

**IN THE COURT OF THE JUDICIAL FIRST CLASS MAGISTRATE I,
ALATHUR.**

Present: Smt. Ancy.T., LL.B.,
Judicial First Class Magistrate I.

Wednesday, this the 22nd day of July, 2020.
31st day of Ashada, 1942 (S.E)

Calender Case No. 71/2014.

Complainant : State Rep. By the Sub Inspector of Police,
Nenmara Police Station, In crime No.
1398/2013 of Nenmara Police Station.
(BY Sri. P.A. Ananthakrishnan,
A.P.P Gr. II, Alathur)

DESCRIPTION OF ACCUSED

Sl. No.	Name	Father's name	Occupation	Residence	Age
1.	Rasheed	Abdulla	Tapping	Kodikarimbu, Kayaradi P.O, Palakkad.	23
2.	Myshook (No more)	Muhammad Khani	Woodcutter	Kadalakkadu veedu, Kodikarimbu, Kayaradi P.O, Palakkad.	41

(BY Adv. Sri. K. Sukumaran)

Offence : Punishable u/ss. 457, 380, 461 r/w Sec. 34
of the Indian Penal Code.

Pleading : Not guilty

Findings : Guilty

Sentence or Order : The accused No.1 is found guilty of the

offence punishable u/s. 457, 461, 380 r/w Sec. 34 of the Indian Penal Code and convicted u/s. 248 (2) of the Code of Criminal Procedure, 1973. He is sentenced to undergo Rigorous Imprisonment for a period of 1 (one) year and to pay fine of Rs. 1,000/- (Rupees One Thousand) for the offence punishable u/s. 380 of the Indian Penal Code. In default of payment of fine, he has to undergo Simple Imprisonment for a period of one month. He is convicted and sentenced to undergo Rigorous Imprisonment for a period of 1 (one) year and to pay fine of Rs. 1,000/- (Rupees One Thousand) for the offence punishable u/s. 457 of the Indian Penal Code. In default of payment of fine, he has to undergo Simple Imprisonment for a period of one month. He is convicted and sentenced to undergo Rigorous Imprisonment for a period of 1 (one) year and to pay fine of Rs. 1,000/- (Rupees One Thousand) for the offence punishable u/s. 461 of the Indian Penal Code.

In default of payment of fine, he has to undergo Simple Imprisonment for a period of one month. Sentences shall run concurrently. The accused No. 1 is entitled to get set off u/s. 428 of the Code of Criminal Procedure, 1973 for the period from 20.11.2013 to 18.01.2014 ie, the period he has undergone judicial custody. Charge against the accused No. 2 stands abated since he is no more.

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DATE OF

Occurrence	Complaint	Apprehension	Released on bail	Commencement of trial	Close of trial	Sentence or Order
16.11.2013	13.01.2014	18.01.2014	18.01.2014	13.08.2019	14.07.2020	22.07.2020

This case is coming on for today's proceedings, the court delivered the following:

J U D G M E N T

The accused are put on trial for the offences punishable u/ss. 457, 380, 461 r/w Sec. 34 of the Indian Penal Code, in Crime No. 1398/2013 of Nenmara Police Station.

2. The prosecution case in brief is that, on 16.11.2013 at 22.30 hours, the

accused No. 1 and 2 in furtherance of their common intention, committed lurking house trespass in house bearing No. XIII/287 of Ayilur Panchayath belonging to the defacto complainant by removing the window frames of the kitchen, entered into the house, the accused No. 1 committed theft of five pairs of ear rings weighing 5gms, gold bangle weighing 7.6gms and an amount of Rs. 5,000/- kept in the almirah and bag, three mobile phones of Nokia and thereby the accused are alleged to have committed the aforesaid offences.

3. On appearance of the accused, they were enlarged on bail. Copies of all the relevant records relied on by the prosecution were served on the accused. The accused No. 2 is reported to be no more. After hearing both sides charge was framed for the offences punishable u/ss. 457, 380, 461 r/w Sec. 34 of the Indian Penal Code read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

4. To prove the prosecution case, PW1 to PW10 were examined and Exts. P1 to P16 were marked. CW2 is examined as PW1. Through her the First Information

Statement is marked as Ext.P1 and photographs are marked as Ext.P2 (series). PW2 is the witness in the Scene Mahazar and through him the Scene Mahazar is marked as Ext.P3. PW6 is the witness in the Recovery Mahazar and through him the Recovery Mahazar is marked as Ext.P4. PW5 is the witness in the Recovery Mahazar and through him the Recovery Mahazar dated 19.11.2013 is marked as Ext.P5. PW9 is the witness in the Recovery Mahazar and through him the Recovery Mahazar dated 19.11.2013 is marked as Ext.P6. PW10 is the Sub Inspector of Nenmara Police Station. Through him the First Information Report in Crime No. 1398/2013 is marked as Ext.P7, arrest memo of accused No. 1 and 2 are marked as Ext.P8 and Ext.P9, property lists are marked as Ext.P10 to Ext.P12, extract of confession statement of accused No. 1 is marked as Ext.P13 (series) (two numbers), extract of confession statement of accused No. 2 is marked as Ext.P14, report to add the name and address of accused is marked as Ext.P15 and report to add Sec.34 IPC is marked as Ext.P16. After completing investigation he has filed charge sheet. Remaining witnesses were given up by the learned Assistant Public Prosecutor.

5. After the prosecution evidence was over, the accused No. 1 was

examined u/s. 313 (1) (b) of the Code of Criminal Procedure, 1973, in order to enable him to personally explain the incriminating circumstances appearing in evidence against him. He denied all the incriminating circumstances brought out in evidence and further stated that he is innocent. There was no defence evidence from the side of the accused.

6. Heard both sides.

7. On the above facts, the following points arises for determination:

(1) Whether the accused committed lurking house trespass or house

breaking by night in house bearing No. XIII/287 of Ayilur

Panchayath belonging to the defacto complainant with an intention to

commit theft so as to be punished u/s 457 IPC?

(2) Whether the accused committed theft of five pairs of ear rings

weighing 5gms, gold bangle weighing 7.6gms, an amount of

Rs. 5,000/- and three mobile phones of Nokia so as to be punished

u/s 380 IPC?

(3) Whether the accused dishonestly break open the receptacle

containing the gold ornaments and money from the house of the defacto complainant so as to be punished u/s 461 IPC?

(4) Whether the offence was committed in furtherance of the common intention of both accused so as to attract Sec 34 IPC?

(5) What is the offence if any committed by the accused? If so, what is the order or sentence?

8. **Point Nos. (1) to (4)** :- Since these points are intermingled on facts, they are considered together for a proper appreciation of evidence. To prove the prosecution case, CW2 was examined as PW1. She stated that the incident happened about five years back at Olippara at 08.00 p.m. When she returned back at 11.15 p.m, the kitchen door of her house was seen opened and the window frame was seen removed. Further she stated that one bangle, five pairs of ear rings kept in the almirah, an amount of Rs. 5,000/- and three mobile phones were found to be stolen. CW1 has given statement before the police and through her the First Information Statement is marked as Ext.P1. The stolen gold ornaments and mobile phones were received back. The gold ornaments were received from the court and through her the photographs are

marked as Ext.P2 (series). She identified the accused. While cross examination she stated that eventhough she has informed the police about the design of gold ornaments, the same is not mentioned in her statement. Further she stated that the bangle was broken and the ornaments were kept in boxes. She added that she has not produced the bill of the ear rings.

9. PW2 is the witness in the Scene Mahazar and through him the Scene Mahazar is marked as Ext.P3.

10. PW3 stated that the incident happened on 16.11.2013 at 10.30 p.m in the house of CW1 at Kodikarimbu. He stated that five pairs of ear rings, gold bangle and mobile phones were stolen from the house of CW1. On 19.11.2013 the accused No. 1 and 2 were brought to the house of CW1 and at that time he was present there. He identified the accused.

11. CW1 is examined as PW4. He stated that the incident happened during the year 2013 at night hours at Kodikarimbu. when he returned back to home, he came to know that five pairs of ear rings, gold bangle weighing one sovereign, three mobile

phones and an amount of Rs. 5,000/- were stolen from the house. He identified Ext.P1 First Information Statement. Further he stated that he sustained loss to the tune of Rs. 50,000/- and the stolen gold ornaments were received back. He identified Ext.P2 (series) photographs. While cross examination he stated that he has no complaint against the accused and that the matter has been settled.

12. PW5 stated that the incident happened during the year 2013, but he couldn't identify the accused.

13. PW6 is the witness in the Recovery Mahazar and through him the Recovery Mahazar is marked as Ext.P4. PW7 identified Ext.P4 Recovery Mahazar.

14. PW8 is the witness in the Recovery Mahazar and through him the Recovery Mahazar dated 19.11.2013 is marked as Ext.P5.

15. PW9 identified Ext.P5 Recovery Mahazar. Moreover he is the witness in the Recovery Mahazar dated 19.11.2013 at 17.30 hours and through him the Recovery Mahazar is marked as Ext.P6.

16. PW10 is the Grade Sub Inspector of Nenmara Police Station. He stated that on the basis of Ext.P1 First Information Statement, he has registered Crime No. 1398/2013 and through him the First Information Report is marked as Ext.P7. He identified Ext.P3 Scene Mahazar. He stated that on 19.11.2013 he has arrested the accused and through him the arrest memos are marked as Ext.P8 and Ext.P9. He has produced the accused before the court. As per the confession statement given by the accused No. 1, he along with the police party proceeded to the coconut farm of Kareem which is situated at Ayilur panchayath and recovered ear rings which was hidden under palm leaf. The earrings were recovered as per Ext.P4 Recovery Mahazar. On the same day, as per the confession statement given by the accused No. 1 they proceeded to the river bank and recovered mobile phones of Nokia and two mobile batteries as per Ext.P5 Recovery Mahazar. On the same day, at 18.00 hours, they proceeded to house No. 13/248 of Ayilur panchayath, Kadalakkad belonging to accused No. 2 and recovered a broken gold bangle weighing 7.6gms from the shed as per Ext.P6 Recovery Mahazar. The seized articles were produced before the court as per Form No. 15. Through him the property lists are marked as Ext.P10, Ext.P11 and

Ext.P12, confession extract of accused No. 1 is marked as Ext.P13 (series) (two numbers), confession extract of accused No. 2 is marked as Ext.P14, report to add the name and address of the accused is marked as Ext.P15 and the report to add Section 34 IPC is marked as Ext.P16. He has recorded the statements of witnesses. After completing investigation he has laid the charge sheet before the court. While cross examination he stated that the company name and model of the stolen mobile phones is not mentioned in the statement. He added that in Ext.P1 First Information Statement it is stated that the lost gold bangle was broken but the recovered gold bangle was not broken.

17. Sec. 27 of the Indian Evidence Act, 1872, is found on the principle that if the confession of the accused is supported by the discovery of a fact, it may be presumed to be true. Sec.27 starts with the word “provided”. Therefore, it is a proviso by way of an exception to Sec.25 and 26 of the Act. The object of the Section is to admit in evidence which is relevant to the matter under enquiry namely the guilt of the accused. “ *The various requirements of the section can be summarized as follows: (1) The fact of which evidence is sought to be given must be relevant to the issue; (2)The*

fact must have been discovered; (3) The discovery must have been in consequence of some information received from the accused; (4) The person giving the information must be accused of an offence; (5) He must be in the custody of a Police officer; (6) the discovery of a fact in consequence of information received from the accused in custody must be deposed to; (7) Thereupon only that portion of the information which relates definitely or strictly to the fact discovered can be proved and received as admissible.”

18. The evidence of PW4 was well corroborated by the oral evidence tendered by PW1 and PW3. They also deposed as to the factum of the place of occurrence and regarding the articles stolen from the house of PW4. Nothing surfaced in their cross examination to discredit their evidence, rather it fortified the prosecution case. The evidence of PW6 to PW9 proves that they are the witnesses in Recovery Mahazars, which are marked as Ext.P4 to Ext.P6. The evidence of PW10 proves that the gold ornaments were seized from the property of one Kareem which is situated at Kodikarimbu.

19. The prosecution mainly relies on the recovery of the gold ornaments and mobile phones on the basis of confession made by the first and second accused to prove the case. PW10, Grade Sub Inspector of Police, Nenmara Police Station deposed that the earrings, mobile phones and batteries were recovered from the property of one Kareem at Ayinampadam as per the confession statement made by the accused No.1 and that Ext. P13 (series) is the relevant portion of the confession statements of accused No. 1. Moreover as per the confession statement of the accused No. 2, broken gold bangle weighing 7.6gms was recovered from the house of accused No. 2 at Kadalakkadu, Kodikarimbu. According to PW10, the said gold ornaments and mobile phones were recovered as per Ext.P4 to Ext.P6 Recovery Mahazars. Evidence of PW4 is corroborated by the evidence of PW1 to PW3 and PW5 to PW10. Ext. P14 is the relevant portion of the confession statement of second accused marked through PW10.

20. The main defence canvassed is that no documents have been produced by prosecution to prove that the alleged place of occurrence is a dwelling house in order to attract Sec. 380 IPC. In that regard, I am of the view that the evidence of

PW1 to PW7 and Ext.P3 Scene Mahazar proves that the said building is used as a dwelling house belonging to PW4. If that be so, I am of the view that the non-production of any documents to prove the said fact is only paltry which is not sufficient in itself to the entire prosecution case. Another point canvassed by the learned counsel for the defence is that there is only the evidence of recovery which is adduced in evidence and which recovery is also not believable according to him. So, the crux of the argument is that the recovery of the stolen article in pursuance of the information given by the accused cannot be a sole ground for finding the accused guilty of the said offence.

21. Before getting into the said argument, it can be seen that Sec.27 of the Indian Evidence Act, 1872, is founded on the principle that if the confession of the accused is supported by the discovery of a fact, it may be presumed to be true. Sec.27 starts with the word “provided”. Therefore, it is a proviso by way of an exception to Sec.25 and 26 of the Act. The object of the Section is to admit in evidence which is relevant to the matter under enquiry namely the guilt of the accused. “ *The various requirements of the section can be summarized as follows:*

- (1) The fact of which evidence is sought to be given must be relevant to the issue;*
- (2) The fact must have been discovered;*
- (3) The discovery must have been in consequence of some information received from the accused;*
- (4) The person giving the information must be accused of an offence;*
- (5) He must be in the custody of a Police officer;*
- (6) the discovery of a fact in consequence of information received from the accused in custody must be deposed to;*
- *Thereupon only that portion of the information which relates definitely or strictly to the fact discovered can be proved and received as admissible.”*

22. In the present case, it is proved by the oral evidence of PW10 and Ext. P8 and Ext. P9 that the accused No.1 and 2 were arrested and they have given an information while in the custody of the Police which led to the recovery of the stolen articles. The evidence of PW6 to PW9 remained unshaken, during cross examination, they also deposed in tune with the prosecution case when the recovery was effected as shown by the accused. As the fact discovered u/s 27 of the Act includes the place

from where the said fact was discovered, it also proves the authorship of concealment. The identity of the stolen articles is also according to me, proved by the prosecution by the oral evidence tendered by PW1 and PW4.

23. Regarding the offence u/s 461 of IPC, it should be proved by the prosecution that the accused dishonestly or with intent to commit mischief, breaks open or unfastens any closed receptacle which contains or which he believes to contain property. As per the confession statement of the accused No.1 and 2 the above mentioned offence is proved by the prosecution.

24. So the next question to be gone into is whether the recovery of the stolen articles in pursuance of the information given by the accused can be sole ground for finding him guilty of the offence. An inspiring evidence of discovery of fact u/s 27 can be a foundation for conviction. The ground for inspiration for the evidence of recovery depends upon the facts and circumstances of each case, nature of information, nature of the fact discovered, nature of evidence of recovery, etc. In the present case, I am of the view that the prosecution through its witnesses has tendered an inspiring evidence of recovery which according to me proves the accused

to be guilty of the offence of alleged.

25. So as per the evidence tendered from the side of prosecution it is revealed that the gold ornaments and mobile phones were recovered on the basis of the confession of accused No.1 and 2. As per Ext. P13 (series) and Ext.P14 confession statement of accused No. 1 and 2, the earrings, mobile phones, batteries and broken bangle were recovered from the property of one Kareem and it was recovered on basis of the sole information received from the accused No. 1 and 2 by way of confession. As per illustration (a) to sec.114 of the Evidence Act a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The accused No.1 has no claim over the seized articles. So I find that the accused No.1 and 2 have committed the alleged offences.

26. Regarding the offence u/s 457 IPC., the evidence tendered by the prosecution witnesses proves that the accused committed house breaking by night by removing the window frames of the kitchen. Thus, the act of the accused as proved by the prosecution falls within the definition of house breaking as defined u/s 445

IPC. If that be so, on a thread bare analysis of the entire evidence on record, I am of the view that the prosecution has proved beyond reasonable doubt that the accused committed house breaking by night into the house belonging to PW4 and committed theft of five pairs of ear rings weighing 5gms, gold bangle weighing 7.6 gms and an amount of Rs. 5,000/- kept in the almirah and bag, three mobile phones of Nokia. Hence, the points are found in favour of the prosecution and against the accused. Accused No. 2 is reported to be no more.

27. **Point No. 5:-** In the result, the accused No.1 is found guilty of the offences punishable u/s. 457, 461, 380 r/w Sec. 34 of the Indian Penal Code and convicted thereunder. For hearing on question of sentence of accused No. 1. Charge against the accused No. 2 stands abated since he is no more.

(Dictated to the Confidential Assistant, transcribed and typed by her, corrected and pronounced by me in open Court this the 22nd day of July, 2020).

Judicial First Class Magistrate I,
Alathur.

Heard the accused No.1 on question of sentence. He stated that he has nothing to say and pleaded for mercy. Considering the facts and circumstances of the case, I am of the view that this is not a fit case to invoke the benevolent provisions of Probation of Offenders Act and that the imposition of following sentence would satisfy the ends of Justice.

In the result, accused No. 1 is convicted u/s. 248 (2) of the Code of Criminal Procedure, 1973. He is sentenced to undergo Rigorous Imprisonment for a period of 1 (one) year and to pay fine of Rs. 1,000/- (Rupees One Thousand) for the offence punishable u/s. 380 of the Indian Penal Code. In default of payment of fine, he has to undergo Simple Imprisonment for a period of one month. He is convicted and sentenced to undergo Rigorous Imprisonment for a period of 1 (one) year and to pay fine of Rs. 1,000/- (Rupees One Thousand) for the offence punishable u/s. 457 of the Indian Penal Code. In default of payment of fine, he has to undergo Simple Imprisonment for a period of one month. He is convicted and sentenced to undergo Rigorous Imprisonment for a period of 1 (one) year and to pay fine of Rs. 1,000/- (Rupees One Thousand) for the offence punishable u/s. 461 of the Indian Penal Code.

In default of payment of fine, he has to undergo Simple Imprisonment for a period of one month. Sentences shall run concurrently. The accused No. 1 is entitled to get set off u/s. 428 of the Code of Criminal Procedure for the period from 20.11.2013 to 18.01.2014 ie, the period he has undergone judicial custody. Charge against the accused No. 2 stands abated since he is no more.

Release of the property as per order in CMP 166/2014 dated 20.01.2014 is made absolute and the Kychit is cancelled.

(Dictated to the Confidential Assistant, transcribed and typed by her, corrected and pronounced by me in open Court this the 22nd day of July, 2020).

sd/-
Judicial First Class Magistrate I,
Alathur.

APPENDIX

Witnesses examined on the side of Prosecution:-

PW 1 : Nidhi, W/o. Sijo K Bharathan, Kayaradi, Palakkad.

PW 2 : Pazhanimala, S/o. Velan, Kayaradi, Palakkad.

PW 3 : Thankachan S/o. Vava, Kayaradi, Palakkad.

PW 4 : Sijo K Bharathan, S/o. Bharathan, Kayaradi, Palakkad.

PW 5 : Devakumar, S/o. Kunjukuttan, Kayaradi, Palakkad.

PW 6 : Binu Kuryakose, S/o. Kuryakose, Kayaradi, Palakkad.

PW 7 : Rafeeq, S/o. Kassim, Kayaradi, Palakkad.

PW 8 : Rajesh, S/o. Lakshmanan, Kayaradi, Palakkad.

PW 9 : Subeer, S/o. Ali, Kayaradi, Palakkad.

PW 10 : C. Mohanan, Grade Sub Inspector of Police, Nenmara Police Station.

Exhibits marked on the side of Prosecution:-

Ext. P1 : First Information Statement dated 17.11.2013 proved through PW1 on 14.10.2019.

Ext. P2 (series) : Photographs proved through PW1 on 14.10.2019.

Ext. P3 : Scene Mahazar dated 17.11.2013 proved through PW2 on 13.11.2019.

Ext. P4 : Recovery Mahazar dated 19.11.2013 proved through PW6 on 31.01.2020.

Ext. P5 : Recovery Mahazar dated 19.11.2013 proved through PW8 on 31.01.2020.

Ext. P6 : Recovery Mahazar dated 19.11.2013 proved through PW8 on 31.01.2020.

Ext. P7 : First Information Report dated 17.11.2013 proved through PW10 on 18.02.2020.

Ext. P8 : Arrest memo of accused No. 1 dated 18.11.2013 proved through PW10 on 18.02.2020.

Ext. P9 : Arrest memo of accused No. 2 dated 18.11.2013 proved through PW10 on 18.02.2020.

Ext. P10 : Property list dated 20.11.2013 proved through PW10 on 18.02.2020.

Ext. P11 : Property list dated 20.11.2013 proved through PW10 on 18.02.2020.

Ext. P12 : Property list dated 20.11.2013 proved through PW10 on 18.02.2020.

Ext. P13 (series) : Confession extract of accused No. 1 dated 19.11.2013 proved through PW10 on 18.02.2020.

Ext. P14 : Confession extract of accused No. 2 dated 19.11.2013 proved through PW10 on 18.02.2020.

Ext. P15 : Report to add the name and address of accused dated 22.11.2013 proved through PW10 on 18.02.2020.

Ext. P16 : Report to add Sec. 34 IPC dated 20.11.2013 proved through PW10 on 18.02.2020.

Material Objects marked for Prosecution:- Nil

Witnesses examined for Defence:- Nil

Exhibits filed for Defence:- Nil

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