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**(1997) 09 KL CK 0047**

**High Court Of Kerala**

**Case No:** Criminal R.P. No. 435 of 1993

Kamalakshu

APPELLANT

Vs

State of Kerala

RESPONDENT

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**Date of Decision:** Sept. 10, 1997

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313, 360, 361
- Evidence Act, 1872 - Section 8
- Penal Code, 1860 (IPC) - Section 360, 380, 443, 454

**Citation:** (1997) 2 KLJ 311 : (1998) 1 RCR(Criminal) 611

**Hon'ble Judges:** N. Dhinakar, J

**Bench:** Single Bench

**Advocate:** Bechu Kurian Thomas, for the Appellant; C.M. Suresh Babu ), for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

N. Dhinakar, J.

Petitioner on being convicted by the trial court for the offences punishable under Sections 454 and 380 IPC was sentenced to suffer rigorous imprisonment for a period of one year each for the said offences, which on appeal was confirmed. Hence this revision. The case of the prosecution is that on 13.8.1988 at about 10.30 a.m. the petitioner pushed opened the door and entered the northern room of the house belonging to PW1 situated at Kulanada and took away a multi national panasonic cassette recorder valued at Rs. 2000/- and 3 sarees valued at Rs. 500/-. On a complaint laid by PW1 on 26.9.1988 with PW7, the Head Constable, a crime in Crime No. 243/88 was registered for the offences punishable u/s 380 IPC to which an additional Section 454 was added later.

2. To the allegations, the prosecution examined PWs 1 to 9 and marked Exts.P1 to P6 and MOs 1 and 2. When questioned u/s 313 Cr.P.C., the petitioner denied her

complicity and pleaded innocence. On the evidence adduced, the trial court accepted the prosecution case and convicted and sentenced her, which on appeal was confirmed as stated above.

3. I have heard the counsel for the petitioner and the Public Prosecutor. The only contention of the petitioner is that the courts below were not justified in accepting the evidence of PWs 1 to 3 and PWs 4 and 8. According to the counsel, there is no direct evidence to connect the petitioner with theft and in any event, an offence under 454 IPC is not made out as the ingredients as contemplated u/s 443 IPC make out an offence of lurking house trespass are not made put.

4. According to the prosecution, the petitioner went to the house of PWs 1 and 2 and enquired for the urinal for passing urine and at that time PW1 was sitting on the veranda of his house and PW2 was engaged in drying clothes. PW2 showed the bathroom to the petitioner and thereafter went about busying herself with her job. The petitioner after using the bathroom came out and asked for rice water from PW2. At that time PW2 was cutting fish. The petitioner after remaining at the place for some time, left the place and only when PW2's son came to the house after attending tuition, noticed the missing of the tape recorder and on further search, it was found that three sarees were also found missing. She then went and informed the matter to her husband, who was at the nearby market. Search for the petitioner by the witnesses became futile and on 26.9.1988 they were able to trace the petitioner and a complaint was lodged with the police. The investigation was taken up and the petitioner was arrested immediately on the same day and she gave a statement and took the police party to PW8. PW8 thereafter took the police party to PW4 from whom MO1, the tape recorder was recovered. According to the evidence of PW8, the said tape recorder MO1 was sold to him by the petitioner and he in turn sold the same to PW4. PW4 also supported the evidence of PW8 when he stated that he purchased MO1 from PW8. The said tape recorder MO1 was recovered under Ext.P3, attested by PW6, though he turned hostile. MO2 sarees were recovered from the residence of the petitioner under Ext.P5 mahazar.

5. The facts extracted above indicate the complicity of the petitioner for the offence u/s 380 IPC. Immediately after the arrest of the petitioner MO1 sarees were recovered under mahazar Ext.P5. She also took the police party to PW8 and this conduct of the petitioner taking the police party to PW8 though cannot attract the provision of 27 of the Evidence Act will be relevant as conduct u/s 8 of the Evidence Act. The police party was also able to recover MO1 from PW4 under a mahazar and both the witnesses, namely, PWs 4 and 8 supported the prosecution case. The evidence of PWs 1 and 2 coupled with the evidence of recovery supported by the mahazars Exts.P3 and P5 clearly prove the complicity of the petitioner with the offence u/s 380 IPC and in my view the courts below were justified in convicting her for the said offence.

6. Regarding the offence u/s 454, it contended, as stated earlier, that the ingredients for attracting the penal provisions of 454 are not attracted. Lurking house trespass is defined u/s 443 IPC and it reads thus:

Whoever commits house-trespass having taken precautions to conceal such house-trespass from some persons who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit lurking house-trespass.

To attract an offence of lurking house-trespass, it is essential to show that whoever commit house-trespass must take precaution to conceal such house-trespass from person who has a right to exclude or eject the trespasser from the building etc.....It is the admitted case of the prosecution that the petitioner did not take any precaution to conceal house-trespass as even according to the witnesses she entered into the house after obtaining permission from PW2. In my view, the offence u/s 454 is not made out against the petitioner and hence she is entitled for an acquittal for the said charge.

7. In the result, the conviction against the petitioner u/s 454 IPC is set aside. The conviction u/s 380 IPC is confirmed. Regarding the sentence, it is stated that the occurrence took place in the year 1988 and nearly 9 years have elapsed since then. According to the counsel, the petitioner is a house wife and has no bad antecedents and further she is not involved in any offence subsequent to the offence in question in this case. He submits that the provisions of 360 Cr.P.C. can be applied to the case of the petitioner. On the facts and circumstances of the case, I feel, the provisions of Section 360 Cr.P.C. can be applied more so when we look at Section 361 Cr.P.C. Section 361 Cr.P.C. contemplates that if a person could be dealt with u/s 360 IPC and the said provisions are not applied then the court should give record in the judgment the special reasons for not applying the provisions of Section 360. I find no special reason to hold that Section 360 cannot be applied to the case of the petitioner. Accordingly, though the petitioner is now convicted for the offence u/s 380 IPC, her sentence for the said offence is now set aside and instead she is not directed to be released u/s 360 Cr.P.C. on probation of good conduct on condition that she will enter into a bond for a sum of Rs. 1000/- with one surety for a period of one year to the satisfaction of the Judicial First Class Magistrate, Adoor within two weeks from today and the said bond will be in force for a period of one year and during the said period, she will appear and receive the sentence when called upon. In the meantime, she will keep the peace and be of good behaviour.

In the result, the conviction against the petitioner u/s 454 IPC is set aside. The conviction against her u/s 380 IPC is confirmed and the sentence of imprisonment imposed upon her for the offence u/s 380 IPC is set aside and instead she is now released u/s 360 Cr.P.C. as indicated above. Crl. R.P. stands partly allowed.