

**IN THE COURT OF THE JUDICIAL FIRST CLASS MAGISTRATE III,
PALAKKAD**

Present: Sri: Suhaib.M., B.A., LL.M.,
Judicial First Class Magistrate.

Dated this the 29th day of July 2017.

CALENDAR CASE No.78/2011

Complainant : State rep.by the Sub Inspector of Police,
Town South P.S in Cr. 261/2006
(Repd. By APP. Sri. P.Premnath)

Accused : 1.Sasikumar, Aged 30/06
S/o Kumaran, Tholannur House,
Koranakunnu, Irumbukachola,
Kanjirapuzha.
2.Sujeendran, Aged 28/06,
S/o A.Sreedharan, Edakkandi House
Koranakunnu, Irumbukachola,
Kanjirapuzha
(Rep.by Adv.Sri. John John & Rajesh Panangad)

Offences : U/ss 454, 380, 461 r/w 34 IPC.

Plea : Not guilty

Finding : Guilty of offences under sections 454 and
380 r/w 34 IPC and not guilty of offence
under section 461 of IPC.

Sentence or order : Both the accused are sentenced to undergo rigorous
imprisonment for three years and to pay fine of
Rs. 10,000/- each and in default of payment of fine
amount to undergo rigorous imprisonment for two
months for the offence under section 454 r/w 34 of
IPC and to undergo rigorous imprisonment for three
years and to pay fine of Rs. 10,000/- each and in
default of payment of fine amount to undergo

rigorous imprisonment for two months for the offence under section 380 r/w 34 of IPC. The sentences shall run concurrently.

Description of accused

| Sl.No | Name of accused | Father's Name | Occupation | Residence | Age |
|-------|-----------------|---------------|------------|--------------|-------|
| 1 | Sasikumar | Kumaran | - | Kanjirapuzha | 30/06 |
| 2. | Suचेendran | A.Sreedharan | - | Kanjirapuzha | 28/06 |

Date of

| | | | |
|---|--|---|----------------------------|
| 1 | Offence | : | 17.06.2006 |
| 2 | Complaint | : | 19.06.2006 |
| 3 | Apprehension | : | A1,22.06.06, A2,23.06.06 |
| 4 | Released on bail | : | A1, 27.06.06, A2, 29.06.06 |
| 5 | Commencement on trial | : | 25.03.2008 |
| 6 | Close of trial | : | 26.07.2017 |
| 7 | Sentence or order | : | 29.07.2017 |
| 8 | Service or copy of judgment of finding accused | : | NIL |
| 9 | Explanation for delay | : | NIL |

This case coming on to this day's proceedings, the court passed the following:-

JUDGEMENT

The accused stand charged having committed offences under sections 454, 380 and 461 r/w 34 IPC.

2. Factual matrix of prosecution case:- A jewellery shop by name Alukkas Jewellery was owned by CW2 Paul Alukka. It situated at TB road in Palakkad. On 18/06/2006 at about 2 PM, in furtherance of common intention of both the accused, first accused who was a staff in the said jewellery shop, with dishonest intention to

commit theft, took CW3 Raveendran a security guard of the jewellery shop to Amabadi Bar. At that time, second accused opened the door of air conditioner room of the jewellery using key handed over by first accused. Second accused entered into air conditioner room and thereafter removed a panel and plywood of duct of AC and entered through duct of AC channel to the Jewellery shop and committed theft of gold ornaments having 14.547 kg worth rupees 1, 24, 58, 212/- and cash of Rs. 64, 100/-.Hence both the accused committed offences under sections 454, 380 and 461 r/w 34 of Indian Penal Code.

3. After completion of investigation, final report under section 173 (3) of CrPC was submitted before the court of Chief judicial magistrate, Palakkad and then cognizance of offences was taken as CC 146/2006 for the aforementioned offences. Both the accused persons were enlarged on bail during the investigation stage. Both the accused entered appearance before the court of Chief Judicial magistrate responding to summons. They were served copies of prosecution records under Sec. 307 of CrPC. After hearing both sides, a charge for the offences under Sec. 454, 380 and 461 of IPC was framed, read over and explained to the accused to which they pleaded not guilty and opted to face trial. Thereafter, the case was made over to this court for trial and disposal. After receipt of case records, the case was taken on file as CC 78/ 2011.

4. From the part of the prosecution 25 witnesses were examined as PWs 1 to 25 and 30 documents were marked as Ext P1 to P30. MOs 1 to 5 were identified. CWs 6,8,9,11,27, 30, and 33 were given up by the Assistant Public Prosecutor. CW16 was reported to have gone abroad. CWs 18 and 23 were reported to be no more.

5. After close of prosecution evidence, both the accused were examined under Sec. 313 of CrPC with regard to incriminating circumstances made against them. They denied those circumstances and maintained plea of innocence. Thereafter the

defence was called upon to enter its defence. No defence evidence was adduced. Heard both sides.

6. The followings are the points that would arise for consideration:

1. Did A1, in furtherance of common intention of both the accused, trespass in to Alukkas Jewellery at Palakkad with intention to commit theft of gold ornaments and cash?
2. Did A1, in furtherance of common intention of both the accused dishonestly moved gold ornaments having 14.547 Kg and cash worth Rs. 64, 100/- from Alukkas Jewellery at Palakkad without consent and knowledge of its owner PW1 Paul Alukka?
3. Did A1, in furtherance of common intention of both the accused broke open a closed receptacle at Alukkas Jewellery at Palakkad intending to commit theft?
4. What is sentence as to conviction if any?

7. Points 1 to 3: For securing brevity and to avoid repetition of facts of the case I am considering these points together.

8. Summary of prosecution witnesses: PW1 Paul Alukka is the owner of Alukkas Jewellery, Palakkad. PW2 Francis Jacob is the manager of Alukkas Jewellery Palakkad. He had lodged Exts. P1 first information statement. PW3 Ravendran and PW4 Ramaraj are security guards of the Jewellery shop. PW5 George and PW6 Joseph are sales men in the jewellery shop. PW7 Linto is an attester to Ext P3 seizure mahazar under which MO5 mobile phone was seized from the possession of A1. PW8 Ramadevan a member in Special Investigation Team accompanied Investigating officer to Assumption Hospital to arrest A1 and he is an attester to Ext P4 seizure mahazar under which MO 4 mobile phone was seized from

A2. PW9 Narayanan Achari , a gold smith tested genuinness of gold ornaments seized. He is attestor to Exts. P5 and P6 seizure mahazers and Ext. P7 search list. PW10 Thomas is a native of accused persons. He is an attestor to Ext. P5 and P6 seizure mahazers. He was not fully loyal to prosecution case. PW11 Moideen a neighbour of A2 who was cited as a witness to seizure of ornaments did not support prosecution case. PW12 Marimuthu is a relative of A1. He was examined to prove pledging of MO3 necklace by him and also to prove handing over of the same to him by A1. However he did not fully support the prosecution case. PW13 MohanaKrishnan is a salesman at Darsana collection. He was cited to prove purchase of a lock by A1 from that shop. He did not support the prosecution case. PW14 Kumaran is father of A1. He turned hostile to the prosecution case. PW15 Madhavan is Manager of Ambadi Hotel . He was examined to prove the presence of A1 in the said hotel to consume liquor as on the date of the incident. PW16 Baiju is a salesman at Alukkas Jewellery. He is an attestor to Ext. P3 seizure mahazer under which muster roll was seized. PW17 an employee of Pottassery service co-operative Bank in the gold section is an asttestor to Ext. P15 and P16 seizure mahazars by which gold loan register and NAST Loan register were seized. Exts.P18 extract of resolution of governing body of bank , Ext.P19 gold cum register sheet were marked through him. PW18 Jamshad who was Head clerk of Pottassery Service Co-operative Bank was examined to prove pledge of MO3 gold necklace by PW12 Mari Muthu. PW19 Jayesh is Field Staff at Alukkas Jewellery. He was examined to prove sale of MO4 Mobile Phone by him to A1. PW20 Balakrishnan a Police constable at Town South Police Station is an attestor to Ext. P20 seizure mahazer by which computer print containing call data details was seized. PW21 RajarajaVarma who was Nodal Officer at Reliance connections was examined to prove call data details (Ext.P21) and call connection between cell phone number 9388407149 and 9387719590, as on the date of the incident and prior to that. PW22

Anil Kumar a Nodal Officer at Reliance connections proved Ext.P22 call data details and certificate under section 65 B of Evidence Act. PW23 Babu Raj the Circle Inspector is the investigating officer. PW24 Pramod the Sub Inspector recorded Ext. P1 First Information Statement and registered FIR. PW25 Siva Prakash an employee at a petrol bunk at Sakunthala junction was cited to prove purchase of diesel by the accused from there. But he turned hostile and did not support prosecution case.

9. Argument of the defence :- The following are the crux of arguments canvassed by the defence lawyer.

1) There is delay in sending FIR to the Magistrate. The delay was so caused on account of antedate of FIR.

2) The Police failed to register FIR soon after getting information as to commission of a cognizable offence. The principles noted in **Lalitha Kumari Vs. Government of U.P and others(AIR 2014 SC 187)** have been violated in this case.

3) The present prosecution is a plot arranged by owner of Alukkas Jewellery when the attempt to grab insurance amount was failed . Thus manipulation was done in lodging FIR.

4) The CCTV footage was withheld purposefully .

5) Authenticity of MO3 gold necklace was not properly proved.

6) Alleged handing over of MO3 by A1 to PW12 was not properly proved.

7) There is no corroboration to seizure of properties done by PW23. His oral evidence is totally doubtful on account of his interchanging version as to place of concealment of ornaments.

8) Prosecution did not prove the manner of commission of theft in a jewellery which was closed.

10. The Assistant Public Prosecutor submitted that the prosecution is

successful in proving its case against the accused beyond all reasonable doubt. Entire chains of circumstances are so close and connected without having any missing link and those circumstances point the proximity of the accused with the offences alleged .

11. As mentioned above, PW1 is the owner of Alukkas Jewellery, Palakkad. From his oral account, it appears that he had come over to Palakkad on getting information of alleged commission of theft. It is seen from his evidence that he had reached at the jewellery by noon. He had deposed that the jewellery was managed by PW2.

12. PW2 has deposed that the jewellery was closed at 8.30 p.m on 17/6/2006. He had kept key with him. It was holiday on 18/6/2006 as it was Sunday. On 19/6/2006 at 9.30 a.m, it was came to know that theft was committed at the jewellery shop. On verification, it was found that ornaments displayed in two floors were found lost. On scrutiny, it was realised that gold ornaments having 14.5 kgs were stolen. The market value of the ornaments at that time would fetch Rs. 1.25 crores. Currency notes worth Rs.64,100/- was also found lost. Information was given to Police. The room wherein duct of air conditioner was placed was found locked with another lock. Then security guard informed that he had locked with that lock as the door was found opened in the previous night. The door of the room was opened using key given by him. Then a stool was seen on the floor. One can by standing on the stool, get entry into the jewellery shop by crawling through the duct of the Air conditioner. When a police man verified duct, a sheet placed therein was found removed. The thief might have made his entry through that way, is the contention made by PW2 from witness box. It is further submitted that he could quantify stolen properties by 7:00 p.m and thereafter he gave FI statement to Police .

13. The case was investigated by PW23 the Circle Inspector. The information given by PW3 the Security Guard and suspicion came on A1 on account of his

behaviour paved way for his arrest. PW23 had arrested A1 on 22-6-2006 under Ext.P23 arrest memo. A mobile phone which was marked as MO5 was seized from the possession of A1 at the time of his arrest.

14. PW23 has deposed that when A1 was at his custody, he had given confessional statement to the effect that he was ready to point out 5 sovereigns of gold ornaments which was handed over to his 'cheriyachan' Marimuthu for pledging and he can point out Sujeendran (A2) to whom the gold ornaments were entrusted. PW23 further deposed that he had gone to Assumption hospital at Kanjirapuzha as guided by A1 and identified A2 from there and consequently he was arrested. It is further deposed that A2 gave him confessional statement. A2 confessed that he was ready to point out gold ornaments as well as the bag wherein it were placed. On the basis of information given by A2, he went to the house of one Sreedharan S/o Chathu as guided by A2 and after reaching that house, A2 took a red coloured bag from the drawer of a table kept at north-east corner of the house and after verification of 407 items gold ornaments contained in that bag, he seized the same under Ext.P5 seizure mahazar. Ext.P5(a) is the relevant portion of confessional statement given by A2.

15. The counsel for the accused in the course of his argument has assailed the acceptability of evidence adduced by PW23 by referring mode of his giving deposition recorded in Page No. 3 and 4. It is true that PW23 has initially submitted that he had proceeded to the house of one Marimuthu along with A2. In the next breath, he identified his mistake and corrected himself stating that he was led by A2 to the house of Sreedharan s/o Chathu and his contention that it was the house of one Marimuthu was a mistake. I have gone through the evidence of PW23 carefully. I am satisfied to say that the mistake committed by PW23 while referring the house of seizure as the house of one Marimuthu was only a slip of tongue. However, PW23 has in the next breath identified the mistake and gave proper evidence.

16. Ext. P7 is search list dated 23-6-2006 prepared by PW23 at the time of search of the house of the afore mentioned Sreedharan. Ext.P5 is Seizure mahazar prepared by him at the time of seizure of 407 items of different gold ornaments. Exts. P5 and P7 were initially proved by PW9 an attester to the same. He is none other than a goldsmith who had verified the genuineness of the gold. He has clearly deposed that he had gone to the said house along with the police.

17. PWs 10 and 11 are neighbours of A2. PW10 is an attester to Ext.P5 and P6 mahazars. His evidence shows that A1 and A2 belong to same locality. Contention of PW10 is that Police party had came to the house of A2 at night. However, he denied his presence at the house at the time of the seizure. PW11 has denied to have seen seizure of ornaments at the house of A2.

18. The counsel for the accused has vehemently argued that since seizure of ornaments was not proved by independent witnesses, it is unsafe to rely upon uncorroborated testimony of PW23. As mentioned above, PW10 and 11 are the neighbours of A2. The chance for winning over them by the accused cannot be ruled out. PW10 has admitted his signature in Ext.P5 seizure mahazer. Evidence of PW9 a gold smith shows that he had put his signature at the house where from gold was seized. I do not find any reason to out weight the hostile evidence of PW10 over the evidence of PWs 9 and 23 with regard to place of seizure. The evidence of PW11 to the effect that he had put his signature on the mahazer at Police station can only be isolated as unreliable . I do not find any reason to disbelieve words of PW23 with regard to seizure of gold ornaments from the house which was pointed out by A2. There is no legal implement to accept sole testimony of an office witness. As per section 134 of Indian Evidence Act, no particular number of witness is required to prove a fact . The Hon'ble Supreme Court in **Veer Singh and others Vs. state of U.P (2014 (2) SCC 455)** has held as follows:

"Legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses.

It is not the number of witnesses but quality of their evidence which is important as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove / disprove a fact"

19. The apex court in another ruling in **State government of NTC of Delhi vs. Sunil and Another (2001 (1) SCC 652)** has held as follows:

"At any rate the Court cannot start with the presumption that the police records are untrust worthy. As a proposition of law the presumption should be the other way around. That official acts of the Police have been regularly performed is a vice principle of presumption and recognized even by legislature. Hence, when a Police officer gives evidence in Court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the Court to believe the version to be correct if it is not other wise shown to be unreliable. It is for the accused, through cross-examination of witness or through any other materials, to show that evidence of Police officer is either unreliable or at least unsafe to be acted upon in a particular case."

The Hon'ble High Court of Kerala in **Suresh Vs. State (1995(1)KLT 636)** by referring decision of Hon'ble Supreme Court in **Modan Singh Vs. State of Rajasthan (1979 SCC (Crl) 56)** has held thus :

"If evidence of investigating officer who recovered the material objects is convincing , the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version."

Section 114 (e) of Evidence Act empowers a court to presume that official acts have been regularly performed. No doubt, this presumption could be rebutted by the accused. Having gone through the oral account of PW23 especially through the cross-examination, I could not find any convincing reason to discard the veracity of the evidence of PW23. Hence, the argument of the counsel that evidence of PW23 is to be discarded on account of lack of corroboration is unsound.

20. The gold ornaments shown in Ext. P28 list of property were given for interim custody of PW1 as per order in CMP 3303/2006 of the Court of Chief

Judicial Magistrate. Exts.P24 (a) to (n) are the photographs of the such gold ornaments taken as per the direction in the order in CMP 3303/2006 . The said photographs were identified by PW1. As per the dictum laid by the Hon'ble Supreme Court in **Sunderbhai Ambalal Desai Vs. State of Gujarat (2003(2) KLT 1089)** such photographs can be used in evidence instead of its production before the Court during trial and if necessary, evidence could also be recorded describing the nature of property in trial. In the instant case on hand, PW2 the Manager of the jewellery has gave evidence that the stolen properties having 14.5 kgs comprises necklace, bangles , chutty, matti, back chain and bangles with stones. This description tallies with the gold ornaments seized. Hence, I am satisfied to say that there is proper identification of the properties mentioned in Ext. P28 list of property.

21. PW 23 has further deposed that on 27/06/2006 he had got custody of A1 and A1 while he was in his custody has given confessional statement to the effect that he was ready to point out short necklace as well as his relative Marimuthu to whom it was handed over. Accordingly, he proceeded to the house of Marimuthu as guided by A1. On reaching at the house, Marimuthu handed over to him MO3 gold necklace which was seized under exhibit P6 seizure mahazar. He clarified that exhibit P6 (a) is the relevant portion of the confessional statement given by A1.

22. The aforementioned Marimuthu is none other than PW 12. The prosecution has got a case that PW2 had pledged MO3 gold necklace at Pottassery service co-operative bank on 19/06/2006 and redeemed it on 23/06/2006. PW 18 the then Head Clerk of the said bank identified MO3 and contented that it was pledged by PW18. PW 17 an employee of the bank in charge of gold section was examined to prove exhibits P15 and P16 mahazars prepared for seizure of a gold loan register and NAST loan register. Exhibit P18 extract of resolution, exhibit P19 gold cum register sheet were marked through him. By referring exhibit P18 resolution,

contention of PW 17 is that the gold loan registers were already destroyed. In exhibit P19, it is noted that necklace having 41 gm was pledged by PW 12 on 19/06/2006 and loan was closed on 23/06/2006. Exhibit P19 is computer printout of relevant page of loan register. Though it was attested by secretary of the bank, it was not certified under sections 65 B of Indian Evidence Act. Even if exhibit P19 is excluded from consideration, the oral evidence of PW 12 is supporting prosecution case to the extent that MO3 gold necklace was pledged by him at the aforementioned bank. However, he has disputed the prosecution case that MO3 was handed over to him by A1. His contention is that MO3 was his personal property and he had purchased the same for his daughter. The relationship between him and A1 was admitted by him. He has admitted pledge of 41 gms of gold necklace on 19/06/2006 and its redumption on 23/06/2006. He has admitted seizure of necklace from his possession. His dispute is as to the claim of the prosecution that MO3 was given to him by A1.

23. The counsel for the accused has submitted that the proximity between A1 and MO3 was not proved by prosecution. PW12 did not make any claim over MO3 so far by filing petition for its interim custody. The defence could not produce any scrap of paper to show that MO3 was purchased by PW12. However, PW1 has identified MO3 as one of the items stolen from his shop. It is seen that he had submitted an application before the court as CMP 416/2014 claiming interim custody of MO3. That claim was not entertained on account of claim made by PW 12 from witness box. Pledge of the gold ornaments on the next day of the incident and its taking back within few days cast serious doubt on the claim of PW12. The close relationship between A1 and PW 12 might have pursued him to give such evidence so as to screen out A1 from the clutches of law. The argument of the counsel for the accused is that the prosecution could not prove any mark or impression on MO3 to show that it was the product of Alukkas Jewellery. In this regard the evidence of PW1 is to be noted. His contention is that he has the practice of purchase and sale of

gold ornaments. Therefore, absence of imprint of the name of jewellery shop on MO3 could not be taken as a ground to say that it was not the property stolen from Alukkas Jewellery.

24. Having gone through the oral evidence of PW 23, I do find that 407 items of gold ornaments were seized by PW23 in consequence of disclosure statement given by A2 while he was under his custody. It is further found that MO3 gold necklace was seized in consequence of information given by A1 while he was in the custody of PW23. Now it is to be examined how far the alleged seizure is relevant in this case. No doubt, the confession made by an accused to a police officer is not admissible in evidence by virtue of rigour in section 26 of Indian Evidence Act. Section 27 is an exception to the rigour of section 26. In **State of Uttar Pradesh v. Deo Man Upadhyaya, AIR 1960 SC 1125** Supreme Court has held that Section 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of truth of the statement made by him and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement. In **Mohmed Inayatullah v. State of Maharashtra, AIR 1976 SC 483 : (1976 Cri LJ 481)** it was held that expression 'fact discovered' includes not only the physical object produced but also place from which it is produced and the knowledge of the accused as to that. In a judgment of Supreme Court in **State of Maharashtra v. Damu Gopinath Shinde (AIR 2000 SC 1691)** it was held that the Section 27 was based on the doctrine of confirmation by subsequent events and giving the section actual and expanding meanings, held thus:

"The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but it results in discovery of a fact it becomes a reliable information. "

25. In the instant case on hand, in consequence of disclosure statement of A1 the fact that MO3 gold necklace was in the possession of PW12 Marimuthu was came to knowledge of investigating officer. When gone to the house of PW 12 along with A1, it was found that the information was true and consequently MO3 was seized from there. The fact that MO3 was in the possession of PW 12 within the knowledge of A1 has been discovered in consequence of information given by A1 while he was in the custody of PW 23 and he had deposed with regard to such discovery of fact and hence the information given by A1 to that extent is admissible under section 27 of Indian Evidence Act.

26. Likewise, the concealment of 407 items of gold ornaments in the house of one Sreedharan within the exclusive knowledge of A2 was came to the knowledge of PW 23 in consequence of information given by him while he was under the custody of PW 23 and when PW 23 had gone to the house of the said Sreedharan along with A2, the information was found to be correct and he has deposed as to the discovery of such fact from witness box and hence so much of information given by A2 as distinctly related to the facts so discovered is admissible under section 27 of Indian Evidence Act. In **Jaffer Husain Dastagir v. State of Maharashtra, AIR 1970 SUPREME COURT 1934**, it was held thus:

"It is evident that the discovery must be of some fact which the police had not previously learnt from other sources and that the knowledge of the fact was first derived from information given by accused."

There is no indication that before the disclosure statement given by the accused persons PW 23 had any sort of knowledge with regard to concealment of the stolen object.

27. The arrest of A2 was effected as per information given by A1. As mentioned above, ornaments were recovered as per information given by A2. In a

case before Supreme court in **Mehboob Ali V. State of Rajasthan (2015(4) KLJ 581)** statement of an accused led to arrest of co accused and recovery of currency notes from him. It was concluded by Supreme court that there was discovery of fact as per information of the accused as the facts were not to the knowledge of the Police and hence the statements of the accused leading to discovery of fact are clearly admissible as per S.27 of the Evidence Act .The dictum in Mehboob Ali is applicable in this case as regards statement of A1 is concerned.

28. As observed in **Pulikuri Kotayya v. Emperor (AIR 1947 PC 67)**, information leading to the discovery of a fact is one link in the chain of proof and the other links must be proved in manner allowed by law.

29. It is to be examined what are the other links in the circumstances which will prove the nexus between the accused persons and the offence of theft committed. Here oral evidence of PW 3 Raveendran comes into field. He was security guard at the jewellery shop at the relevant time. He has deposed that theft was committed in the jewellery shop at daytime on 18/06/2006. He was guarding the jewellery shop at daytime. It was Sunday. His duty time was from 8 AM to 8 PM. Thereafter, the charge of guard duty will be handed over to PW4. He has further deposed that on the crucial day, at about 1:45 PM, A1 who was a staff at the jewellery shop came near to him. He offered him food in connection with birth of his child. A1 took him to Amdady Bar. They spent at the bar till 2:30 PM. It is further deposed that at the time when PW4 had come to guard at night , air conditioner room was found unlocked. Hence he locked the door with another lock . At that time he had noticed a stool and a bottle contained with the diesel on the floor. On the next day in the morning, according to him, he came to know that theft was committed and the thief had made entry through AC duct.

30. Contention of PW4 is that when he had came to take night duty at the jewellery shop, it was noticed that the door of air conditioner room was found

opened. Diesel was found smeared on the floor. When the matter was told to PW3, he brought a lock and locked the door.

31. A1 was a staff in the jewellery. That fact was deposed by PW1, PW2, PW3, PW5, PW6, and PW16. Contention of PW1 is that on 19/06/2006, A1 was there in the jewellery when the police party had come there. It is submitted by PW5 a salesman that A2 had come to the jewellery two weeks before the incident. A1 introduced A2 as his friend. It is further deposed by PW5 that A1 had shown the entire area of the jewellery shop to A2. PW6 another salesman of the jewellery shop gave similar evidence. He has stated that A2 had come to the jewellery along with A1 and then A2 was introduced by A1. The counsel for the accused has argued that as per evidence of PW5, it was came out that around 300 customers would visit the jewellery shop daily and it is unbelievable that PW5 and PW6 had specially noticed A2 when he had come to the jewellery along with A1. I am not satisfied to accept that argument. The visit of A2 cannot be equated with visit of a customer . Here A2 was introduced by A1 as his friend to other staff members. Hence he will get more attention as a guest of thier colleague. Furthermore, A2 had come to the jewellery shop just before two weeks of the incident. Therefore the evidence of PW5 and PW6 as to presence of A2 along with A1 in the jewellery shop two weeks before the incident cannot be visited with suspicion.

32. The prosecution has examined PW 21 the Manager (legal) cum Nodal Officer of Reliance Connection to prove that there had telephonic conversation between cell number 9388407149 and 9387719590 at around the time of the incident. He has deposed that the first number was registered in the name of Sasikumar (A1), Alukkas jewellery, PV Tower, PB Road, Palakkad and the second number was in the name of one Jayesh. The said Jayesh is none other than PW 19 a field staff of Alukkkas jewellery. He has deposed that he had sold his mobile phone having number 9387719590 to A1. That mobile phone was identified by him as

MO4. MO4 was seized from the possession of A2 at the time of his arrest. The mobile phone having number 9388407149 was seized from the possession of A1 at the time of his arrest. Oral account of PW 21 shows that between 13:35 hours and 15:36 hours, there had telephonic conversation between these two phone connections. This aspect has been proved by prosecution by the production of exhibits P21 and P22 call data details which were duly certified under section 65B of Indian Evidence Act. These documents were proved through PW 22 the Nodal officer of Reliance Communications.

33. PW 15 the manager of Ambadi Hotel has deposed that A1 had came to his shop on 18/06/2006.

34. The prosecution has projected a case that by utilising cash stolen from the jewellery shop, a loan taken by the father of the accused was redeemed. Father of A1 was examined as PW14. But he did not support prosecution case. However, the prosecution could not procure acceptable evidence in this regard.

35. It is seen that the accused persons had no account with regard to their knowledge as to concealment of stolen articles. In this regard the ruling of honourable Supreme Court in state of **Maharashtra versus Suresh (2000 SCC (Cri) 263)** has relevance. In that case the Apex court has held that in case the accused pointed out the incriminating materials as concealed without stating it as concealed by him, there are three possibilities. 1. He himself concealed it, 2. He had seen somebody concealed it 3. He was sold by another person that he had concealed it. If accused declined to tell the court that his knowledge was on account of last two possibilities, the court can presume that it was concealed by the accused. In the instant case on hand, since the accused have no explanation as to the circumstances by which the place of concealment of stolen articles was came to their knowledge, it can be presumed that the stolen articles were concealed by them.

36. The counsel for the accused during the course of argument has submitted

that there is delay in sending FIR to the court and that was an indication that the FIR was antedated. FIR was lodged on 19/06/2006 at 7 PM. It was reached at the court on 20/06/2006 at 11.30 am. FIR was lodged by PW 24 the Sub Inspector. At the time of his examination, there was no cross examination as to the delay in sending the FIR to the court. The honourable Supreme Court in **Gosu Jairami Reddy and another V. State of AP (AIR 2011 SC 3147)** has expressed the following:

"If delay in the despatch of the First Information Report to the Magistrate was material the attention of the Investigating Officer ought to have been drawn to that aspect to give him an opportunity to offer an explanation for the same. How far was the explanation acceptable would then be a matter for the Court to consider."

The honourable Apex court in **Bhajan Singh @ Harbajan Singh and others V. State of Hariyana (AIR 2011 SC 2552)** has held as follows:

"It is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been anti - timed or anti - dated or investigation is not fair and forthright. Every such delay is not fatal unless prejudice to the accused is shown. The expression 'forthwith' mentioned therein does not mean that the prosecution is required to explain delay of every hour in sending the FIR to the Magistrate."

In this case on hand I do not find any convincing reason to say that FIR was antedated.

37. The counsel for the accused has argued that there was delay in lodging first information statement. The counsel has pointed out that though the information as to commission of the offence of theft was came to knowledge of PW2 at the morning of 19/06/2006, first information statement was lodged only at 7 PM. In this regard, it is profitable to visit the evidence of PW2. His oral evidence indicates that soon after opening of the jewellery shop, suspicion was raised had there been theft of ornaments. He has stated that after throughout verification of the stock, it was

detected that 14.5 kilograms of gold ornaments were stolen. The counsel has drawn my attention that PW1 has stated that he had reached at the jewellery shop by noon and at that time, the assessment of stolen article was over. Even though there is such evidence of PW1, I do find that entire prosecution case cannot be thrown out on account of delay of few hours in lodging FI statement before the police. In **Gosu Jairami Reddy and another V. State of AP (AIR 2011 SC 3147)** the honourable Supreme Court has expressed the following view:

"A report regarding the commission of a cognizable offence, lodged within an hour of the incident cannot be said to be so inordinately delayed as to give rise to a suspicion that the delay if at all the time lag can be described to be constituting delay, was caused because the complainant, resorted to deliberations and consultations with a view to presenting a distorted, inaccurate or exaggerated version of the actual incident."

The reason for the delay has been properly explained by PW2. Furthermore, the same reason had been mentioned in first information report itself. I do not find any reason to say that the prosecution case is to be doubted on account of delay of few hours in lodging first information statement. No prejudice was caused to the accused on account of such delay.

38. The counsel has argued further that the prosecution against accused is a plot adopted by PW1 so as to falsely claim insured amount. According to the counsel, the present case was foisted, when the plot of PW1 was failed. There is no positive evidence to prove this contention and hence such version cannot be taken into account.

39. The Counsel has canvassed that the prosecution did not prove how the accused who had allegedly got down to the jewellery shop by crawling through duct of AC had returned back and hence such prosecution case is to be disbelieved. The offence of theft will be done in secrecy. When it is done in daytime, the offenders will not get their entry in a manner capable of seen by others. In the instant case on

hand, out of the evidence of PW2, it was made out that entry was made to the jewellery shop through duct of air-conditioner and the thief had made his access to the duct by standing on a stool. The presence of stool at the air-conditioner room makes its possibility. If entry in to a building was made by a thief, normally he will find his own course to come back after his aim was accomplished. So how the accused had come back through the duct is a matter within his knowledge. Hence prosecution cannot be faulted for not explaining the manner by which the accused had came back after accomplishment of theft.

40. The council has further argued that the prosecution has withheld CCTV footage. PW2 has clarified in the cross examination that at the time of the incident alleged the camera was not functioning. I do not find any reason to disbelieve the version of PW2 in this regard . There is no evidence to say that the scene of theft has been captured in CCTV camera.

41. By referring the principles in **LalithaKumari Vs. Government of U.P and others(AIR 2014 SC 187)** , the Counsel has submitted that the police did not lodge first information report in the morning though they had reached at the spot at marinig and hence that is fatal the prosecution case. I am not inclined to accept such contention. *Lalita Kumari's* case do not contain the proposition that delay of few hours in registering first information report after getting information as to commission of cognizable offence will defeat the prosecution case. What is laid in *Lalitha Kumari* is that if any information disclosing a cognizable offence is led before an officer in charge of a police station satisfying the requirement of section 154 (1) of CrPC, the said police officer has no other option except to register the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. In the instant case on hand, soon after furnishing Exhibit P1 first information statement at 7 PM, first information report was registered .

42. Having gone through the totality of evidence available in this case, I do

find that the prosecution is successful in proving that the accused have committed theft of gold ornaments as alleged. The allegation that accused had stolen currencies could not be proved. The prosecution is successful in proving chain of circumstances showing complicity of the accused with the offence of theft of ornaments. In **C. Chenga Reddy v. State of A. P., 1996 (10) SCC 193** it was held thus: (para 21)

"In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. That apart, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

Out of the admissible evidence on record, the following circumstances have been proved against the accused .

1. A1 was office boy of Alukkas jewellery.
2. Mobile phone connection 9388 40 4149 was taken in the name of A1 in the address of the Alukkas Jewellery.
3. The proximity of A1 with the jewellery helped him to have clear-cut idea with regard to backward entry through the duct of air-conditioner into the jewellery shop.
4. Two weeks before the incident A1 brought A2 to the jewellery and they together walked throughout the jewellery and A1 introduced A2 to PWs 5 and 6 as his friend.
5. A1 approached PW3 a security guard at around 1:45 PM on 18/06/2006 which was Sunday .
6. A1 took PW3 to Ambadi Bar at 1:45 PM on 18/06/2006 under the pretext of giving him treat in connection with child birth.
7. When PW4 a security guard came at night to take charge of security from PW3, the door of air-conditioner room was found opened. A stool

was seen placed in that room. Diesel was seen smeared on the floor.

8. A1 secured his presence in the jewellery on 19/06/2006 so as to remove doubt on him.
9. The information given by PW3 led to arrest A1.
10. At the time of arrest of A1, MO 5 mobile phone having connection 938840 4149 was found in the possession of A1.
11. A1 gave disclosure statement and pointed out A2.
12. MO4 mobile phone having connection 9387719590 was sold by PW 19 a salesman of the jewellery to A1.
13. At the time of arrest of A2, MO4 mobile phone having connection 9387 719 590 was found in the possession of A2.
14. Between 1:35 PM and 3:36 PM on 18/06/2006, there had telephonic conversation between A1 and A2 through aforesaid two phone connections using MO4 and MO5 mobile phones.
15. Both A1 and A2 are residing within the radius of half kilometres. (This was proved through the oral evidence of PW 10 a neighbour of A2).
16. Theft was committed at day time on 18/06/2006.
17. MO3 gold necklace which was one of stolen items was pledged by PW 12 a close relative of A1 on 19/06/2006. The gold loan was redeemed on 23/06/2006.
18. In consequence of information given by A1 while he was in the custody of police, MO3 gold necklace was recovered from the possession of PW12.
19. As per the disclosure statement given by A2, 407 different items of stolen gold ornaments were recovered.
20. Ornaments were identified by PW1.
21. A1 and A2 have no account as to the circumstance by which they got

knowledge regarding the concealment of the stolen properties.

I am satisfied that the circumstances from which the conclusion of guilt of the accused is drawn have been fully established and all the facts so established are consistent only with the hypothesis of the guilt of the accused. The circumstances exclude every hypothesis but the one proposed to be proved. The chain of evidence are so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and are such as to show that within all human probability the act must have been done by the accused. Having considered all the said aspect, I do find that both the accused had joined their head together and made a plan to commit theft from Alukkas jewellery, Palakkad. A1 cunningly took security guard away from the jewellery shop premises and at that time A2 entered into the jewellery through the duct of air-conditioner by making an entry into the room where in air-conditioner was placed and thereafter accomplished the task of committing theft and took away 14.547 kg (408 items) of gold ornaments.

43. Even though A1 did not enter into the jewellery at the time of the alleged commission of theft, it has been proved that the theft was committed by A2 in furtherance of common object of both the accused. Hence A1 is liable for the act done by A2 as if such act was done by himself. The offences alleged are sections 454, 380 and 461 r/w 34 of IPC. The ingredients of offences under sections 454 and 380 r/w 34 of IPC have been proved by the prosecution. It is evident that the gold ornaments were taken by the accused from the show case kept in the jewellery. There is no evidence to prove that the accused had broke open or unfasten a closed receptacle contained with gold ornaments. Thence, offence under section 461 of IPC cannot be slapped on the accused. The prosecution has proved beyond all doubt that both the accused have committed offences punishable under section 454 and 380 r/w 34 of IPC. Hence both the accused are found not guilty of the offence under section 461 of IPC and they are acquitted of that offence under section 248(1) of

CrPC and they are found guilty of offences punishable under sections 454 and 380 r/w 34 of IPC and they are convicted accordingly.

Judicial First Class Magistrate III,
Palakkad.

44. Point 4:- The prosecution and the accused were heard on question of sentence. The accused sought for mercy indicating that there is no other criminal antecedents on them. Having considered bulk quantity of stolen properties and the thankless act of A1 selecting his own place of employment for committing theft, I am not inclined to invoke benevolent provisions of Probation of Offenders Act in favour of the accused. In the result, both the accused are sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs. 10,000/- each and in default of payment of fine amount to undergo rigorous imprisonment for two months for the offence under section 454 r/w 34 of IPC and to undergo rigorous imprisonment for three years and to pay fine of Rs. 10,000/- each and in default of payment of fine amount to undergo rigorous imprisonment for two months for the offence under section 380 r/w 34 of IPC. The sentences shall run concurrently. A1 will be entitled for set off from 23/06/2006 to 27/06/2006 and A2 is entitled for set off from 23/06/2006 to 29/06/2006. MO3 gold chain shall be returned to PW1. MOs 4 and 5 mobile phones confiscated. Interim custody of gold ornaments and cash as per order in CMP 2486/2006 and CMP 3303/2006 made absolute.

(Dictated to Confidential Assistant, transcribed and typed by her, corrected and pronounced by me in the open court this the 29th day of July 2017).

Judicial First Class Magistrate III,
Palakkad.

APPENDIX

WITNESS EXAMINED FOR THE PROSOECUTION.

- PW 1 : Paul Alukka S/o Alukka, Kanayannur.
- PW2 : Francis Jacob S/o K.F.Jacob, Chalakudi.
- PW3 : Ravindran S/o Sukumaran, Thenkurrissi, Alathur.
- PW4 : Ramaraj S/o Harihara Chettiyar, Tamilnadu.
- PW5 : Geo George S/o A.T.Geore, Pottor, Thrissur.
- PW6 : Joseph S/o Devassi, Thrissur.
- PW7 : Linto S/o Antony, Palakkad.
- PW8 : Remadevan,S/o Karuppaswami,Peruvembu,Palakkad.
- PW9 : Narayanan Achari S/o Viswanathan, Koppam, Palakkad
- PW10 : Thomas S/o Ulahannan, Palakkayam, Mannarkkad
- PW11 : Moideen S/o Muhammed, Palakkad.
- PW12 : Marimuthu, S/o Chamayi, Palakkayam, Mannarkkad.
- PW13 : Mohanakrishnan S/o Viswanathan, Parali I, Palakkad.
- PW14 : Kumaran S/o Kombi, Pottassery, Mannarkkad.
- PW15 : Madhavan S/o V.K.Nair, Chittur.
- PW16 : Baiju S/o Porinchukutty, Kaipharambu, Thrissur.
- PW17 : RajaGopalan S/o Govindankutty Nair, Pottassery, Mannarkkad.
- PW18 : Jamshid S/o Muhammed, Kumaramputhur, Mannarkkad.
- PW19 : Jayesh S/o Narayanan,Thathamangalam, Chittur.
- PW20 : Balakrishnsnan S/o Ponnann, Kannambra, Alathur.
- PW21 : RajarajaVarma S/o Ravi Varma Adjith ,Thiruvankulam, Kanayannur.
- PW22 :Anil Kumar S/o Sundaresan, Ernakulam.
- PW23 :BabuRaj S/o Balakrishnan, C.I, Town South, Palakkad.
- PW24 :Pramod P S/o Velayudhan Nair, S.I, Town South, Palakkad.

PW25 :Siva Prakash S/o Mani,Kannadi, Palakkad.

WITNESSES EXAMINED FOR THE DEFENCE:

Nil

EXHIBITS MARKED FOR THE PROSECUTION:

- Ext.P1 : FI Statement dated 19-6-2006.
- Ext.P1(a) FIR in Cr. No.261/2006 of Town South P.S dated 19-6-06
- Ext.P2 Scene Mahazer dated 20-6-2006
- Ext.P3 Seizure mahazer dated 22-6-2006
- Ext.P4 Seizure Mahazer dated 23-6-2006
- Ext.P5 Seizure Mahazer dated 23-6-2006
- Ext.P5(a) Relevant portion of confession in Ext P5
- Ext.P6 Seizure Mahazer dated 27-6-2006
- Ext.P6(a) Relevant portion of confession in Ext P6
- Ext.P7 : Search List dated 23-06-2006.
- Ext. P8 : Relevant portion of 161 statement of PW10 Thomas
- Ext. P8(a) : Relevant portion of 161 statement of PW10 Thomas
- Ext.P9 : Relevant portion of 161 statement of PW11Moideen
- Ext.P10 : Copy of Loan Application dated 19.06.2006.
- Ext.P11 : Relevant portion of 161 statement of PW12 Marimuthu
- Ext.P11(a) : Relevant portion of 161 statement of PW12 Marimuthu
- Ext. P12 : Relevant portion of 161 statement of PW13 Mohanakrishna
- Ext.P12(a) : Relevant portion of 161 statement of PW13 Mohanakrishnan
- Ext.P13 : Seizure Mahazer dated 30-6-2006.
- Ext.P14 : Copy of Muster Roll
- Ext.P15. : Seizure Mahazer dated 5-7-2006
- Ext.P15(a) : Relevant portion in P15
- Ext.P16 : Seizure Mahazer dated 5-7-2006
- Ext.P16(a) : Relevant portion in P16
- Ext.P17 : True attested copy of Ledger dated 27-6-2005.
- Ext.P18 : True copy of Board Resolution dated 27-1-2015
- Ext.P19 : Computer printout of Gold Loan Ledger dated 19.06.2006
- Ext.P20 : Seizure Mahazer dated 19-7-2006
- Ext.P21(a) : Covering letter dated 15-07-2006.
- Ext.P21(b) : Call details
- Ext.P21(c) : Call details
- Ext.P21(d) : Call details
- Ext.P21(e) : Call details
- Ext.P21(f) : Call details
- Ext.P21(g) : Call details

| | |
|---------------|--|
| Ext.P21(h) | : Call details |
| Ext.P21(i) | : Call details |
| Ext.P22 | : Call detail dated 18-1-2016 |
| Ext.P23 | : Arrest Memo of A1 SasiKumar dated 22.06.2006. |
| Ext.P24(a) | : Photographs |
| Ext.P24(b) | : Photographs |
| Ext.P24(c) | : Photographs |
| Ext.P24(d) | : Photographs |
| Ext.P24(e) | : Photographs |
| Ext.P24(f) | : Photographs |
| Ext.P24(g) | : Photographs |
| Ext.P24(h) | : Photographs |
| Ext.P24(i) | : Photographs |
| Ext.P24(j) | : Photographs |
| Ext.P24(k) | : Photographs |
| Ext.P24(l) | : Photographs |
| Ext.P24(m) | : Photographs |
| Ext.P24(n) | : Photographs |
| Ext.P25 | : Negative of photographs. |
| Ext.P26 | : Arrest Memo of A2 Sujeendran dated 23.06.2006. |
| Ext.P27 | : Report to alter section dated 23-6-2006 |
| Ext.P28series | : Property list |
| Ext.P29 | : Call details (Ext.P29 and P24 series are one and same) |
| Ext.P30 | : Kaichit for returning back muster role dated 30.06.2006. |

EXHIBITS MARKED FOR THE DEFENCE

Nil

MATERIAL OBJECTS MARKED:

| | |
|------------|--|
| MO1series | : Photographs and Negatives of gold ornaments(13 in Nos.), (same were also marked on Ext.P24 series) |
| MO2 series | : Photographs and negatives of currency notes (13 in Nos) |
| MO3 | : Gold Necklace |
| MO4 | : Nokia Mobile Phone |
| MO5 | : Reliance Mobile Phone. |

Judicial First Class Magistrate III,
Palakkad.

