"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

THURSDAY, THE 04TH DAY OF JUNE 2020 / 14TH JYAISHTA, 1942

CRL.A.No.481 OF 2008

SC 599/2003 DATED 29-02-2008 OF ADDITIONAL DISTRICT COURT (ADHOC), TRIVANDRUM

CP 71/2001 OF JUDICIAL MAGISTRATE OF FIRST CLASS -III,TRIVANDRUM

APPELLANT/S:

NISAR
S/O MEERASAHIB,VAYALIL VEEDU T.C, 36/1187 NEAR SHOPPING COMPLEX, YATHIMKHANA, VALLAKKADAVU, PERUMTHANI WARD, PALKULANGARA VILLAGE.

BY ADVS.
SRI.R.T.PRADEEP
SRI.V.VIJULAL

RESPONDENT/S:

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

OTHER PRESENT:

SR.PP.B.JAYASURYA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20-02-2020, THE COURT ON 04-06-2020 DELIVERED THE FOLLOWING:

"CR"

JUDGMENT

Dated this the 4th day of June, 2020.

The appellant, who was the third accused in Crime No.133 of 2001 of Cantonment Police Station, Thiruvananthapuram, challenges his conviction and sentence in S.C.No.599 of 2003 of the Additional Sessions Court (Fast Track-I), Thiruvananthapuram for the offences punishable under Sections 365, 395 and 468 IPC. Out of the 7 indicted accused, the first accused was absconding and the case against him had to be split up. Accused Nos.2 to 7, faced trial and the appellant alone was convicted while the others were acquitted for want of evidence.

2. The prosecution allegations, upon which the accused were charged and the appellant convicted are as under:-

On 22.06.2001, at about 8.15 p.m, while PW2 was riding on his motorcycle, a Maruti Van bearing

registration No.KBT 3265 blocked the motorcycle at Bakery Junction and six well built men who got out from the van, forced PW2 into the Maruti Van and the vehicle drove off. Of the six persons, PW2 identified the first accused Oopher Shaji, with whom he had previous acquaintance. While sitting inside the moving vehicle, the first accused fisted PW2 on his face asking why PW2 had not returned his mobile phone. The other accused also fisted and kicked PW2. After some time the first accused called out to someone named Sabeer to remove the number sticker fixed on the number plate. Thereupon, the vehicle stopped and the false number sticker was peeled off. Meanwhile, the first accused forcibly removed Rs.5000/- from the pant pocket of PW2 and another person removed Rs.1000/- from his shirt pocket. The vehicle stopped at a secluded place and PW2 was forced to put his signature and thumb impression on blank and stamped papers. The vehicle moved again and had to stop due to traffic congestion. Utilising the

opportunity, PW2 jumped out of the vehicle, got into an autorichshaw and straight away went to the General Hospital. On receiving information regarding the incident, PW11 reached the Government Hospital and recorded Ext.P3 First Information statement and thereafter registered Ext.P13 FIR, arraying against Oopher Shaji (A1), Sameer (A2) and five other identifiable persons as accused. The first accused was arrested by 6.30 a.m. on 23.06.2001 and the Maruti Van, two fake number stickers, stamp pad and an amount of Rs.2030 was seized from his residential premises. Based on the information provided by the first accused, the Police party apprehended the second accused from his house at around 8 a.m.and thereafter arrested the appellant (A3) from his wife's house by 8.30 a.m. The stamp paper and blank papers with revenue stamps affixed on it and bearing the signature and thumb impression of PW2 were produced by the appellant and seized under Ext.P6 mahazar. The other accused, except accused No.7, were

also arrested on the same day.

3. In order to prove the prosecution case, PWs 1 to 11 were examined and Exts.P1 to P13 documents and MO1 to MO5, material objects marked in evidence.

4. The trial court, after appreciation of evidence, acquitted accused Nos.2 and 4 to 7 for want of evidence regarding their participation in the crime and convicted the appellant under Sections 365, 395 and 468 IPC. The other accused were acquitted since PW2; the victim failed to identify any of the accused in the dock, including the appellant. But, as far as the appellant is concerned, the trial court found that his guilt stood proved by the recovery of signed stamp and blank papers under Ext.P6 Mahazar.

5. Heard Sri.R.T.Pradeep, learned counsel for the appellant and Senior Public Prosecutor Sri.B.Jayasurya for the State.

6. The learned counsel for the appellant assails

the reliance placed by the trial court on the alleged recovery of the stamp papers from the appellant, the only piece of evidence to connect the appellant with the crime. It is submitted that the prosecution case of the appellant having voluntarily produced the stamp papers after his arrest by PW11 and the seizure of MO1 series and MO2 under Ext.P6 is legally untenable, since the seizure do not fall either under Sections 102 or 165 of the Cr.P.C and cannot be termed as a statement admissible under Section 27 of the Indian Evidence Act. In elaboration, the learned Counsel submitted that the only provision under which the recovery/discovery of a material object/fact, at the instance of an accused in custody could be proved is the discovery/recovery effected on the basis of a voluntary disclosure made by the accused under Section 27 of the Indian Evidence Act. In support of this contention, the learned Counsel relied on the decisions of the Honourable Supreme Court in *Anter Singh v. State of Rajastan[(2004) 10 SCC 657]* and

Mangu Singh v. Dharmendra and another [(2015) 17 SCC 488]

7. In order to appreciate this contention, it is necessary to scrutinise the evidence with regard to the recovery of stamp and blank papers from the appellant. The investigating officer (PW11) had deposed that he had arrested the first accused on the next day of the incident, and thereafter the second accused followed by the appellant. PW11 deposed that after the appellant's arrest, he had handed over the stamp paper and 3 blank white papers affixed with revenue stamps, bearing the signature and thumb impression of PW2. The relevant portion of Ext.P6 Mahazar under which the stamp papers were seized reads as under :-

> "ടി സ്റ്റേഷൻ ക്രൈം-133/01-)o നമ്പർ കേസ്സിലെ 3-)o പ്രതി ടിയാന്റെ ഭാര്യ വീടായ അമ്പലത്തറ, TC-46/130-)o നമ്പർ വീട്ടിൽ നിന്നും എടുത്ത് ഹാജരാക്കിയ മുദ്രപത്രവും, മൂന്ന് റവന്യൂ സ്റ്റാമ്പ് ഒട്ടിച്ച് ഒപ്പും, വിരൽ അടയാളവും ഇട്ടിട്ടുള്ള വെള്ള പേപ്പറുകളും തടസ്സരുടെയും മറ്റും സാന്നിദ്ധ്യത്തിൽ നോക്കി തിട്ടപ്പെടുത്തുന്നു.."

Therefore, the evidence, oral as well as documentary, regarding the recovery of MOs 1 and 2, is to the effect that the appellant had voluntarily produced the material objects before the investigating officer, after his arrest (while in custody). The legal issue that arises for consideration in the light of the evidence is, whether such production and consequent seizure can be brought under the ambit of evidence admissible under Section 27. A deliberation on this issue calls for consideration of Sections 25, 26 and 27 of the Evidence Act. Section 25 makes any confessional statement given by an accused before the police inadmissible in evidence. When it comes to Section 26, the rigour of the prohibition against proving the confession made by a person whilst in police custody is relaxed to the extent of making such confession admissible, if made in the immediate presence of a magistrate. Under Section 27, which is more like a proviso to the earlier two Sections, so much information received from a person accused of

any offence and in the custody of a police officer can be proved, if such information leads to the discovery of any fact in issue. The ambit of Section 27 has been discussed and delineated by the Hon'ble Supreme Court in a plethora of decisions, including the decision in *Mangu Singh v. Dharmendra and another [(2015) 17 SCC 488].* Therefore, only that portion of the statement of the person in custody which led to the discovery/recovery of a material fact/object is admissible in evidence. Here, the recovery of stamp and blank papers were not on the basis of the statement made by the accused and on the other hand, it was the accused himself who had voluntarily handed over the papers to the investigating officer, who seized it under Ext.P6 Mahazar. In such circumstances, the recovery of MO's 1 and 2 would not fall within the ambit of evidence admissible under Section 27.

8. In *Anter Singh*, the Apex Court after detailed consideration of the precedents, has laid

down the various requirements of Section 27 as under:-

> "***16. The various requirements of the Section can be summed up as follows:***
>
> ***(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.***
>
> ***(2) The fact must have been discovered.***
>
> ***(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.***
>
> ***(4) The person giving the information must be accused of any offence.***
>
> ***(5) He must be in the custody of a police officer.***
>
> ***(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.***
>
> ***(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.***"
>
> *(underlining supplied)*

It is hence clear that, for a statement/information

under Section 27 to be admissible, such statement/information should have led to the discovery of a material fact or the recovery of a material object. As far as the case at hand is concerned, it was not the statement of the appellant which led to the recovery of the stamp and other papers. The appellant had voluntarily taken the documents from the house and produced it before the investigating officer, stating that those were the documents on which PW2 was forced to affix his signature. This statement would undoubtedly amount to a confession made by the appellant while in police custody and consequently, the prohibition under Section 26 would apply. In that view of the matter, the trial court could not have relied on the statement and recovery of the documents to find the appellant guilty. In this context, it is pertinent to note that PW4, the witness to Ext.P6 Mahazar, did not support the prosecution case and according to him, the mahazar was signed at the Police Station. The

recovery, rather production, of MO1 series and MO2 being the solitary piece of evidence on which the accused was convicted, it is not possible to sustain the conviction.

9. Yet another issue to be considered is as to whether the offences with which the appellant was charged is attracted in the facts and circumstances of the case. The charge as framed by the trial court reads as follows:-

> *"That you the accused Nos.2 to 7 along with the absconding first accused abducted CW1 on 22.06.2001 around 8.15 P.M. in a Maruti van bearing Regn. No.KEV 5464 by exhibiting false number as KBT 3265 and thereby committed offence u/s. 365 of IPC and*
>
> *Whereas you the accused Nos.2 to 7 along with the first accused committed dacoity by manhandling and looted a sum of Rs.6200/- and thereby committed offence u/s. 395 of IPC.*
>
> *Whereas you have forcefully obtained the signature and thumb impression of CW1 in stamp papers and white papers and thereby forged documents for the purpose of cheating and and thereby committed offence u/s.468 of IPC within any cognizance."*

The form and content of the charge leaves much to be

desired, about which I don't intend to belabour, since the offences are clearly stated. The first charge is of abduction, which by itself is not a punishable offence. The offence of kidnapping or abduction with intent to secretly and wrongfully confine a person is made punishable under Section 365. On scrutiny of the provisions relating to abduction and kidnapping, it can be seen that Section 359 segregates kidnapping into two kinds; kidnapping from India and kidnapping from lawful guardianship. Going by Section 360, kidnapping from India would be attracted only when a person is conveyed beyond the limits of India without consent and as per section 361, the offence of kidnapping from lawful guardianship is attracted only if the victim is a minor. Abduction by itself is not made a punishable offence. Only when the abduction is coupled with kidnapping and is made with certain intent, as stated in Sections 364 to 369, does it become a punishable offence. The evidence of this case would show that

PW2 was forced into the Maruti Van and removed from the spot against his will, thereby committing the act of abduction. But, there is nothing in the evidence of either PW2 or PW11 to indicate that such abduction was made with the intention of secretly and wrongfully confining PW2. The evidence only shows that PW2 was forced into the Maruti Van and taken in the vehicle for some distance, during the course of which PW2 was assaulted, cash removed from his possession and forced to affix signature on certain papers. A little while later, PW2 managed to jump out of the vehicle. The two limbs of Section 365 are, (i) the victim should have been abducted or kidnapped and (ii) such abduction or kidnapping should have been with intent to secretly and wrongfully confine the victim. Both limbs having been used conjunctively, in order to attract the offence under Section 365, it is necessary that the victim should have been abducted with intent to wrongfully and secretly confine him/her. The second limb of

Section 365 is not stated in the charge or proved by the prosecution. Hence, conviction of the appellant under Section 365 cannot be sustained.

10. The second charge is of dacoity. It is to be noted that robbery is the aggregated form of theft and would transcend to the graver offence of dacoity when the robbery is committed by five or more persons conjointly. According to the version of PW2, six persons had forced him into the Maruti Van and the first accused and another person had committed theft of cash from his pockets after causing hurt to him. Undoubtedly, the ingredients for attracting the offence of robbery punishable under Section 392 of the IPC was brought out in evidence. But, for the robbery to be termed as dacoity, the act of robbery or its attempt should have been made by five or more persons conjointly. Here, the crucial aspect is that, by the acquittal of all accused, other than the appellant and the first accused, the number of offenders got reduced to two. In *Om Prakash v. State*

of Rajasthan [1998 SCC (Cri) 696], **the Honourable Supreme Court had occasion to consider the effect of acquittal of few among the accused, thereby reducing the number of remaining accused to less than five, to a charge under Section 395 IPC. The relevant portion of the judgment in *Om Prakash* is extracted below:**

> *"7. It was lastly argued by the learned counsel that even after believing their evidence the courts below could not have convicted the appellants under Section 395 IPC as the charge of dacoity was against five named persons and out of them two were acquitted by the trial court. Neither the charge nor the finding recorded by the trial court was that accused Om Prakash, Munna, Amarjit Singh and two other unknown persons had committed dacoity. Specifically, the five named accused were alleged to have committed the offence. Two accused having been acquitted it ought to have been appreciated that only the remaining three accused had committed the said offence. Therefore, it was not proper to convict the remaining three accused under Section 395 IPC. Their conviction will have to be altered to one under Section 392 IPC."*

Here also, the charge is specific that all the accused had conjointly manhandled PW2 and looted a sum of Rs.6,200/- from him and had thereby committed the offence of dacoity. Since, pursuant to the

acquittal of accused Nos.2 and 4 to 7 for want of evidence, the remaining accused were only two, the trial court could not have convicted the appellant for the offence under Section 395.

11. With regard to the charge under Section 468, it is to be noted that the specific case of the prosecution is that PW2 was forced to put his signature on a 50 rupee stamp paper and three blank papers affixed with revenue stamps. Whether mere putting of signature on blank papers under compulsion would amount to making of a false document is to be considered. The punishment under Section 468 is imposed when a person is found to have committed forgery, with the intention of using the forged document or electronic record for the purpose of cheating. Forgery under Section 463 means making any false document or false electronic record or part of a document or electronic record, with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person

to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed. The two essential elements of forgery contemplated under Section 463 are (i) the making of a false document or part of it, and (ii) such making is with such intention as is specified in the Section. What amounts to making a false document is stated under Section 464. As per Section 464, a person can be said to have made a false document when he is found to have committed any of the acts enumerated under *first, secondly and thirdly.* Section 464 is extracted here under:

> ***"464. Making a false document.—A person is said to make a false document or false electronic record—***
> ***First.—Who dishonestly or fraudulently—***
>
> ***(a) makes, signs, seals or executes a document or part of a document;***
> ***(b) makes or transmits any electronic record or part of any electronic record;***
> ***(c) affixes any [electronic signature] on any electronic record;***
> ***(d) makes any mark denoting the execution of a document or the authenticity of the [electronic signature],***
>
> ***With the intention of causing it to be believed that such document or part of a***

> ***document, electronic record or [electronic signature] was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or***
>
> ***Secondly.—Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with [electronic signature] either by himself or by any other person, whether such person be living or dead at the time of such alteration; or***
>
> ***Thirdly.—Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his [electronic signature] on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration."***

The first and second limb of the Section is applicable when the accused himself commits the acts enumerated therein whereas under thirdly, the accused causes another person to dishonestly or fraudulently do certain acts. But even under the third limb, the act of forcing another person to sign on blank papers does not amount to making of false document.

12. Yet another interesting question is as to

whether, a or blank paper containing only a signature can be termed as a 'document'. A perusal of Section 29 of IPC shows that the word 'document' is meant to denote any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used or which may be used, as evidence of that matter. The definition of 'document' under Section 3 of the Evidence Act is almost similar. Going by the definitions, in order to term a substance as a document, some matter should have been expressed or described on that substance by means of letter, figures or marks and such matter should be intended to be used as evidence of that matter. It is doubtful whether the act of putting a signature on blank paper can be termed as expression or description of any matter intended to be used as evidence of that matter and thereby, bringing it within the meaning of 'document' under Section 29 of IPC. In any case, forcing another person to sign on a blank paper will

not amount to forgery under Section 463, amounting to an offence punishable under Section 468. In such circumstances, the finding of guilt and conviction of the appellant under Sections 365, 395 and 468 IPC cannot be legally sustained.

For the reasons mentioned above, the criminal appeal is allowed and the appellant acquitted. The bail bond executed by the appellant is cancelled.

Sd/-

V.G.ARUN
JUDGE

Scl/04.06