

**Althaf Vs. Station House officer,manjersshwar Police**

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**SooperKanoon Citation :** [sooperkanoon.com/8433](http://sooperkanoon.com/8433)

**Court :** Kerala

**Decided On :** Nov-25-2014

**Judge :** Honourable Mr. Justice a.Muhammed Mustaque

**Appellant :** Althaf

**Respondent :** Station House officer,manjersshwar Police

**Judgement :**

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE  
HONOURABLE MR. JUSTICE A.HARIPRASAD TUESDAY, THE 25TH DAY OF  
NOVEMBER 2014 4TH AGRAHAYANA, 1936 CRL.A.No. 876 of 2004 (A)  
----- AGAINST THE

JUDGMENT

IN S.C.NO. 680/2000 of ADDITIONAL SESSIONS COURT (ADHOC- I),  
KASARAGOD DATED 28-04-2004 APPELLANT(S)/ACCUSED.:

----- 1. ALTHAF, S/O.SYED WOOD SAHIB, KALINJA,  
UPPALA.

2. MUHAMMED ANEEF, S/O.ABDUL RAZAK, JAYA NAGAR, PATHODY,  
UPPALA.

3. ABDUL SALIM, S/O.NOOR MUHAMMED, MANIMUNDA HOUSE, UPPALA.

4. MUHAMMED MAZOOD, S/O.ADAM YUSUF, MANIMUNDA HOUSE, UPPALA.

5. JAFER ALI, S/O.IBRAHIM SHAHABAL, HIDAYATH NAGAR, UPPALA.

6. FASAL, S/O.HUSSAIN, HUSSAIN NAGAR, NEAR UPPALA RAILWAY STATION. BY ADV. SRI.T.G.RAJENDRAN RESPONDENT(S)/COMPLAINANT AND STATE.: ----- 1. THE STATION HOUSE OFFICER, MANJESHWAR POLICE STATION.

2. STATE OF KERALA, REP.BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SHRI K.K.RAJEEV THIS CRIMINALAPPEAL HAVING BEEN FINALLYHEARD ON1311.2014, THE COURT ON2511.2014 DELIVERED THE FOLLOWING: A.HARIPRASAD, J.

----- Crl.Appeal No.876 of 2004  
----- Dated this the 25th day of November, 2014.

## JUDGMENT

Appellants are accused 1 to 6 in S.C.No.680 of 2000 on the file of learned Additional Sessions Judge, Kasaragod. The trial court tried them for offences under Sections 427, 294(b) and 395 of the Indian Penal Code (in short, "IPC"). The court found them guilty for the offences punishable under Sections 427, 394 and 395 IPC and sentenced. They were acquitted for the offence under Section 294(b) IPC.

2. Prosecution case, in nut-shell, is that on 02.05.1998, the accused persons in furtherance of their common object attempted to commit dacoity after stopping a lorry bearing No.KA194048 driven by PW2 through the national highway at Uppala, at about 1 o'clock in the night. Prosecution further contended that the 1st accused abused the driver (defacto complainant) in filthy language. The accused persons voluntarily caused injury to the driver and cleaner of the lorry and caused damage to the vehicle. In the course of trial, ten witnesses were examined and eight documents were marked by the prosecution. MOs 1 to 3 are the material objects. There was no defence evidence. Crl.Appeal No.876/2004 2 3. Heard the learned counsel for the appellants/accused and the learned Public Prosecutor.

4. Learned counsel for the appellants argued that conviction entered by the court below is legally unsustainable for the sole reason that none of the prosecution witnesses properly identified the accused persons. This argument is built up on the premise that even the prosecution has no case that the defacto complainant or the other injured witness had any previous acquaintance with the accused persons. Moreover, the fact that the alleged incident took place in the dead of night is also a factor compelling the prosecution to adduce clinching evidence regarding identity of the accused persons. To appreciate this contention, I shall deal with the evidence in this case. Ext.P2 is the first information statement(FIS). It was recorded on 02.05.1998 at about 10.00 a.m. It is to be remembered in this context that the incident was at about 1 o'clock in the night on the same day. PW2 is the informant. He was the driver of the lorry involved in the incident. During night on 01.05.1998, the lorry started its trip from Parassinikadavu towards Mangalore loaded with saw dust. At about 1 o'clock, the lorry reached at Uppala Bazar near Manjeswaram. At that time, about 5-6 persons, identifiable on sight, blocked the road. They raised their hands to stop the vehicle. They were holding wooden rafters at that time. PW2 stopped the vehicle. They damaged the head light and tail lamp of the lorry. At that time, PW9, the cleaner of the lorry, asked them not to cause damage to the vehicle. Then they came into the cabin of the lorry and pulled PWs 2 and 9 out. Accused beat them. They demanded money. When PW9 tried to prevent attack on PW2, one person by name Althaf among the accused attacked PW9 on head with a reaper. He abused PW9 in obscene language. All the accused persons assaulted PWs 2 and 9. When they cried out for help, the accused ran away. PW2 took PW9 to a nearby hotel and requested the inmates for help. The injured persons were taken in an autorickshaw to a nearby hospital by the hotel owner's son. After giving first aid, they were asked to go to a hospital at Mangalore and they got admitted there. They came down to Manjeswaram for lodging FIS. It is mentioned in Ext.P2 FIS that the accused were calling out their names Althaf, Aneef, etc. during the commotion.

5. PW2 deposed in lines with the recitals in Ext.P2 FIS. He started the trip from Parassinikadavu to Mangalapuram at about 7.00 p.m. PW9 was also travelling in the lorry as a cleaner. It is the deposition of PW2 that at about 1 o'clock in the

night, the lorry reached at Uppala Bazar and at that time, the accused persons waylaid the vehicle. Thereafter, they mounted on the side of the cabin and attacked the cleaner. When PW2 prevented them from doing so, he also received blows. PW9 fell out of the Crl.Appeal No.876/2004 4 lorry. PW2 identified only the 5th accused in court. It is also contended that they demanded money from PWs 2 and 9 by uttering bad words. This witness was cross-examined by the defence counsel. PW2 stated that PW9 was wearing MOs 2 and 3 shirt and lunki. During cross-examination, PW2 deposed that on receiving the first blow on head with a rafter, PW9 became unconscious. Suggestion put to PW2 that he did not identify the accused is stoutly denied by him. Evidence tendered by PW2 is singly not sufficient to identify the accused persons involved in the crime.

6. Another material witness is PW9. He was the cleaner of the lorry. He also supported the version of PW2 in respect of the incident. The case spoken to by PW9 is that the accused persons attacked them with rafters and caused damage to head light and tail lamp of the lorry. They abused the injured witnesses and assaulted them demanding money. He heard someone calling out a name Althaf. He lost consciousness after some time. Testimony of PW9 is that he could know their names as they themselves called each other. In cross-examination, he stated that the accused ran away abandoning the rafters at the place of occurrence. Testimony of PWs 2 and 9 would emphatically show that the lorry driven by PW2 was blocked at the time and place as alleged by the prosecution and the assailants caused damage to the lorry and attacked them. The pertinent question is regarding the identity of the accused persons. Even Crl.Appeal No.876/2004 5 though in chief-examination, PW9 had only mentioned some names, at the time of cross-examination, he had clearly identified the accused persons who beat PW2. According to his assertion, accused 2 to 4 attacked the driver (PW2). He also stated that the accused persons climbed on the lorry and attacked the driver. PW9 admitted that he had no previous acquaintance with the accused persons. He could understand their names as they were calling each other at the time of melee. PW9 stated that he lost consciousness after the accused fled from the scene abandoning the sticks used for beating them. PW2 in chief-examination deposed that the 1st accused Althaf beat him while he was trying to get out of the lorry. Suggestion that accused 5 and 6 were not present at the place of occurrence is

denied by this witness. It is relevant to note that in Ext.P2 first information statement, names of accused 1 and 2 were mentioned. The injured witnesses could identify these names as the accused persons themselves were calling their names.

7. PW1 is a witness to Ext.P1 scene mahazar. Testimony of this witness will only show the regularity of investigation upto that level. PW3 recorded Ext.P2 FIS and registered Ext.P3 first information report. There is a contradiction between the evidence of PWs 2 and 9. PW2 stated that the accused persons dragged them out of lorry and attacked, whereas PW9 stated that the accused attacked them while they were sitting in the lorry Crl.Appeal No.876/2004 6 and thereafter PW9 fell down on receiving a blow on his head. It is true that some margin can be given for the fading of memory by efflux of time.

8. PW4 is the investigating officer. He caused the preparation of material documents. On 30.12.1998 he filed the charge adding Section 395 IPC also. Suggestions put to this witness that he did not properly verify the materials and the witnesses did not identify the accused were denied. PW5 is another witness to Ext.P1 scene mahazar. He also signed as a witness in Ext.P4 seizure mahazar whereby the dress worn by PW9 were recovered by the Police.

9. PW6 inspected the lorry involved in the incident and submitted Ext.P5 report. PW7 is the Doctor who treated PWs 2 and 9. He issued Ext.P6 wound certificate relating to PW9 and Ext.P7 certificate in relation to PW2. In both these documents, names of the assailants were not mentioned and they were described as unknown persons.

10. PW8 is the Village Officer who prepared Ext.P8 site plan. PW10 took over investigation from PW4. He recovered the broken glass pieces of head light and wooden rafters used for attacking the injured witnesses. On 03.05.1998, accused 1 to 4 were arrested after identifying them by the defacto complainant. Accused 5 and 6 were arrested on 11.05.1998. PW10 filed an application before the Chief Judicial Magistrate Court, Kasaragod for conducting test identification parade. Even though Crl.Appeal No.876/2004 7 this witness deposed that he had submitted a request for test identification parade, there is no evidence to show that

the test identification parade was conducted. Further, no report is produced nor the Magistrate, who might have conducted the test identification parade, was examined.

11. Learned counsel for the appellants submitted that the court below legally went wrong in finding that the ingredients of the offence under Sections 394 and 395 IPC have been established in this case. 'Dacoity' is defined in Section 391. It reads as follows: "Dacoity.-When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity"". 'Robbery' in turn is defined in Section 390 IPC. Going by the prosecution allegation, the offence attributed to the accused persons will fall within the category of robbery as defined, 'when extortion is robbery'. Robbery is defined in Section 390 IPC. It reads as follows: "Robbery.- In all robbery there is either theft or extortion. xxxx When extortion is robbery.- Extortion is CrI.Appeal No.876/2004 8 "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted. Explanation.- The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, or instant hurt, or of instant wrongful restraint." According to the learned counsel for the accused, there was no forceful taking of money by the accused persons from PWs 2 and 9 though they deposed that there was a demand for money by the accused persons. According to the learned counsel, therefore, the offence of dacoity is not attracted. I am unable to agree with this contention. As rightly held by the court below, in the light of the definition of dacoity in Section 391 IPC, the very attempt or aiding of commission of dacoity by itself is a completed crime. Court below placed reliance on the decision of the Supreme Court in Shyam Behari v. State of U.P. (AIR 1957 SC320. I confirm the view taken by the court below that in appropriate cases, even if there is no successful robbery completed, as per the definition of dacoity in the Penal Code, the offence may be attracted if the ingredients are satisfied. If the

allegations herein are satisfactorily proved, the offence under Section 394 CrI.Appeal No.876/2004 9 IPC also could be attracted. But, the question here is regarding the establishment of identity of the accused persons. A Division Bench of this Court in Pradeepan v. State of Kerala (2005 (3) KLT1075 considered in detail the purpose of test identification parade and the manner in which it has to be performed. Even though the said decision was later considered and modified by the Apex Court, the broad principles regarding test identification parade remain unaffected. The following quotation from the above decision will be useful for our purpose: "It is well settled position of law that the evidence given by the witnesses before Court is substantive evidence. It is to lend assurance to the testimony of the witnesses that evidence in the form of an earlier identification is tendered. If the accused persons are got identified by the witnesses soon after their arrest and such identification does not suffer from any infirmity, that circumstance lends corroboration to the evidence given by the witness before Court. The Test Identification Parade is not a magisterial act. It is only the part of the investigation. The purpose of the identification parade is to test the veracity of the witness who tries to identify the accused or one of the participants in a crime. The Test Identification Parades are conducted to satisfy the investigating authorities that certain person, not previously known to the witnesses, was involved in the commission of the crime. It is also designed to CrI.Appeal No.876/2004 10 furnish evidence to corroborate the testimony which the witness concerned tenders before the Court. It is not a substantive evidence. A test identification evidence is, at best, supporting evidence. It can be used only to corroborate the substantive evidence given by the witness in Court regarding identification of the accused as the doer of the criminal act." 12. In this case, PWs 9 and 10 deposed that a test identification parade was conducted to identify the accused persons. It was rightly done for the reason that the accused persons were unknown to the victims and for ascertaining the right progress of investigation, the investigating officer wanted to ascertain the identity of the accused persons. But, the perfunctory manner in which the prosecution was conducted had sealed the fate of the case. It is true that identification of the accused from the dock is the substantive evidence. But, that principle cannot be applied in all cases as a universal rule. In this case, as mentioned earlier, the aggressors were total strangers to the injured witnesses. In

spite of taking steps to hold a test identification parade, the prosecution did not care to prove that fact before the trial court and that the witnesses at the first opportunity identified the assailants correctly. That would have been the best piece of evidence to give credence to the testimony of PWs 2 and 9. The incident was on 02.05.1998. PWs 2 and 9 were examined on 18.03.2004 and 13.04.2004 respectively. Applying the test of normal CrI.Appeal No.876/2004 11 human intelligence and experience, there is no reason to think that the witnesses, who had occasion to see the assailants for the first time during midnight and that too approximately six years ago, would have remembered them at the trial. Preponderance of probability is also not in favour of such a line of thinking.

13. Learned Prosecutor placed reliance on a decision rendered by the Supreme Court in *Budhsen v. State of U.P.* (AIR 1970 SC1321). The relevant dictum reads thus: "Facts which establish the identity of an accused person are relevant under Sec.

9. As a general rule, the substantive evidence of a witness is a statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification CrI.Appeal No.876/2004 12 proceeding. There may, however, be exceptions to this general rule, when, for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to

corroborate their testimony in Court. Identification proceedings in their legal effect amount simply to this: that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by Section 162, Cr. P. C." It is true that test identification parade in this case must have been held without much delay, but what was the outcome of the parade is not established. In the absence of a report of the test identification parade produced and proved before the trial court, the accused can legitimately argue that the witnesses failed to identify the assailants in the parade and Crl.Appeal No.876/2004 13 that is why the report is held back from the court. Although the principle that the identification of the accused from the dock by the witness is the substantive evidence, one cannot forget the fact that if the witness failed to identify the accused in a regularly held test identification parade, the identification from the dock would become suspicious. It is all the more important in a case where admittedly the test identification parade was held and without any justification, its report was withheld. The Supreme Court in Sampat Tatyada Shinde v. State of Maharashtra (AIR 1974 SC791 held thus: "The evidence of test identification is admissible under Section 9. It is at best supporting evidence. It can be used only to corroborate the substantive evidence given by the witnesses in Court regarding identification of the accused as the doer of the criminal act. The earlier identification made by the witnesses at the test identification parade, by itself, has no independent value. Nor is test identification the only type of evidence that can be tendered to confirm the evidence of a witness regarding identification. The identity of the culprit can be fixed by circumstantial evidence also." In the absence of any satisfactory explanation for non-production of proof regarding the test identification parade, the prosecution case certainly becomes weak. Further, the evidence tendered by PWs 2 and 9 cannot be Crl.Appeal No.876/2004 14 relied on to fix the identity of the assailants. The evidence is shaky and not fully convincing. Certainly the benefit of doubt should go to the accused persons. Therefore, I find the conviction of the accused cannot be sustained. In the result, the appeal is allowed. Conviction of the appellants in S.C.No.680 of 2000 on the file of the Additional Sessions Court (Adhoc-I), Kasaragod is hereby set aside.

They shall be set free forthwith, if not wanted in any other case. Their bail bonds are cancelled. All pending interlocutory applications will stand dismissed. A. HARIPRASAD, JUDGE. cks

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