

IN THE HIGH COURT OF KERALA AT ERNAKULAM

C.R.

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

TUESDAY, THE 23<sup>RD</sup> DAY OF AUGUST 2022 / 1ST BHADRA, 1944

CRL.A NO. 237 OF 2020

AGAINST THE JUDGMENTSC IN S.C.No.627/2009 DATED 14.06.2017 OF ADDITIONAL  
DISTRICT COURT & SESSIONS COURT - VI, THIRUVANANTHAPURAM / III ADDITIONAL  
MACT

CP 127/2004 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,TRIVANDRUM

APPELLANT/ACCUSED:

JAHIR HUSSAIN, C.NO.1909

BY ADV ADV.SRUTHY K.K. STATE BRIEF

RESPONDENT/COMPLAINANT:

1. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA
2. THE INSPECTOR OF POLICE, FORT POLICE STATION

SRI.T.R.RENJITH, SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 23.08.2022,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**C.R.**

K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ.

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Crl.Appeal No.237 of 2020  
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Dated this the 23<sup>rd</sup> August, 2022

**JUDGMENT**

**Vinod Chandran, J.**

House trespass, robbery and murder are the charges on which the appellant was convicted, based only on circumstantial evidence, that too mainly on the recoveries made of the various articles which were alleged to have been stolen from the house and sold to various persons or kept in secure places. There were two accused, one of whom was convicted in an earlier trial, since the cases were split up on the present appellant absconding after the Sessions Court had taken the case on file. Later, arrest of the appellant led to the present trial in which he was convicted under Ss.449, 392, 394 & 302. Life imprisonment and fine under S.302 and various terms of imprisonment under the other provisions, with

appropriate fine and also default sentences, in the event of failure to pay fines, were imposed.

2. Adv. Sruthy K.K., learned State Brief, appeared for the appellant and Sri. Renjith, learned Public Prosecutor appeared for the State. Learned counsel for the appellant argued that there is no single circumstance connecting the accused with the crime, leave alone an unbroken chain of such circumstances. There is absolutely no evidence obtained regarding the murder, either scientific or circumstantial. The motive spoken of is frivolous to say the least and there is no clear ascertainment of ownership or identity of the stolen goods from the house. The recovered goods, the MOs, were not properly identified and the proceedings sheet shows that they were missing from the court and there is no whisper as to how they were traced out. Apart from there being no proper identification of the recovered goods, even the alleged owner does not have a definite case as to the quantity of the goods stolen or its value. The fact that the goods were insured for a huge amount should normally raise a suspicion against the owner of the goods himself. The recoveries have also not been properly witnessed and many of the crucial witnesses were not examined. Neither does the investigating officer (I.O) identify the

goods, as recovered on the basis of the separate recovery mahazars, nor do the attestors or persons from whose possession it was recovered. The owner of the goods does not produce a license to run the business, a stock register or even the purchase bills of the alleged stolen goods. The goods allegedly recovered from the possession of the accused and those to whom allegedly sale was made by the accused, are not ascertainable or identifiable. There is no question of the accused being found guilty for even the charge of robbery, leave alone the house trespass and murder. The learned Counsel placed heavy reliance on Tulsiram Kanu v. State AIR 1954 SC1.

3. Learned Public Prosecutor on the other hand relied on Ganeshlal v. State of Rajasthan [2002 (1) SCC 731] to put forth the contention of the house trespass and murder being a reasonable inference possible from the fact that the stolen goods were recovered at the instance of the accused based on confession statement admissible under S.27 of the Evidence Act. The various recoveries were pointed out and mahazars read out, to emphasize that there is clear evidence of the stolen goods being in the possession of the accused. The accused offered absolutely no explanation for such possession and he was caught red handed while trying

to sell the goods. The various recoveries clearly indicate the goods having been stolen from the house rented out by PW1, wherein he had kept the valuable goods dealt with in the business. The house, as per the testimonies, during daytime would be occupied only by the cook, the person who was murdered. The accused had been an earlier employee and was privy to the manner in which the employees worked and also the time on which they left the house and came back for the night. The accused had also spoken to one of the witnesses regarding the specific business carried on by PW1. He had a motive in so far as fulfilling his love affair, by starting a business; the pre-condition set by his fiancée's family, for which purpose he had ventured into crime. The well laid plans collapsed like a pack of cards only by the prompt action of the police, who responded to the leads offered by the owner of the goods and the co-operation of the various people involved in the business. While asserting that the recoveries of stolen goods amounted to clinching circumstances, it was also alternatively argued that, in any event the recovery of the two bags (MO1 & MO65) belonging to the two employees of PW1, recovered from the possession of the accused would by itself offer a very valid circumstance against the accused. The learned Prosecutor would assert that the conviction is proper

and the sentence is appropriate and seek the impugned judgment to be upheld.

4. The FIS was by PW2, who was an employee in the business carried on by PW1, in the name and style, 'Star Tools'. PW1 along with other eight employees, PW6, the brother of PW1 and a cook were staying in a rented house, the owner of which was PW3. PW2 regularly used to shuttle between the house and the shop; which was a ten minute walk from the house, to bring food for the other employees. The cook employed by PW1 alone was the occupant of the house during day time. PW2, at around 1' o clock in the noon and 8-8.30 in the night would come to the house, pick up the food for the other employees and go back to the shop. Three employees were staying in the shop itself and those who were residing in the house leave for work in the morning at 9 am and come back only at 9.p.m. On the crucial day, when PW2 came to the house, he saw the collapsible gate open, which he took to be a sign of visitors in the house. As usual he went to the rear of the house and called the cook whom he and the other employees address as 'Appa'. There was no response and he entered the kitchen when he heard the TV blaring in the drawing room. He again called for 'Appa' and went inside the house where he saw total disarray with clothes strewn

around and the room occupied by the owner; which is usually locked, pried open. The almirah inside the room was also pried open and there were a lot of empty plastic containers strewn around, which used to contain crystal beads, dealt with by PW1. He then entered the room occupied by PW6 and found the cook covered with a bed sheet and lying on the floor. Removing the bed sheet, he found the hands and body of the cook tied with a rope and his legs tied with a towel. His mouth was taped shut with a cello tape. He removed the cello tape and tried to revive the supine man and pressed on his chest; but having failed, he tried to make a telephone call which too failed. He immediately went to the nearby house of the land owner, PW3, and summoned him. From PW3's house, he called PW6 and told him about the murder of the cook. PW3 informed the police and they were at the house immediately thereafter and PW2 gave the FIS which was marked as Ext.P1 before court. PW2 deposed in tune with the FIS and identified MO4 rope & MO61 bed sheet which were on the body of the deceased and MO8 series of plastic containers strewn around. PW1 very pertinently stated that, within one week of the incident, the appellant herein was summoned by the police to the shop, questioned and left free.

5. PW1 is the owner of 'Star Tools', who is a native of Tamil Nadu and had been carrying on the business at Thiruvananthapuram for 25 years. On 5.7.2004, he had gone to Kayalpattanam, his native place, for a marriage, and was informed of the crime in the night by his brother PW6. He rushed back and came to the rented house at 3'o clock, which was under police guard. He was allowed to go in only at around 9 a.m. and he saw the body of the deceased and spoke of it, as recited by PW2. PW1 spoke of having dealt with crystal beads, artificial beads and working tools for goldsmiths. It was on 5.7.2004 that the cook employed by him was killed, in the house rented out by him, by name K.S.Nivas, and his goods stolen. The lock on the door of the bedroom occupied by him was broken. He had kept 25 containers of crystal beads in two almirahs in the said room. The two almirahs were open and the crystal beads were missing. Twenty five empty containers, in which the crystal beads were kept, were strewn around and so were the dress of the staff. Three bags owned by his staff were also missing, in which probably the thieves had taken the stolen goods. Immediately thereafter, he informed, Khalid at Kozhikode, Amir Ali at Thrissur and Hamsa in Ernakulam; who were carrying on a like business, about the robbery and asked them to be vigilant and detain



anybody coming to them with the same business. On 11.8.2004, Hamsa informed him that a person had come to Khalid's house offering crystal beads at a lesser price than that available in the market, but demanded immediate cash. Khalid for paucity of cash sent him back. PW1 carried this information to the Fort Police Station and recited it to the Additional Sub Inspector (ASI). The ASI along with a police team, accompanied PW1 to Thrissur on 12.8.2004, and camped at Thrissur.

6. On the next day, Hamsa again called PW1 and told him about a person having approached 'Fathima Tools', Thrissur owned by Amir Ali, with crystal beads with a like offer, and a request for immediate cash. PW1 asked Hamsa to somehow detain the person and rushed to 'Fathima Tools' with the police party. The person detained was the appellant herein who had worked with PW1 in 1996-97 and 2000-2001, and he was identified from the dock. The detention of the accused was immediately communicated to the Circle Inspector(C.I), Fort Police Station, who had already started from Ernakulam. The C.I(PW33) reached 'Fathima Tools' Thrissur by around 7.30 p.m. and questioned the accused. There was a canvas bag with the accused which contained crystal beads packed in transparent plastic covers. There was also a watch, a stapler pin, white

covers to repack crystal beads, stickers, cassette, a purse, KSRTC ticket and railway ticket. The confession said to have been made by the accused was rightly not recorded by the trial Court, finding it to be hit by S.25 of the Evidence Act. PW1 went on to say that he recognised the crystal beads as those taken from his house, the value of which was around Rs.59,800/-. The total value of the goods stolen from his house, according to PW1, was Rs.4,56,661/-, weighing around 75kgs. Here, we have to specifically note that in chief examination itself PW1 admitted that on 6.7.2004, he had given a statement to the police that the stolen goods weighed around 5 kilos, valued at around Rs.1,00,000/-. He also said that only later he found from the accounts that the goods stolen and the value, were much more. Here we also have to emphasize that there is no stock register produced and it is the evidence of PW6 that they never maintained a stock register. But as pointed out by the learned Counsel for the appellant, PW1 admitted the goods to have been insured for around 12 lakhs.

7. Continuing with the testimony of PW1: he said that appellant confessed of another person being with him, one Jerook, with whom some crystal beads were kept. Immediately PW1, accompanied by the police party led by PW32, went to Kayalpattanam, and from the beach, Jerook

was arrested. Crystal beads valued at Rs.9,000/- was recovered from him, which were identified as those stolen from PW1. The appellant made another confession, of beads kept at the house of Said Haneefa at Villivakkom, Madras. PW1 deposed that the appellant had an affair with the daughter of Haneefa and Haneefa had required the appellant to start a business, as a condition to give his daughter in marriage. PW1 along with the police party, went to Haneefa's house from where 78 packets of crystal beads kept in an almirah valued at Rs.3,45,770/- was recovered, which was also identified as those stolen from PW1's house. Two bags belonging to the employees of PW1 were also recovered from the almirah at Haneefa's house. There was also a suitcase recovered from Haneefa's house. The two bags stolen from his house were marked as MO1 and MO2 respectively having the mark 'Reebok' and 'OSCAR' on them. The blue bag in which the crystal beads were found at Trisuur was marked as MO3. The suitcase along with a pants and T-shirt for Jerook, were said to have been purchased with the money obtained by selling flower stones to one Murthy (PW14) at Nagarkovil. Then it was deposed that the stolen goods were not only crystal beads but also flower stones, heart stones etc. which flower stones were received from all the places of recovery. This was contrary to

the earlier statement in chief-examination itself that crystal beads kept in the empty plastic containers strewn around, were stolen from the house. A little later, it was deposed by PW1 that in addition to the above goods, there was also Taiwan coral and white pearls stolen from his house.

8. PW1 identified the rope & towel (MO4 & 5), with which the body of the deceased was tied and also his belt and banyan (MO6 & 7), found on the body. He also marked MO8 series of 25 empty plastic boxes found strewn around in the crime scene. There was also a hammer (MO9), a billhook (MO 10), a screwdriver (MO11) and a chisel (MO14) recovered from the scene of occurrence. According to PW1 and other witnesses, MO11 and 14 were not objects available in the house and would have been probably brought by the thieving murderers. However there is no scientific evidence of finger prints from the said MOs nor is it connected to the accused in any manner. MO15 to MO60 were the various articles recovered, which was marked as those stolen from the house. Here we have to pertinently note that the MOs marked are not clearly identifiable as those belonging to PW1, because it cannot be distinguished from similar goods available in the market. No identifying features were specified by PW1 nor was the purchase bills of the various items produced. Even according to

PW1, he was regularly dealing in these goods and he used to purchase it from other places and sell it to jewelries and goldsmiths. MO15 to MO60 were said to be goods recovered from: (i) the appellant, at 'Fathima Tools', Ameer Ali's shop at Trissur, (ii) the house of Jerook at Kayalpattinam, (iii) the house of Said Haneefa, at Villivakkom, Chennai, (iv) M.S. Diamonds, Nagarkovil; PW14's shop and (v) 'Aishwarya Tools' Thrissur, belonging to PW15. PW1 spoke of having kept stock of goods in the house and that the stock in trade was insured for around 12 lakhs. He also asserted that he had a licence to carry on the business and that there were purchase bills of the purchases made from Mumbai; but without producing any of these.

9. PW3 is the house owner of K.S.Nivas, which according to him was rented out 8 years back. He spoke of having seen the accused in the period 1996-97. PW3 corroborated the testimony of PW2 as to the detection of the dead body, the disarray in the house and also the information of the crime, passed on to the police. PW4 is an employee of 'Star Tools' who said that the bags belonging to himself, Salim and Jaffer Sulaiman were not seen. The bags of himself and Jaffar Sulaiman were black bags with the mark of 'Rebok' and that of Salim had the mark 'Oscar'. He identified MO1 bag as belonging to him by the mark 'Reebok' on it,

which was shown to him a month after the crime, from the police station. He also identified MO2 bag as one belonging to Salim, another employee, who was abroad at that time, by the mark 'OSCAR'. He spoke of the accused having worked with 'Star Tools' for about an year in 1996 and another one year in the year 2000. Ext.D1 contradiction was with respect to the use of the rope in the house, with which the body of the deceased was found tied, which is not at all relevant. PW5 is another employee of 'Star Tools' who identified MO65 bag again by the mark 'Reebok' on it, which he said was owned by him and found lost at the crime scene. He said that he was shown the bag after a month by the police, torn and not in the condition in which he lost it. He also identified MO1 and MO2 bags. MO65 was recovered on the confession statement of Jerook. The contradiction Ext.D2 marked in PW5's deposition, is his prior statement that the death would have occurred between 1.00 p.m. and 8.50 p.m. on 5.7.2004; which is only a layman's opinion. PW6, brother of PW1 testified in tune with PW2 and spoke of the supine body and the disarray in the house. He too spoke of accused having worked one year each in 1996 and 2000 with them. He claimed that there was no stock register maintained at Star Tools.

10. PW7 is a social worker who witnessed Ext.P2 inquest report. PW8 is the cousin of the deceased who was informed of the death by PW1 and he went to the crime scene. He spoke also of going to Jerook's house hearing about the police having reached there. Jerook took a blue bag from under the cot, which bore the inscription 'Fathimas'. He witnessed Ext. P3 mahazar, which recovered the bag (MO66), a shirt (MO68), pants (MO67) and gems and beads (MO69). Again the identification of gems/beads recovered from A2's house cannot be relied on, for the same having no distinguishing feature from that available in the market and the said recovery incriminates Jerook and not the present appellant, if at all. Further, PW8 is also engaged in the same business, but not a person who could identify the goods stolen from PW1. PW9 was proffered to speak of a circumstance, which raises a suspicion against the appellant. According to him, he was a person taking orders for jewelry boxes and he used to canvas orders for container boxes manufactured by 'Star Tools'. Here, it has to be noticed that there is no testimony of 'Star Tools' having been engaged in any manufacture of containers by PW1 or the other employees. It is only the testimony of PW1 that the empty containers found strewn around in the house, contained crystal beads. If PW9 is believed then the presence of

empty containers in the house is natural and it need not have contained stones, beads or the like. PW9 claimed to have seen the appellant a month before the murder when the appellant enquired with him about, the cook at 'Star Tools'. PW9 responded that it was 'Appa' and asked him why he made the enquiry. The appellant answered that a person who worked as a cook earlier wanted to go back. This, by itself does not project any motive nor is it relevant as a prior conduct.

11. Hamsa, PW10, is a representative and sales agent for the goods dealt with by 'Star Tools'. He speaks of information from Khalid at Kozhikode, regarding a person having approached him at his house to sell beads at a discounted price, for immediate cash. He went to Amir Ali's shop on 13.12.2004 when the accused came there to sell crystal beads. He identified the accused from the dock and deposed that the accused fumbled, when he was asked the price and was at a loss to quote a specific price; a clear indication of no acquaintance with the trade. Amir Ali and himself, detained the accused and informed PW1. PW1 came with a police party and identified the goods in the blue coloured bag of the accused, as the stolen goods. Later the C.I also reached there and these goods were seized as per a mahazar, witnessed by Sharafudeen, PW31. He identified



MO3 bag in which the goods were brought, but not the goods. The witness was not asked to identify any of the goods recovered from Amir Ali's shop nor had he any prior acquaintance with the accused. He identified the accused from the dock in the year 2017, by reason of having seen him in 'Fathima Tools' in the year 2004. Amir Ali, the owner of 'Fathima Tools' was not examined.

12. PW11 is Khalid, who was also carrying on a business in stones. He identified the accused from the dock as the person who came to him with a discount offer, but from whom no purchase was made. He also did not have any prior acquaintance with the accused and identified him in the year 2017 for reason of having seen him in 2004. In cross examination, he admitted that he neither had a shop of his own nor was he licensed to carry on the business. There was absolutely no document produced before the police showing his business activities. PW12 in the year 2017, identified the accused as one of the two persons who came to his cafe and purchased two biryanis on 05.07.2004. In cross examination, he stated that he would be in the cash counter from 8.30 to 6.30 and about 800 persons would come to the cafe, on a given day. He merely identified the accused without specifying any distinguishing features of the accused. Even if believed this

would only prove the presence of the accused in the locality and nothing more. PW13 is the receptionist in a lodge at Nagarkovil who produced the receipts of rooms allegedly taken by the accused and another on 05.07.2004. He said that they had luggage with them and they vacated the room on the next day. He marked, the receipt book with carbon copies (Ext.P4), copy of receipt no 179 of advance received from them, (Ext.P4(a)), bill book (Ext.P5), carbon copy of bill given to the two accused (Ext.P5(a)) and the register maintained at the lodge (Ext.P6). This was also spoken of by PW18, another receptionist of the same lodge, who was on duty when the two persons vacated the room. The said testimonies or the exhibits marked also do not incriminate the accused, but for establishing their presence at Nagerkovil on the night of the crime. The presence, if established can only form a link in the ring of circumstances, if there are other circumstances; linking the accused to the crime.

13. Now we come to the seizures made from the accused and the recoveries, on confession under S.27. These are recoveries of the stolen goods, which is the main link relied on by the prosecution to connect the accused to the crime. We would refer to the prosecution witnesses in the course of our discussion on the seizure and recoveries. The first seizure was

from the accused itself at 'Fathima Tools', Thrissur from where he is alleged to have been apprehended, with part of the booty. The seizure was by Ext. P19 mahazar dated 13.08.2004 witnessed by PW31 and was spoken of by PW1, PW10, PW31 & PW33, the I.O. Strangely Amir Ali from whose shop the seizure and arrest were made was not examined. PW1 did not identify the specific items seized from the accused, despite his presence at the time of seizure and PW10 & PW31 were not even confronted with the same. PW33 proved Ext.P19 mahazar and from his testimony we see the witness having read out the mahazars about the seizure made, with the weight of each of the items recovered also being narrated, however without separate identification of the goods he seized with reference to the MOs marked by PW1 and the locations from which they were separately seized.

14. PW32 was entrusted with the task of investigating the involvement of one Jerook at Kayalpattinam. He recovered the goods from Jerook's house through Ext.P3 mahazar dated 14.08.2004 based on Ext.P3(a) confession of Jerook along with a pants and T-shirt allegedly purchased by the accused for Jerook, with the sale proceeds of some of the stolen items. The bag seized was marked as MO66 and the pants and T-shirt as MOs 67 & 68. MO65 bag, which was thrown away after taking the

beads transported in it, was also recovered on Ext. P20(a) confession of Jerook, by Ext. P20 mahazar from under a culvert on the Nagerkovil-Thirunelveli road. PW32 did not identify any of the stolen goods recovered from Jerook's house, nor were they confronted to him. PW8 was the mahazar witness who not only identified MO66 to MO68 but also MO69 as the goods recovered from Jerook. We have to emphasize here these are recoveries on confession made by Jerook and would not incriminate the appellant herein unless a link is provided to connect them. But for a casual statement of PW9 that Jerook and the appellant were seen together and that their houses were only less than one kilometer apart, nothing else is proffered to assume that they were partners in the crime. That testimony by itself, fails to incriminate Jerook or the appellant, since they and almost every other witness are natives of Kayalpattinam; people from which place seems to abound in the trade of crystal beads, stones etc.

15. The next recovery is from the house of PW25, heavily relied on by the learned Prosecutor not only for recovery of the crystal beads/stones, but more particularly for the recovery of MO1 & MO2 bags. Here we have to examine the evidence of PW25. PW25 is the wife of the accused and she speaks of an affair commencing from 1999 when the

accused was employed in a jewelry in Chennai. The affair was known to her family and her mother had also required the appellant to start a business of his own, for her hand in marriage. She also knew of the appellant having gone to Thiruvananthapuram after he left the jewelry at Chennai. She spoke of the appellant having returned from Thiruvananthapuram, with two bags and a suitcase. She did not know the exact year when that happened. A leading question was put to her in chief-examination as to whether that was on 08.07.2004, which she answered in the affirmative. The said testimony has to be eschewed and it can only be taken that PW25 did not clearly remember the year, in which circumstance she definitely would not have remembered the date. She said that the accused had brought two bags and a suitcase and when he was asked as to what was inside the bags, he said it was his father's bead chains. There were beads and stones in the bags and suitcase which were kept in an almirah. The two bags and suitcase were gifted to herself, her mother and her brother. Again, after two days he came and took some stones from the almirah and went with those stones. Later, the accused was brought by the police and she identified MO1 and MO2 bags and also the suitcase which was marked as MO70, recovered as per Ext.P26(a) confession. Ext. P26 is the recovery

mahazar dated 24.08.2004, but none of the independent witnesses were examined. Here it is pertinent to note that according to PW33, the I.O, on reaching PW25's house, her father was present, who identified the accused and gave the keys to the accused, who opened the almirah, where the bags and beads were kept, which is in consonance with the recital in Ext.P26 mahazar. The father of PW25 was not examined and the mahazar or PW33 does not speak of the presence of PW25 at the time of recovery. Pertinent also is the fact that a reading of Ext.P26, indicates the confession having been made on arrest of the accused, which was on 13.08.2004 and the recovery made on 24.08.2004 after 10 days. There is no request made for immediate police custody, based on the confession made and there is only a prayer for remand as per Ext. P23. The I.O again narrated from the mahazar the various recoveries made but identified only the white pearls as MO58 and the red pearls as MO59, besides the bags, MOs 1 & 2 and the suitcase, MO70. In cross examination, PW25 admitted that she was married to the accused in 2006, after the case was registered against him and he absconded. The fact that PW25 was given in marriage to the accused, even after he was indicted in a crime, puts to peril the motive, of having committed the crime and stolen the goods to start a business, so as

to materialize his love affair. Yet again, the prosecution case of the accused having inquired with PW9, about the cook engaged by PW1, cannot be an incriminating circumstance by itself. In fact, PW9's statement was that the accused made the enquiry only since another person had wanted that position. The recovery from the house of PW25 cannot be relied on for the various inconsistencies and irregularities pointed out herein above, significant from among which is that the testimony of PW25 cannot at all be reckoned to find the recoveries through Ext.P23 as having been made at the instance of the appellant/accused.

16. PW15 is the owner of Aishwarya Tools at Thrissur from whom were recovered flower stones of different colours and crystal beads which he had purchased from the appellant for Rs.11,400/-. He also failed to identify the specific goods purchased by him since the entire items were mixed together, clearly recorded by the Court. PW16 is PW15's salesman who witnessed Ext.P7 mahazar dated 26.8.2004, of the recovery made from PW15's shop; which too speaks of the confession made on arrest, which is on 13.08.2004. According to PW15 and PW16, the accused did not take the money for the purchase and told them that he would come later. He was brought by the police after a week, is the testimony. PW16 failed to

identify the recovered items since they were in a mixed state and PW17, the mahazar witness was not confronted with the recovered items. PW14 is the owner of one M.S.Diamonds, Nagarkovil, from whom Rs.1,400/- was received by the accused after selling flower stones on 06.07.2004. He specifically said that he cannot identify the flower stones purchased from him since what was shown to him were the stones in a mixed state and it is not possible to separate them. PW17, brother of PW16 attested Ext.P8 mahazar dated 28.08.2004, of the recovery made from PW14's shop. The confession statement was Ext.P8(a) and PW17 was not confronted with the recovered items or even an attempt made to make him identify them. Ext.P8 mahazar also speaks of the confession having been made on arrest of the accused, which was on 13.08.2004 and the delay is fatal; as we noticed in the recovery from PW25's house.

17. PW19 was proffered to prove the purchase of a pants and a T-shirt for Jerook from one Salomi Ready-made Shop. PW19, was running 'Titans' showroom, one shop away from Salomi ready-made shop. There was no identification of the accused and there was no proof of the bill book other than Ext.P10 mahazar, which was witnessed by PW19, not the owner of the shop from which allegedly the purchase was made. PW20 was



proffered to prove Ext.P11 mahazar, of the purchase of a bag, which did not fructify since he turned hostile. PW21 is the Assistant Director of the FSL who marked Exts.P12 and P15 reports. The samples collected from the scene of occurrence are seen from Ext.P12 report and Ext.P15 is the FSL report. There is no material recovered from the scene of occurrence or the body of the deceased, which on scientific analysis incriminates the appellant herein. PW22 was the attesor to Ext.P16 scene mahazar, of the house of PW11, who the accused allegedly approached to sell beads, according to us, of no avail to the prosecution. PW23 is the salesman of 'Hiba Tools, a like business, who was brought as an assessor of the goods seized. He claimed that the goods were valued at more than Rs.3 lakhs. According to him the goods were shown to him at the Police Station, which were said to be those stolen from PW1. He admitted that he was not an expert. PW24 is the photographer who produced the photos of the scene of occurrence, PW26, the son-in-law of the deceased who received the body after post-mortem, PW27 is the person who stood scene guard and PW28, the head constable who received a wireless message on 05.07.2004 about the crime committed. PW29 is the ASI who was on patrol duty who was informed about the crime and asked to proceed from the control room.

PW30 is the doctor who conducted the postmortem. PW34 was a Psychiatrist who treated the appellant, while he as incarcerated and who speaks of a deteriorating mental condition due to the long incarceration and lack of social or family support.

18. As we noticed, the recoveries are not convincing enough, for reason of the recovered items not having been specifically identified as those recovered from the separate locations. MO1, MO2 & MO65 were identified by PW4 and PW5, only by the mark on them respectively of 'Reebok' 'OSCAR' and 'Rebook'. MO1 is said to have been owned by PW4 and MO2 by another employee, Salim, who was at the time of the trial, employed abroad and MO65 by PW5. MO65 was recovered at the instance of Jerook and the recovery of MO1 & 2 as we already found is on a sticky premise and wholly unreliable. Be that as it may, the identifiable marks spoken of by the witnesses were the emblem/legend of the manufacturers and there were no distinguishing features spoken of by the witnesses to identify the said bags as those owned by them. It is trite that the recovery of objects which are easily available in the market, not identifiable by the owners on a specific description, cannot be an incriminating material in a criminal trial.

19. The medical evidence is clear and the death is by reason of smothering. The body had a number of ante mortem injuries, precisely twenty, which were lacerated wounds, abrasions and contusions. The death itself was stated to have occurred 6 to 8 hrs. prior to the commencement of postmortem examination. The postmortem, as per the report Ext.P18 was conducted at 1.50 p.m on 06.07.2004. Hence the death could have occurred any time between, noon of 05.07.2004 and the night, at which time, according to the testimonies, the cook was alone in the house. As per the usual practice, PW2 had come in the afternoon for taking food for the employees at the shop, when the cook was alive. PW2, then returned only at 8.30 in the night, when he saw the cook dead and his body trussed up. The death is a homicide and absolutely no evidence was received from the scene of occurrence to connect the accused with the crime. The body did not reveal anything worthwhile in scientific examination. The screwdriver and chisel found from the scene of occurrence also did not have any finger prints connecting the accused to the crime, nor was their source discovered.

20. The only circumstance insofar as the connection of the appellant to the crime are allegedly the recoveries made on confession

statements under S.27. It is trite that there can be no conviction entered on the sole circumstance of a recovery under S.27, but when the crime of murder is accompanied with theft and the stolen articles are recovered on the confession statement, there could be more weight attached to the recovery so made, under S.114, Illustration (a) of the Evidence Act. In this context we have to refer to Ganesh Lal [supra] as quoted by the learned Prosecutor. Paragraphs 13 & 14 are herewith extracted:

*“13. In Baiju Vs. State of M.P., (1978) 1 SCC 588, Earabhadrapa Vs. State of Karnataka (1983) 2 SCC 330, Gulab Chand Vs. State of M.P. (1995) 3 SCC 574, Mukund @ Mishra & Anr. Vs. State of Madhya Pradesh - AIR 1997 SC 2622 and A. Devendran Vs. State of T.N., (1997) 11 SCC 720, para 20, murder and robbery were proved to have been integral parts of one and the same transaction and the presumption arising under illustration (a) to Section 114 of the Evidence Act was applied for holding the accused guilty of not only having committed robbery but also murder of the deceased. The presumption was founded on recovery of stolen property belonging to the deceased.*

*14. While raising such presumption the time factor between the date of the offence and recovery of stolen property from the possession of the accused would play a significant role. Precaution has to be taken that the presumption may not be so*

*stretched as to permit suspicion taking the place of proof. No hard and fast rule can be laid down.”*

Hence when robbery and murder are proved to be integral parts of one and the same transaction, the presumption under Illustration (a) to S.114 arises, which is founded on the recovery of the stolen property belonging to the deceased, from the accused. However, precaution has to be taken that the presumption may not be so stretched as to permit suspicion, taking the place of proof. Keeping the above principle in mind, if we examine the recoveries, specifically on the question of the identity of the stolen goods, lack of identification of the recovered items, the delay occasioned in acting on the confession statements with respect to the last three recoveries and the infirmities pointed out by us regarding each of the recoveries as also the seizure made from the appellant, it is difficult, in the present case to even harbour a grave suspicion; leave alone proof beyond reasonable doubt.

21. Examining the seizure from the accused and the recoveries under S.27, we have to notice that even witnesses engaged in the business, could not identify the recovered goods confronted to them as the goods made on the specific recovery, especially since the items were mixed together, as recorded by the trial Court. PW32, who made the recovery

from Jerooks house did not even attempt to identify them. PW33, the I.O who arrested the accused and seized goods from him and made the other recoveries under S.27 merely narrated from the mahazar, without identifying the goods produced in Court. Except PW8 who identified MO69 as the items recovered from Jerooks house (incriminating only that accused), none of the other mahazar witnesses or the persons from whom the recoveries were made identified the specific goods recovered, which was also impossible. The testimony of PW25 has to be completely eschewed for reason of her presence itself, at the time of recovery, not being revealed from the mahazar. It was the father of PW25, as revealed from Ext.P26, who identified the accused and gave him the keys to the almira from which the beads & stones were recovered. Neither was he examined before Court nor any of the mahazar witnesses. The last three recoveries were also grossly delayed after the confession statements. None of these recoveries can incriminate the appellant/accused. Here we have to pertinently notice that PW1, who was accompanying the police party, merely marked the material objects from MO15 to MO60. Obviously these were all alleged to be recovered on the confession statement of the accused or seized from the appellant/accused and the house of his co-accused. PW1 did not identify

the separate items seized and recovered from the different locations nor did the I.Os who carried out the seizure and recoveries. The items sold were all beads, stones and gems, which cannot be distinguished from that available in the market. We quite understand the practical difficulty of ensuring the identification of the goods, not distinguishable from those available in the market. But then, the benefit has to go to the accused and the prosecution's case based on the recoveries cannot lead to a conviction especially when PW1 failed to prove atleast his purchase of similar goods. We reiterate the principle stated in Ganesh Lal that the presumption based on Illustration (a) of S.114 can arise only if the theft is inextricably connected with the murder, and the items thieved are established to either belong to the deceased, or as in this case, belongs to the occupants of the house in which the deceased was staying and was found murdered.

22. Pertinently, PW1, merely marked the various items confronted to him in Court as MO15 to MO60 even when there were no distinguishing features in the said items, from those available in the market; on which circumstance alone prosecution asserts ownership of the goods produced in Court, on PW1. It is also pertinent that PW1 did not produce a Stock Register to indicate the items stocked by him and its value,

both at the shop and at the rented residential premises; despite the admission that the stock in trade was insured for an amount of Rs.12 lakhs. Pertinent also is the fact that the immediate statement of PW1 to the police, on an assessment of the value and weight of the stolen goods, was that it would have been around 5 kgs, valued at Rs.1 lakh. Later, both these were enhanced to 75 kgs and more than Rs.4 lakhs; according to PW1, after verifying the accounts, which account books or ledgers were not produced before the Police or the Court. Hence, but for the fact that certain empty plastic containers were strewn over the floor of the rented residential premises, there is nothing to show that PW1 had in his possession or stocked in his residential building, crystal beads, stones, gems *et al.* PW1, according to PW9 was also involved in the manufacture or trade of empty plastic containers. At the risk of repetition, there is absolutely no link, scientific, circumstantial, medical or under S.27 of the Evidence Act, connecting the accused with the crime of theft, much less the murder. Even according to the prosecution, other than the so called seizure and recoveries made there is nothing incriminating the accused. The seizure and recoveries made, as we already found, cannot be reckoned for the purpose of a conviction. There is also nothing to distinguish the items sold,



from that available in the market, both the valuable goods and the bags in which the goods were alleged to have been carried. We find absolutely no reason to uphold the conviction and we set aside the same by reversing the judgment of the trial Court. We direct the accused to be released forthwith if he is not wanted in any other case. The Crl. Appeal is allowed.

23. Before we leave the matter, we have to notice a very distressing aspect in the above case. The accused in the above case was arrested and arraigned before the Sessions Court in the year 2005, but he absconded. The case was split up and A2 was tried and convicted. The appellant, first accused, was arrested sometime in 2009 and he was an under-trial prisoner till 2017. We see from the proceedings sheet that the original documents were not available and there was a request made to the High Court for reconstructing the documents. The matter was kept pending and communications were exchanged between the Sessions Court and the High Court and eventually as per the directions of the High Court, on 24.06.2013, the Public Prosecutor was directed to produce the photocopies of original records. The accused was produced and remand was extended periodically. On 12.03.2014 the charges were read over to the accused on being produced. However, the M.Os were not available. Again, the matter

was kept pending for tracing out the material objects and then for verification of the said property, on tracing it out. Eventually, the trial commenced on 01.02.2017 with the examination of CW1 as PW1. The impugned judgment was passed on 14.06.2017, a little above four months. The distressing aspect is that from 2009 to 2017 the accused was an under-trial prisoner. Further, even after the conviction in 2017, the appeal was not filed. The present appeal, as a jail appeal, was filed in the year 2020, after three years.

24. We cannot but point out the distressing aspect of continued incarceration of under-trial prisoners and the delay occasioned in conducting trials. As per the statistics of the National Legal Services Authority, the ratio of under-trial prisoners to that of the total population in prisons in Kerala is 59% in the year 2020. We are of the opinion that the High Court could issue directions to the Trial Courts to take up matters based on the date of incarceration of convicts and also in fit cases to consider bail, if there is inordinate delay caused, for any reason not attributable to the accused; as in this case, due to the missing of original documents and then, the properties not being traced out. In the present case when we have acquitted the accused, it is appalling that he has

completed 13 years in prison, almost the life term as per the Criminal Procedure Code; to enable commutation. We are also informed that the co-accused, who was convicted, has been released after 14 years of incarceration.

25. In this context, we also have to call upon the District Legal Services Authorities [DLSA] to take up a more proactive role in the case of under-trial prisoners and also in cases like the present one and in the case of any convict, released after completing the sentence imposed, for rehabilitation; especially of first offenders. It is also for the State to formulate a scheme for such rehabilitation, which alone could realize the shift from the retributive and punitive theories of sentencing to the broader one intended of reformation. We also notice the long delay in filing appeals by indigent convicts, despite there being in existence Legal Aid Clinics at the Prisons, manned by Para Legal Volunteers of the Legal Services Authority. The Department of Prisons and Correctional Home shall also sensitize the Jail Authorities about the need to render assistance to the convicts in filing timely appeals before this Court and moving applications for suspending the sentence.

26. In the present case we see that the convict is incarcerated in the Central Prison, Thiruvananthapuram and is a native of Kayalpattanam. On his release, the Secretary, DLSA, Thiruvananthapuram shall, in co-ordination with the Secretary, DLSA having jurisdiction over Kayalpattanam or any other place where the accused intends to reside, provide assistance to enable effective rehabilitation. We hope the Tamil Nadu Legal Services Authority will also take a proactive role in rehabilitating the accused with the aid of the State Government.

27. A copy of this judgment shall be placed before the Hon'ble the Chief Justice, by the Registry, for the purpose of considering guidelines to be drawn up in prioritizing trials in criminal cases, with reference to the date of continued incarceration of the accused.

28. We also direct the copy of the judgment to be transmitted to the Member Secretary, Kerala Legal Services Authority to address the concern expressed by us. The Member Secretary shall also transmit a copy of the same to the Secretary, Tamil Nadu Legal Services Authority.

29. We direct the judgment to be placed before the Chief Secretary, State of Kerala to apprise the Government of the concern of this Court

regarding the absence of a proper scheme for rehabilitation of prisoners and also the Director General of Police, Prisons and Correctional Services, for appropriate action.

We keep the matter pending only to have an effective follow up on the rehabilitation of the acquitted person in this case. Post after two months for compliance.

Sd/-

K.VINOD CHANDRAN, JUDGE

Sd/-

C.JAYACHANDRAN, JUDGE

uu/sp