IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

FRIDAY, THE 10TH DAY OF SEPTEMBER 2021 / 19TH BHADRA, 1943

CRL.A NO. 315 OF 2015

AGAINST THE JUDGMENT DATED 07.02.2015 IN S.C.NO.250/2012 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT-IV, THIRUVANANTHAPURAM (CP 66/2011 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II, NEDUMANGAD THIRUVANANTHAPURAM)

(CRIME NO.340/2011 OF Kilimanoor Police Station, Thiruvananthapuram)

APPELLANT/S:

PREMITH,
S/O. PRABHAKARAN, HOUSE NO. XII/286A,
KUZHIPURAYIDOMKARA, MANNARKADU, KOTTAYAM DISTRICT,
PRABHA BHAVAN, KOODAL GANDHI JUNCTION, KOODAL VILLAGE,
PATHANAMTHITTA DISTRICT.

BY ADVS.
SRI.BABU S. NAIR
SMT.M.LISHA
SRI.P.A.RAJESH
SRI.K.RAKESH
SRI.R.RANJITH K4892011
SMT.SMITHA BABU

RESPONDENT/S:

THE STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 682 031, FOR THE CIRCLE INSPECTOR OF POLICE, KILIMANOOR, THIRUVANANTHAPURAM.

BY PUBLIC PROSECUTOR SRI.ALEX M.THOMBRA

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 02.09.2021, ALONG WITH CRL.A.435/2015 AND CONNECTED CASES, THE COURT ON 10.09.2021 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

FRIDAY, THE 10TH DAY OF SEPTEMBER 2021 / 19TH BHADRA, 1943

CRL.A NO. 435 OF 2015

AGAINST THE JUDGMENT DATED 07.02.2015 IN SC 250/2012 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT-IV, THIRUVANANTHAPURAM (CP 66/2011 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II, NEDUMANGAD THIRUVANANTHAPURAM)

(CRIME NO.340/2011 OF Kilimanoor Police Station, Thiruvananthapuram)

APPELLANT/S:

DILESH KUMAR @ KUTTAN
S/O SUDEVAN PILLAI,CHARUVILA PUTHEN VEEDU, PARAKONAM, PAPPALA DESOM,PAZHAYAKUNNUMEL VILLAGE,
(DILESH BHAVAN,VATTAMAN DESOM,KARAVALOOR VILLAGE, KOLLAM DISTRICT).

BY ADVS.
SRI.P.VIJAYA BHANU (SR.)
SRI.M.REVIKRISHNAN
SRI.VIPIN NARAYAN

RESPONDENT/S:

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

BY PUBLIC PROSECUTOR SRI.ALEX M.THOMBRA

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 02.09.2021, ALONG WITH CRL.A.315/2015 AND CONNECTED CASES, THE COURT ON 10.09.2021 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

FRIDAY, THE 10TH DAY OF SEPTEMBER 2021 / 19TH BHADRA, 1943

CRL.A NO. 680 OF 2015

AGAINST THE JUDGMENT DATED 07.02.2015 IN SC 250/2012 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT-IV, THIRUVANANTHAPURAM

(CP 66/2011 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II, NEDUMANGAD, THIRUVANANTHAPURAM)

(CRIME NO.340/2011 OF Pangode Police Station, Thiruvananthapuram)

APPELLANT/S:

KANNAN @ KARUNAKARAN,
C.NO.9861, CENTRAL PRISON,
THIRUVANANTHAPURAM.

BY ADVS.
SRI.GRASHIOUS KURIAKOSE (SR.)
SRI.GEORGE MATHEWS
SRI.PRANOY K.KOTTARAM

RESPONDENT/S:

STATE OF KERALA,
REPRESENTED BY THE DGP,
HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI.ALEX M.THOMBRA

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 02.09.2021, ALONG WITH CRL.A.315/2015 AND CONNECTED CASES, THE COURT ON 10.09.2021 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

FRIDAY, THE 10TH DAY OF SEPTEMBER 2021 / 19TH BHADRA, 1943

CRL.A NO. 806 OF 2015

AGAINST THE JUDGMENT DATED 07.02.2015 IN SC 250/2012 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT-IV, THIRUVANANTHAPURAM

(CP 66/2011 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,NEDUMANGAD, THIRUVANANTHAPURAM)

(CRIME NO.340/2011 OF Pangode Police Station, Thiruvananthapuram)

APPELLANT/S:

NAVAS
AGED 43 YEARS, S/O BADARUDEEN,
CHARUVILA PUTHEN VEEDU,KARIYODE, PARUTHIUYIL,
NILAMEL VILLAGE,KOLLAM DISTRICT.

BY ADVS.
SRI.P.VIJAYA BHANU (SR.)
SMT.M.M.DEEPA
SRI.V.C.SARATH

RESPONDENT/S:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.ALEX M.THOMBRA

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 02.09.2021, ALONG WITH CRL.A.315/2015 AND CONNECTED CASES, THE COURT ON 10.09.2021 DELIVERED THE FOLLOWING:

K. Vinod Chandran & Ziyad Rahman A.A, JJ.

Crl.Appeal Nos.315, 435, 680 & 806 of 2015

Dated, this the 10th September 2021

JUDGMENT

Vinod Chandran, J.

The 'night-watchmen' are a lot, generally ill-equipped and ill-paid, who often stake their lives to offer nothing more than a sense of security to those, whose property they watch over. Little resistance can be offered to a concerted robbery by the sole emaciated man, we often see armed with a smouldering mosquito coil on the veranda of shop rooms; where they spent the night guarding over the effects of a man or woman slumbering in their opulent homes, on soft beds. We have here an incident in which a night watchman, guarding a jewellery, was murdered and his body dumped in a well in the course of a dacoity executed in the night of 05.05.2011 or the wee hours of the sixth.

2. There were fourteen arrayed as accused in the trial, wherein documents were numbered as Exts.P1 to P99 with multiple documents under the same number differentiated by alphabets through 90 witnesses, who also marked 128 material objects with many marked as one series. The defence examined two witnesses and marked ten documents as Exts.D1 to D9 & D9(a). The Court too marked four exhibits. A7, A9 and A10 to

A14 stood acquitted. A2 expired before trial and A4 & A5 are still absconding. A1, A3, A6 & A8 are the appellants before us. A3 was convicted under Sec.449, 392, 302 and 120(B) read with 392 of the Indian Penal Code [for brevity, 'the IPC']. A1, A6 & A8 were found guilty under Sec.120(B) read with Sec.392 IPC. The case set up by the prosecution is entirely hinged on circumstantial evidence. In the present appeals, we are only called upon to decide on the evidence led, to establish the culpability of the appellants herein; one of whom (A3) is convicted for the offence of murder in the course of house trespass, robbery and for conspiracy. The other appellants are convicted for the offence of robbery and the conspiracy leading to the same.

3. Sri.P.Vijayabhanu, learned Senior Counsel, instructed by learned Counsel Smt. Sanjana Rachel Jose appeared for A1 & A6. Sri. Babu S.Nair, learned Counsel, appeared for A8 and Sri. Pranoy Kottaram, learned Counsel, appeared for A3.

4. Sri. Vijayabhanu argued that there is not even one circumstance proved against any of the accused. The evidence led on conspiracy falls short of proving it and there is nothing connecting the crime to the accused. The only evidence led is of recovery of the thieved ornaments,

some of which were alleged to have been converted to gold ingots. There can be no conviction for robbery or murder based solely on recoveries; which in this case are not reliable to even establish possession of stolen property. There is nothing to prove that the recovered ornaments were those thieved from the jewellery. The robbery is alleged to have been made from a jewellery, which has a statutory obligation to maintain a Stock Register. But for the identification made by the owner of the jewellery, there is no proof offered of the possession and ownership of the articles recovered. A manual Stock Register is said to have been handed over to the Investigating Officer [for brevity, 'the I.O'], which was not produced before Court nor were the recovered articles verified and tallied with the stock held by the jewellery as per the register. Though an identifying mark is referred to by certain witnesses, the owners of the jewellery do not speak about it. The prosecution did not attempt to elicit any identifying mark on the articles thieved from the jewellery. On the contrary, the I.O. deposed that no such distinguishing mark was stated by the owners. Each of the recoveries made concerning A1 & A6 were also challenged with reference to the evidence of witnesses examined to prove the same. It is pointed out that A1 has

been roped in also on the alleged confession made by A8 concerning the recoveries effected from that accused. The confession itself is inadmissible under Sec.27 of the Evidence Act. The confessions read as, the recovered articles being handed over by one Kuttan; whose identity is not decipherable. Only the I.O says that Kuttan is A1 and A1's wife, who was examined, was not asked whether he was known by that name in any circle.

5. Sri. Babu S.Nair learned Counsel points out that as far as A8 is concerned, there is a complete lack of evidence regarding the conspiracy. The circumstances alleged by the prosecution does not at all connect the accused and the entire case rests on conjectures and surmises without any valid evidence led to connect the accused with the crime. The call details though produced prove absolutely nothing, not even a casual contact between the various accused arrayed. The trial Court itself has not reckoned the evidence led on that count. The seizures made from the house of A8 are articles of daily use and there is not even an explanation as to how these are connected to the crime. The learned Counsel specifically pointed out that an LPG cylinder was seized from A8's house without any reason. The specific case of the prosecution is use of some gas cutting equipment to break

into the locker; which cannot be with LPG. The rental of a car, which is said to have been used in the commission of the crime, even as per the evidence led by the prosecution is not at any time proximate to the alleged crime.

6. Learned Counsel Sri. Pranoy Kottaram relies on *Ramreddy v. State of Andhra Pradesh, (2006) 10 SCC 172* to urge the trite position of law regarding proof in cases, where the prosecution is entirely based on circumstantial evidence. There is not even one circumstance that connects the accused to the crime and in the case of A3, the trial Court has presumed that he was part of the robbery, based on which presumption, a further presumption on murder is also drawn. This is quite contrary to the law declared by the Hon'ble Supreme Court in *Suresh Budharmal Kalani @ Pappu Kalani v. State of Maharashtra, AIR 1998 SC 3258*. The learned Counsel also took us through the evidence of those witnesses paraded before Court by the prosecution to argue that there is no proof offered for his culpability in the offence of robberry and much less of murder.

7. The learned Public Prosecutor, Sri. Alex M.Thombra submitted that PW1 is the most competent witness to attest and identify the recovered gold articles. He is the owner of the shop and he identified each of the ornaments

from the property list and the material objects shown to him in Court. The recoveries unerringly established the involvement of the accused and they had no explanation for the possession of the ornaments thieved from the jewellery. Sec.114, *Illustration* (a) of the Evidence Act squarely applies. The accused were moving together before and after the crime. They were arrested and recoveries were made from their body. Based on confession statements, the Police carried out a series of recoveries from third parties, with and to whom, the accused had pledged and sold the ornaments. A huge amount of cash was also recovered from the accused. The conspiracy is very clearly established and so is the commission of robbery, in the course of which the three persons involved in the actual commission, murdered a poor watchman. The body of the watchman and the articles used for the commission of crime were dumped in a nearby well. The booty was shared by the actual perpetrators and the conspirators, whose confession statements led to the recoveries. The prosecution has unerringly established the circumstances leading to the culpability of the accused and the appeals are to be dismissed, argues the Prosecutor.

8. Before we look into the evidence, we first perused the charge sheet. As per the charge-sheet, A1 to A10

entered into a criminal conspiracy to commit dacoity in Jaseena Jewellery. In furtherance of such common object, A3, A4 & A5 are alleged to have committed the actual dacoity. Having made arrangements and travelled to the jewellery in a car, A3 to A5 forcefully took the Security Guard to the adjacent School compound and beat him with a reaper as also strangulated him, thus committing his murder. A3 to A5 then broke open a wall to enter the jewellery and committed dacoity by removing 1066 gms of gold ornaments valued at Rs.2,15,000/- [Rupees Two lakhs fifteen thousand only] and two watches one a 'Rado' and the other a 'Rolex'. A1 and A6 to A10 are alleged to have abetted the commission of the above offences. A1 by arranging the stay of A3 to A5 and a car, KL 22B 3032, as also having waited outside when the dacoity was carried out. A2, who is no more, was alleged to have made available a gas cutting gun, A8 an LPG cylinder, the latter of whom had also transported the same to the School compound. A3 to A5 are also alleged to have caused the disappearance of evidence by throwing the cylinder, a chair and the dead body of the deceased into a nearby well. A11 to A14 were alleged to have dishonestly received stolen property. As we noticed, except for the appellants and A4 & A5, all the other accused have been acquitted.

9. We are not dealing with the evidence led, to prove the involvement of the acquitted accused, as it has been disbelieved by the trial Court. We also notice that PW55 to PW57, PW76 to PW78 and PW89 are authorised Officers of mobile phone service providers, who marked various documents regarding the call details of different mobile numbers. However, the prosecution has not established the ownership of the various subscriptions; nor identified their tower location or even connected the call details, to even barely evidence constant contact between the various accused arrayed. The trial Court itself has found in paragraph 38 that only A3 has been shown to be the subscriber of one of the mobile numbers and there is no connection established even between A1 & A3, who were projected as using two mobile numbers. When the identity of subscribers, call details and the tower locations are not established, there cannot be any proof of conspiracy from the evidence of the said witnesses. We do not propose to at all discuss the evidence of the said witnesses.

10. The FIS-Ext.P1, was by PW1, the son of the owner; who was examined as PW2. PW1 deposed in tune with the FIS. On the previous night, the night watchman was attending a wedding reception and joined duty only at 9 p.m. Having

come to the premises, he called PW2, the owner and father of PW1, to inform that he had commenced his duties. PW1 at 9 a.m on 06.05.2011, opened the jewellery and saw the shop in disarray. The entire ornaments on the display board were missing. He rushed to the locker room and found an unsuccessful attempt to break into the locker room. On the backside wall of the shop, there was a hole drilled, through which a person could wriggle in. The Security Guard was not seen anywhere and local people gathered at the crime scene. Somebody informed him that there was a body inside the nearby well. PW1 immediately informed the Sub Inspector, who deputed 3-4 policemen to the scene of occurrence. PW1 gave the FIS to one of them. Later he was repeatedly summoned to the Office of the Circle Inspector, where he was shown the accused and the recovered articles.

11. PW1 identified MO1 to MO22, some of which marked, have multiple items as a series. He identified the objects on sight and cross-verifying them from the property list with specific reference to the *thondy* numbers. In cross-examination, first by A1, he said there are distinguishing marks in the ornaments kept in the shop and that was stated to the police. Later in cross, by A3, he said that the distinguishing marks were not stated to the police. He also

confirmed that he regularly paid tax and the registers maintained at the shop would disclose the sales as also the stock retained in the shop. He also asserted that there was in existence a stock statement, which was shown to the Police but returned to him. In cross-examination, PW1 stated that usually the displayed items are kept in the locker room before the shop is closed and on the crucial day there were items left on the display board since on the next day it was '*Akshaya Tritheeya*'. It was also admitted that on the night of 05.05.2011 his father closed the shop.

12. PW2, the owner of the shop, corroborated PW1 on what happened in the morning of the day after. PW2 verified the stock remaining at the time of closure on 05.05.2011. He stated that there were a total of 13 Kilograms in the locker, out of which 1½ kilograms was displayed, which display was of small ornaments. He confirmed that the registers maintained would clearly indicate the opening and closing stock of the shop. In cross-examination for A3, a specific question was put whether the witness had spoken about the distinguishing marks 'JSM' on the ornaments. PW2 answered in the affirmative. Ext.D1 contradiction was insofar as the witness stating to the Police that before closing on 05.05.2011, the entire ornaments, including those displayed,

were secured in the locker. An attempt was made to explain Ext.D1 in re-examination by the prosecution and PW2 clarified that what was kept inside the locker were those ornaments displayed, but not including those kept in the 'corner box'. To another specific question in re-examination, PW2 also answered that what was lost were the ingots and cash kept inside the table and those ornaments kept in the corner box.

13. We have to immediately notice that there were no distinguishing marks on the ornaments of the jewellery, as disclosed to the Police by PW1. PW1 had different versions on the distinguishing marks on the ornaments. The evidence of PW2 is that the distinguishing mark revealed to the Police was 'JSM'; while the mark seen in some of the ornaments is 'JSJ'. PW90, the I.O, in cross-examination at page 96 specifically deposed that the description marks or identifying particulars of the stolen ornaments were not stated by the owners. We notice this since pertinently some of the witnesses had identified a mark 'JSJ' on some of the recovered ornaments. PW90 also deposed that the owners had not identified the recovered objects with reference to any marks. Pertinent is also the fact that there was no physical stock register produced before Court or cross-verification carried out, of the material objects, with such a stock

register. PW90, the I.O., on page 100 of his deposition categorically stated that the manual stock register was handed over to the I.O. It was also stated that the computers were not seized since the statement of stock was printed out from the computer. None of these is seen produced in Court and the I.O does not speak of any cross verification carried out with these documents on effecting the recoveries. The I.O has not carried out any inventory of the stock available in the jewellery and ascertained, the ornaments stolen, from the stock register maintained. There is no complaint made by PW1 or PW2 as to the exact ornaments lost from the shop, which they could have easily specified. We find force in the submission of the learned Senior Counsel that the ownership and possession of the MOs recovered have not been proved. Now, we come to the evidence led specifically as against the appellants herein.

The Evidence against A1:

14. The items recovered on the confession of A1 are MO12 series of four gold rings, MO10 series of six gold coins, 4 gold rings, one bracelet and a pair of ear-drops as also MO31 iron lever. On the arrest of A1, *interalia,* some pledge receipts in the name of A7 and A8 were seized by Ext.P58. In addition, certain pay-in-slips, four SIM cards,

currency of Rupees one lakh, a watch and three mobile phones were recovered. The four gold rings (MO12) were recovered as per Ext.P15 mahazar on the strength of Ext.P15(a) confession. PW18 is the mahazar witness and the I.O. proved the confession. The confession was to the effect that A1 had concealed the four rings in the backside of the rental residence of his family. Though PW18 stated that four rings were taken from the residence of A1, he did not clearly identify them. He only said, he thinks the rings shown are that recovered. The Sessions Judge too noticed the identification as not correct. PW18 also said that he did not see the rings being recovered but was shown them in a packet. No reliance can be placed on the circumstance of this recovery.

15. M010 series was recovered by Ext.P56 mahazar based on Ext.P56(a) confession statement on 28.06.2011. The confession statement was to the effect that the gold coins, rings, bracelet and ear-drops were handed over to a friend of A1, by name of Ramar, who is examined as PW71. PW71 was acquainted with A1 when they spent time together in prison; less said the better about the antecedents of the witness and also that of A1, which has no bearing on this case. A1 approached PW71 to pledge ornaments for purchasing a lorry.

The ornaments were shown to PW71 and together they unsuccessfully attempted to pledge those. PW71 then pledged the RC Book of his tourist van, the proceeds of which coming to Rs.1.5 lakhs was handed over to A1. He identified MO10 series as those recovered by the police. It has to be emphasized that the prosecution, in chief examination, did not elicit the exact time or day on which A1 is said to have approached PW71 for pledging the ornaments. In re-examination, PW71 said that *"I think it was on 28.06.2011"*, without any indication as to the incident that occurred on 28.06.2011. He also stated that it was a month before that he pledged the RC Book and that he can correctly state the date only if he ascertains it from the documents of pledge. Despite the attempt in re-examination, we do not have any concrete date on which the transaction referred by PW71 had occurred; whether it was before or after the theft thus putting to peril this recovery too.

16. MO31 iron lever is recovered by Ext.P21 mahazar, based on Ext.P21(a) confession. The confession is to the effect that the iron lever was concealed in the shrubs near the wall behind the 'borma', where one Shiju manufactures bakery items. The mahazar witness, PW24 identified both A1 and A3 in court and stated that it was A3

who recovered the iron lever, thus exonerating A1 with regard to the said recovery.

17. The arrest of A1, A3, A6 & A9 was made when the police waylaid the car they were travelling in, on 20.06.2011. PW73 witnessed the arrest and seizure of MOs from each of these accused. Ext.P58 was the seizure mahazar, which was not identified or marked through the said witness. Seven pledge receipts, three in the name of A7 and four in A8's name, were recovered from A1. In addition to this, a bill of 'Cheers India, Industrial Gases', in the name of A2, some personal effects, a watch and dress were also recovered from A1. A7 has been acquitted and the pledge receipts of A8 will be dealt with while discussing the evidence against A8. As to the bill in the name of A2, the prosecution attempts to establish the purchase of the Oxygen Cylinder to use the gas cutting equipment to break open the locker in the jewellery. PW17 is the witness to Ext. P14 Mahazar, by which documents relating to registration made by A2 for purchase of Oxygen Cylinder was seized. The documents were seized from 'Cheers India, Industrial Gases', whose Manager was examined as PW36. PW36 affirmed that A2 had purchased two cylinders, one of which was returned. MO34 was identified as the Cylinder purchased by A2. MO34 was seized as per Ext.P28 Mahazar in

which there were two witnesses, the father of A8, who is said to have surrendered MO34 before the office of the I.O and PW32. PW32 alone was examined, but he has not specified the location of the seizure. In any event, even according to the I.O, the cylinder was surrendered at his Office and Ext.P28 indicates that the father of A8 has a workshop. There is no identification by PW36 that MO34 is the one taken by A2 and there is no distinguishing mark in the cylinder purchased by A2. There is also nothing to indicate that MO34 has any connection with the crime and the attempt seems to be to allege that A8 carried out some experiment with MO34, which again we will discuss later. There is in fact another Oxygen Cylinder, recovered from near the crime scene, which was dumped in the well. There is no incriminating circumstance against A1 coming out of the seizure of the bill from his body since MO34 is not the Cylinder seized from the crime scene; which is MO33.

Evidence against A6:

18. Coming to A6, recovery is made of MO2 gold bar, MO11 ingot and gold ring with the mark of 'JSJ' and a Rolex watch, the last two recovered at the time of the arrest. MO2 gold bar was recovered as per Ext.P41 mahazar, proved by PW49. The confession of A6 is to the effect that a gold bar

was broken by a goldsmith in Thrissur and a piece of it was sold in his jewellery. PW49 is the goldsmith, who handed over MO2 gold bar to the police. The said witness only speaks of the seizure of 10 grams of gold in the form of a broken ingot from him and he also confirmed the presence of A6 at the time the seizure was made. There is nothing stated as to who gave him the ingot, despite A6 having been identified as being present at the time of recovery. No reliance can be placed on Ext.P41 or PW49 as against A6.

19. MO11 ingot was recovered as per Ext.P54 mahazar. PW67 and PW68 are the witnesses. The said recovery was made by PW83 S.I.of Police on the instruction of the I.O. The confession at Ext.P54 is to the effect that two bangles were sold in a jewellery at Mananthavady town. PW68 is the owner of the jewellery who purchased the stolen property. PW67 is an adjacent shop owner, who was summoned since PW68 was not conversant with Malayalam. PW67 spoke of the recovery, identified A6's presence at the time of recovery and also identified MO11 ingot. PW68 identified A6 and stated that he sold two bangles to PW68. He handed over MO11 ingots, which he claimed to be obtained on melting the two bangles. The witness, however, does not speak of any description of the bangles sold to him; nor does he speak of the exact date

on which A6 sold the bangles to him, which again makes the entire recovery unreliable to pin the crime on A6. On the arrest of A6, a gold ring with a 'JSJ' mark is said to have been recovered from him (Ext.P58 Mahazar, PW73 Witness); which mark is not proved to be available in the ornaments stocked for sale in the jewellery.

Evidence against A3:

20. Now we come to A3, who is arrested along with A6 and again a gold ring having the mark 'JSJ' was recovered from his body (Ext.P58 Mahazar, PW73 witness). What we said in the case of A6, of a similar recovery made applies squarely. MO5 series is a watch and gold ring recovered as per Ext.P53(a) confession by Ext.P53 mahazar. A3 is said to have confessed that the said objects were concealed in his house, based on which the recovery was carried out. PW66 is the mahazar witness, who was a Village Administrative Officer. He identified A3 and confirmed that a Rado watch and gold ring were recovered from A3's house. He identified the articles from the ornaments and watch produced by PW1 in court. There is no identification recorded as to the specific material object before court. The ring was also identified as having the mark 'JSJ', which again cannot be traced back to the stolen articles from the jewellery.

21. The recoveries were made by Ext.P58 mahazar when A1, A3, A6 and A9 were arrested on 20.06.2011. The mahazar witness was PW73. Many items were seized as per Ext.P58 mahazar, which were found on the body of the accused arrested on that day. MO17 and MO18 were the gold rings seized from A6 and A3, which have the mark of 'JSJ'. PW73 has specifically spoken of the mark 'JSJ 916'. The prosecution attempted to connect the said recoveries to those ornaments stolen from the jewellery. However, as we noticed, there is no evidence led as to any distinguishing mark available in the jewellery, kept on display, in the corner box or stolen from the jewellery. Hence the said recoveries do not in any manner inculpate the accused, specifically A3 and A6.

22. MO30 series are gas cutting gun, meter and hose recovered on 27.06.2011 by Ext.P20 mahazar. PW24 is the witness, who has earlier spoken of all the articles being recovered by A3 in the presence of police. It is the allegation of the prosecution that the said gas cutting gun, meter and hose were used in the crime committed in the jewellery of PW1 and PW2. But for the allegation and the assumption that the perpetrators of the crime would have used a gas cutting gun, meter and hose in the operation; which reveals an attempt to break into the locker, there is nothing

to connect the recovered items to the crime. As was argued by the learned Counsel, there is no scientific evidence as to any fingerprint or even telltale signs of the said articles having been specifically used in the robbery committed.

23. A3 has been convicted under Section 302 on very sketchy findings as argued by the learned Counsel. The specific finding is available in paragraph 31 of the impugned judgment. The learned trial judge noticed the allegation against A3, which was of having committed dacoity along with A4 and A5. A3 is alleged to have struck the security staff with a wooden reaper; a mere assumption without any proof. It was noticed that the recovery of the stolen articles on the strength of confession statements by A3 is a strong circumstance throwing light on the involvement of A3; again according to us devoid of proof. The arrest of A3 and the possession of a considerable share of the booty was found to be an additional circumstance, giving further strength to the prosecution allegation. Then the circumstance of A3 having been found in the company of A1 and A6, alleged to be the main conspirators as spoken of by PW58 was noticed, which was emphasized as conduct relevant under Section 8 of the Indian Evidence Act. The recovery of implements used for the commission of the offence was also observed to be a

compelling circumstance; not established as we see it. The learned judge then considered the allegation of dacoity and the charge itself being only of three persons having been involved in the crime proper, to hold that the charge of dacoity would not survive, but a charge of robbery would definitely lie against the said accused. Even the charge speaks of only three being involved in the robbery with one standing vigil; definitely falling short of the five required to allege dacoity. The learned judge noticed two decisions; *Mukudu @ Kundu Mishra v. State of MP, 1997 KHC 1208* and *Saji v. State of Kerala, 2007 (3) KLT 151*. The learned judge then found that, with the above proposition of law in mind, an analysis of the evidence on record, would indicate the motive of the theft and the offence of robbery and murder committed in the course of same transaction. "*Therefore, it can safely be presumed that A3 is not only the robberer but also the murderer" (sic)* was the specific finding recorded. The learned judge erred egregiously in presuming the robbery and then based on such presumption, drawing a further presumption of murder.

24. We have found that the circumstances to establish robbery, as projected by the prosecution before Court, was that of conspiracy and the possession of the booty; the

latter allegedly proved through the recoveries. We have considered each of the recoveries and found them to be unreliable. There is no proof of ownership, of the recovered articles, by the jewellery, since the exact articles stolen have not at all been specified. There is also no valid evidence for conspiracy but for the fact that some of the accused, before and after the crime moved and stayed together. Without something more to connect the accused to the crime, we are unable to believe the story of a conspiracy or the sharing of booty alleged. The cited decisions are to the effect that if the robbery is proved, and the murder is found to be arising out of the very same transaction, then the person in possession of the stolen ornaments can be presumed to have committed the murder. The fact of the accused having committed robbery is not established and the recoveries are disbelieved, in the context of which, the decisions have no application. *Suresh Budharmal Kalani @ Pappu Kalani (supra)* is relevant as it held: "*A presumption can be drawn only from facts- and not from other presumptions - by a process of probable and logical reasoning.*"(sic)

Evidence against A8:

25. As against A8 also the sole evidence is again recovery of the thieved ornaments and several items which the

police imagines that the accused used in the dacoity. MO4 series was recovered as per Ext.P12 mahazar from Manappuram Finance. PW15 & PW41 are witnesses to Ext.P12, who merely stated that A8 is known to them and A8 has pledged ornaments in the Finance Company, where they were working. They handed over the records and ornaments to the Police. They were not asked to identify the ornaments. The recoveries are made before the arrest of A1, from whom the pledge receipts in the name of A8 were recovered. If the pledged ornaments were established to be those stolen, probably the pledge and the recovery would barely establish a conspiracy. That having not been established, the above circumstances are rendered useless.

26. In addition, MO36, 39, 40 and 80 to 85 were recovered from A8's house, all household items. The seized articles were found by the trial court itself in para 59 of the judgment to be not incriminating articles having any connection with the crime. PW72 has been arrayed as a witness to speak on an experiment said to have been carried out in a workshop from where metal pieces were recovered as per Ext. P57 Mahazar. The story set up by the prosecution is that A8, before the actual dacoity, used the gas cutting appliances to verify whether it can effectively cut into the locker of the

jewellery. The metal pieces were recovered from a workshop and nobody is seen examined from the workshop to speak on the specific act done by A8. PW72 only speaks of recovery and cannot speak on how the metal pieces were left there. This again is another figment of imagination based on which the prosecution has built the case against the accused. PW90 states that the workshop belongs to the father of A8, without any documentary proof. All the same, if that is true, the presence of A8 in his father's workshop cannot be questioned nor can the presence of metal pieces in a workshop, give rise to any inference, as the prosecution would seek us to draw.

27. The other evidence as against A8 is the rental of a car alleged to have been used in the crime. It is the prosecution case that the car was rented out by A8, in which the perpetrators came to the crime scene and also carried the materials to break into the jewellery. PW32, 33 and 34 are the witnesses arrayed to prove the fact. PW32 had a Rent-A-Car business, who said that A8 had rented out a Maruti Alto car with registration number KL-22B-3032 on 12.03.2011, two months before the alleged incident. He also rented out a Jeep with registration number KL-16-E-5112 to A1, in the 2nd week of April. It was further stated that a Santro car with registration number KL-16-E-6262 was also rented out by A1.

In the month of May, all these vehicles were under repair in a workshop is the evidence of PW32. The police seized three vehicles, the Alto and Santro cars referred above and a Hyundai Accent from the business place of PW32; the last without any rhyme or reason according to us. The scientific examination carried out in the cars seized did not reveal any incriminating circumstance.

28. PW33, an acquaintance of A8, deposes that the rental of the car was in connection with the marriage of A8 and he introduced A8 to PW32. PW34, the employer of A8 deposed that, on 20.03.2011 he paid the rent for a car for three days, which car was rented out in connection with the marriage of A8. The evidence led, concerning the rental of the car does not at all relate to the crime which occurred in the night of 05.05.2011. There is also a further instance of A8 having made some repairs to the car as deposed by PW42 and PW58, which again does not have any connection with the crime. The attempt was to establish that the perpetrators had come to the crime scene in the Alto car, carried out the murder and robbery and got away in the same car and some damage was caused to the car in the process; none of which stands established and remain as mere speculations. The rental itself is seen to be long before the crime. The cars

were stated to be under repair in May, on the 5th of which month, the crime was committed.

29. As argued by the learned Senior Counsel, though many recoveries of ornaments alleged to have been robbed from the jewellery were put forth in evidence before court, the recovered ornaments were not proved to be the ones owned and possessed by the jewellery. *Illustration (a)* of Section 114 of the Evidence Act arise only when the articles recovered are established to be those stolen. The dacoity alleged by the prosecution is of a jewellery where statutory forms and registers are to be mandatorily maintained, especially concerning the stock retained in the shop. The stolen articles are also said to be not those in the locker or displayed, but kept inside the table and in a corner box. The stock register would have disclosed the description of the ornaments and an inventory of the ornaments in the locker would have revealed the exact ornaments which were stolen from the jewellery. The I.O specifically said that a manual stock register was handed over to him, but there is no such verification carried out from the ornaments left in the locker of the jewellery, nor has the recovered ornaments been tallied with the specific items in the stock register. The I.O also deposed that the print-outs of details of stock was

taken from the computers. Neither the stock register nor the print-outs from the computers in the shop, of details of the stock, were produced in evidence. Only two witnesses, PW66 & PW73 spoke of the mark on the recovered ornaments, identified as 'JSJ'. The owners of the jewellery did not speak of any distinguishing mark for identifying the stolen articles. PW1 in cross-examination of A1 first gave a very evasive answer as to there 'could' be a distinguishing mark. Then when A3 cross-examined, PW1 categorically stated that there is no distinguishing mark disclosed to the police. PW2 said the mark was 'JSM' but the I.O said no distinguishing mark was informed to the police. None of the recoveries can be said to be of the ornaments thieved from the jewellery.

30. The recoveries, though said to be under the confession of the various accused, does not lead to an inference that the confession is of the crime. It is trite that the confession which can be accepted is only that of concealment and there should be clear evidence as to the recovered objects having a connection with the crime; which is for the prosecution to establish *Pulukuri Kottayya, AIR 1947 PC 67*. The recovered objects have not been proved to be owned and possessed by PW1 and PW2 and displayed in their

jewellery. As to the other materials recovered of implements used making a hole in the wall and attempting to cut into the locker, it remains a figment of imagination without any telltale signs on the implements or scientific evidence regarding any connection with the crime. The confessions of A8 are paraphrased with the statement "*Kuttan handed over*"; which 'Kuttan' has not been identified. It is only the I.O who asserts that A1 is known also as Kannan. A1's wife was examined as PW4, but she was not asked about any other name by which A1 was known. More significantly, the confession of the accused to the police to the extent of involvement of a co-accused in the crime, is inadmissible *Pulukuri Kottayya (supra)*.

31. At best it can be said that on an inspection of the crime scene, the police could make out what transpired therein on the night of 05.05.2011. A hole was made in the wall and an attempt was made to break into the locker. On the assumption that an iron lever would have been used and cutting implements, specifically gas cutting ones, the police went around recovering the objects which would probably have been used in the commission of the crime. All these objects are available in the market and are things used in daily life and as to the gas cutting equipment, used extensively in job-

works and the like; for example in workshops. Unless the recovered objects are connected with the crime by some evidence; ocular, by way of proved circumstances, scientific or otherwise; there cannot be a connection found merely for the sole reason of the recovery of such items from the possession or residence or workplace of the accused.

32. There is absolutely no evidence as to the presence of the perpetrators of the crime on the day or rather the night the robbery was committed. The version that A3 to A5 along with A1 carried the items to the crime scene and A3 to A5 broke into the jewellery, while A1 was keeping vigil outside, are products of a fertile imagination; not substantiated by valid or cogent evidence, either documentary, scientific or circumstantial. The circumstances proved collectively does not permit any reasonable inference of such a crime having been committed by the appellants herein. True there was a break-in, through a hole drilled in the backside wall of the jewellery, gas cutting implements were used and an attempt was made to break into the locker, which failed. An oxygen cylinder, MO33, was recovered from a well in which the body of the security guard was also found. It is attempted to be established through PW 29 that the cylinder was stolen from his workshop; which again offers no

clue as to who stole it. Based on the story scripted, recoveries were made of several types of equipment on mere probability, but however without any connection being proved to the crime or the appellants herein.

33. To prove the conspiracy alleged, many of the accused in separate groups were said to have occupied lodge rooms before and after the incident. They also are shown to have travelled together in hired vehicles. But that alone does not prove the conspiracy, especially when the crime proper has not been pinned on the accused put to trial. Call records were also produced but without any evidence as to the subscribers, tower locations or at least frequent calls having been made between the accused. We hasten to add that even if there were frequent calls between the accused and that they had stayed together and separately in lodges, before and after the incident, that alone cannot prove the conspiracy to commit the crime unless the involvement of the persons in the crime proper is brought out effectively and substantially before court. The prosecution has miserably failed to establish any circumstance against the appellants. We do not find any reason to sustain the conviction of any of the appellants herein. We set aside the judgment and allow the Appeals. The appellants herein shall be released

forthwith, if they are not wanted in any other case, if undergoing imprisonment and if released on parole or interim bail, all bail bonds shall stand cancelled. Any amounts paid as per the judgment of the trial court, as fine or compensation shall be released forthwith to those who deposited it, at any rate within one month from today.

34. Before leaving the matter, we cannot but address the issue of a poor security guard having been murdered in the course of the robbery carried out. That a robbery was carried out is very clear and there is enough evidence to that end. The deceased was an employee of the jewellery as stated by PW1 and PW2, a security guard engaged to stand guard at night. The owners, the son and father were running the jewellery and were in the status of the employer of the deceased. From the above, it is crystal clear that the deceased met his death in the course of employment. On our request, the learned Senior Counsel also produced before us the Kerala Victim Compensation Scheme, 2017. We see from the Scheme that a maximum amount of Rupees Two lakhs can be granted as compensation for the death of an individual, which computation has to be made by the District Legal Services Authority. We also take note of the provisions of the Employees Compensation Act, 1923 wherein the Commissioner

designated can *suo motu*, under Section 10-A, proceed against the employer on a death reported under the Employees Compensation Act. We are also informed that the Industrial Tribunals are notified as the Commissioners under the Act.

35. We notice the decision of the Hon'ble Supreme Court in *Rita Devi v. New India Assurance Co.Ltd. 2000 ACJ 801 (SC)*. It was stated so in paragraph 10:

> ***"10. The question, therefore is, can a murder be an accident in any given case? There is no doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a "murder" which is not an accident and a "murder" which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder."***

36. In the present appeal, the victim, the night watchman was killed in the course of a robbery, but the accused arraigned have been acquitted by us in the appeal since there is no evidence to find them guilty. That does not detract from the fact that the night watchman was killed in

the course of a robbery committed in the establishment. Hence, the murder caused in furtherance of the other felonious act of robbery is an 'accident', which is also in the course of the employment as a night-watchman.

37. In such circumstances, it is only proper that the Commissioner notified under Sec.20 of the Employees Compensation Act, initiate proceedings under Section 10-A against the employer of the deceased. The details of the deceased and the employer are shown hereunder:

Name	–	Raveendran Nair
Occupation	–	Watchman
Employer	–	Jaseena Jewellery, Kallara
District	–	Thiruvananthapuram
Date of death	–	06.05.2011
Age at Death	–	61 years
Salary in 2011	–	Rs.8500/-
Schedule IV Factorial	–	113.77

38. The Industrial Tribunal, Kollam shall initiate proceedings and issue notice to the employer as also the family of the deceased. The Station House Officer having jurisdiction over the area, the SHO Pangode, Kallara, shall within a period of one month produce the full address of the employer and the family of the employee before the Industrial Tribunal, Kollam, who shall initiate proceedings and also consider the question of limitation under the proviso to

Sec.10 of the Act, after hearing the employer and keeping in mind the special circumstances under which the dependent family was not aware of the remedy and no attempt is made to take a proactive initiation of proceedings, permitted under Sec.10-A of the Employees Compensation Act. We notice the lack of administrative machinery for the Commissioners notified and are raising a *suo motu* writ petition on that aspect. That apart, in this specific case the notified Commissioner, the Industrial Tribunal, Kollam shall proceed in accordance with law. It is made clear that the condonation of delay and the final order has to be passed in accordance with law and not peremptorily by reason only of directions issued by this Court. As to the employer-employee relationship the evidence of PW1 and PW2 in this case can be relied upon.

39. Meanwhile the DLSA, Thiruvananthapuram shall compute the compensation payable under the Victim Compensation Scheme and make the payment to the dependent family within a period of one month from the date of receipt of a certified copy of this Judgment. If the proceedings initiated by the Commissioner culminates in an award, the recovery shall also be made by the Commissioner and the amount paid under the Victim Compensation Scheme shall be

reimbursed to the fund constituted and the balance amount paid to the victim's family.

The Registry shall forward a certified copy of this judgment to the Industrial Tribunal, Kollam and the Member Secretary, KELSA. Certified copies of the deposition of PW1 and PW2 shall also be transmitted to the Industrial Tribunal, Kollam The Appeals are allowed with the above directions. Ordered accordingly.

Sd/-

K.VINOD CHANDRAN,
JUDGE

Sd/-

ZIYAD RAHMAN A.A.,
JUDGE

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