp. The AMVI, PW3 was

questioned by the Circle Inspector of Police, PW10. Thereafter, the accused was got identified by PW3. The vehicle was seized from the A.R.Camp by PW10. After completion of investigation, a charge was laid against petitioner and second accused before the Judicial First Class Magistrate's Court, Ernakulam.

4. On going through the judgment of trial court as well as revisional court it can be seen that both courts have relied upon mainly the evidence of PW1 to find the petitioner guilty of offence under Section 379 IPC. On going through narration of the prosecution case, it is seen that there are several circumstances which can be proved in this case to bring home the guilt of the petitioner. Those are: (1) the riding of the motor bike No.KED 1796 by petitioner and seizure of the same by PW3, AMVI; (2) the identification of petitioner by PW3 on 6.3.1991, at the time of seizure; (3) the check report and the documents prepared by PW3 in respect of the seizure of KED 1796 from petitioner; (4) the production of the vehicle KED 1796 by PW3, AMVI before the City Traffic Police; (5) the documents available in the City Traffic Police in respect of custody of motor bike KED 1796 at Traffic Police Station and the evidence of its custodian at the Traffic Police; (6) the change of the number of the vehicle from KED 1796 to KBF 9876 (as per the prosecution case, a painter has changed the number of the vehicle at the request of the accused); (7) the evidence to connect KEB 1796 which is seen to have been driven by petitioner and the other vehicle which is stolen which bears number KBF 9876; (8) the evidence from the officials of A.R.Camp with respect to the manner in which the vehicle reached A.R.Camp; (9) the seizure of the vehicle from the A.R.Camp and related documents; and lastly, (10) the confession of petitioner which has led to the discovery of a relevant fact.

5. The above are the several links in the chain of circumstantial evidence. It is well settled that in a case where circumstantial evidence, each link has to be independently established and the prosecution has to

establish the case without a missing link. In this case, many of the links of the circumstantial evidence were not attempted to be established. Some of the circumstances which were attempted to be proved were not proved also. The courts below have not considered the evidence in accordance with the well-settled principles and rules governing appreciation of evidence and especially, a prosecution case, based on circumstantial evidence.

6. Both courts proceeded on the basis that PW3 identified first accused correctly. On a close perusal of his evidence, it can be seen that PW3 allegedly saw first accused on 6.3.1991 and identified him for the first time in court on 8.3.1993, years later. The appellate court held that there was identification in between the said period before the Police. But, court below has not looked into the evidence on this aspect. Firstly, there is total inconsistency with respect to the evidence on identification of petitioner by PW3 before the Police. PW3 would state in the evidence that it was in the first week of March, 1991 that he had seen the petitioner and immediately after one week, Police had brought petitioner to him and he had identified him. Curiously, prosecution does not have such a case. As per the prosecution case, it is more than one-and-a-half months after the incident that the accused was arrested, i.e., on 23.4.1991.

7. PW10 has given a go-by to this case, at the time of evidence. According to PW10, the arrest was made on 24.3.1991 and the identification by PW3 also appears to be made on the same day. But, PW1 had not recorded the statement of PW3 with respect to the factum of identification. Even if any statement is recorded, such statement was admittedly not given to accused. In the above circumstances, no value can be attached to the evidence given by PW10, who has given evidence in respect of arrest which is a crucial event. His evidence is not consistent with the prosecution case in respect of the date of arrest and also the date of identification, as revealed from records. This inconsistency cuts the route

of the prosecution case and it is also inconsistent with the evidence given by PW3. The very edifice of the evidence, in relation to the identification, therefore, falls to the ground and court below failed to assess the inconsistency in the evidence of PW3, PW10 and also the prosecution case with respect to arrest and identification.

8. It can also be seen that even if the prosecution case is admitted, prosecution has not established sufficient materials to connect the motor bike which was allegedly driven by petitioner with the stolen bike. There is lack of evidence in this case. PW3 gave evidence that the petitioner was found driving motor bike KEB 1796 and that it was handed over to Traffic Police. But according to PW10's evidence, petitioner has given a statement to him that the bike was given to the A.R.Camp. The alleged statement given by the accused to PW10 in respect of the place where the bike was handed over is also inconsistent. The prosecution has also failed to establish that the bike was seized from the A.R.Camp. It has not been established by cogent evidence as to how and under what circumstances the bike happened to be in the A.R.Camp. The bike bearing registration No.KED 1796 is the one driven by petitioner, and as per evidence of PW3 it was given to the City Traffic Police Station. No recovery is made from the City Traffic Police Station. The petitioner has no case that the bike driven by him was given to the City Traffic Police Station. PW10 is mysteriously silent of the place from where from the bike is seized. The evidence is shabby on this aspect.

9. The prosecution has to connect each link and form a chain of circumstantial evidence, but it has failed to do so. Te most crucial evidence is with respect to the change in the number of the bike and the deliberate attempt to erase the number and substitute it by a new number. The bike stolen is bearing registration No.KBF 9876, but as per the evidence on record the bike driven by petitioner is KED 1796. The prosecution has a duty to establish that the number of the stolen bike was changed. The person

who was cited to prove that petitioner has instructed him to change the number did not support prosecution while examined as PW5. He has totally deviated prosecution case and denied petitioner's involvement in any manner. He has not given any incriminating evidence against petitioner. But curiously, PW5 was not treated or declared as hostile. Therefore, there is no reason to reject the evidence of PW5, which will go against prosecution case. The prosecution has thus not only failed to establish the connection of the stolen article with petitioner, but the witness cited to prove the aspect, namely, PW5 has given evidence inconsistent with the prosecution case. In the above circumstances, conviction entered against petitioner based on the evidence of PW3 that he has identified petitioner correctly is totally unsustainable. The presumption drawn based on such shabby evidence that the petitioner committed theft of alleged bike, especially in the absence of any material to connect him with the stolen bike is also illegal. Both the courts below committed serious illegality in appreciating the evidence.

10. A perusal of the records and the judgments of the courts below will clearly show non application of mind. The value of evidence of PW3 has not been properly assessed. The individual testimony of the witnesses has not been discussed to assess the reliability of the prosecution case. The courts below have not considered each circumstance independently and find out whether the prosecution has established each link in the chain of the circumstances. The entire evidence is full of inconsistencies, but the courts below ignored the same and failed to consider that how such inconsistencies discredited not only the individual evidence, but the prosecution case as a whole. The judgment is brought with faulty reasoning and lack of judicial approach. Accepted canons for appreciation of evidence have been thrown to the wind by lower courts and this has resulted in serious miscarriage of justice and hence this Court will be justified in interfering, in view of the

illegalities mentioned.

In the result, the order of the court below is set aside. The conviction and sentence passed against the petitioner under Section 379 IPC are set aside and the petitioner is set at liberty forthwith.

This revision is allowed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

CRL.R.P.NO.608 OF 1996

O R D E R

15.03.2005