

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 31ST OCTOBER 2008 / 9TH KARTHIKA 1930

Crl.Rev.Pet.No. 2939 of 2007()

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CRA.10/2007 of ADDL. SESSIONS COURT, ALAPPUZHA  
CC.768/2006 of JUDL.MAGISTRATE OF FIRST CLASS-II, CHERTHALA  
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REVN. PETITIONER(S):

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SATHAR BASHA, S/O ABDULHAMEED,  
C.NO.3857, CENTRAL PRISON, KANNUR.

BY ADV. ADV.K.K.RAJEEV (STATE BRIEF)

RESPONDENT(S):

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STATE, REP. BY THE C.I. OF POLICE,  
MARARIKULAM THROUGH THE PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.C.M.KAMAPPU

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD  
ON 03/11/2008, THE COURT ON 31/10/2008 PASSED THE  
FOLLOWING:

**M.SASIDHARAN NAMBIAR, J.**

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Crl.R.P. NO. 2939 OF 2007  
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Dated this the 31st day of October, 2008

ORDER

Petitioner is the accused in C.C.768/2006 on the file of Judicial First Class Magistrate-II, Cherthala. He along with one Dileep were accused in Crime 363/2003 of Alappuzha North Police Station registered under section 41(1)(d) and Section 102 of Code of Criminal Procedure. While questioning the said accused on the information furnished by them that the petitioner is involved in Crime 251/01 which was registered earlier on the basis of Ext.P1 First Information Statement furnished by PW1, PW8, the the Investigating Officer obtained custody of the revision petitioner as well as the other accused Dileep and on the information furnished by the said accused reached the shop of PW6 and under Ext.P2 seizure mahazar recovered M01 series of gold ornaments stolen from PW3 on the night of 11.11.2001 at about 2-30 a.m while she was

sleeping in their house. PW8 after investigation laid the final report against petitioner as first accused and Dileep as the second accused for the offences under section 457,461, and 380 of Indian Penal Code under section 173 of Code of Criminal Procedure. It was taken cognizance by Judicial First Class Magistrate, Cherthala as C.C.768/2006. Petitioner continued to be in custody during trial and was later released on bail. Charge for the offence under sections 457,461 and 380 of Indian Penal Code was framed. Both the accused pleaded not guilty. Prosecution examined 11 witnesses and marked five exhibits and identified MOs 1 and 2. When the case was posted for questioning the accused under section 313 of Code of Criminal Procedure, both the accused absconded. As their presence could not be procured case was transferred to the register of long pending cases. Subsequently petitioner was arrested and produced before the Magistrate. Petitioner was remanded to custody and questioned under section 313 of Code of

Criminal Procedure. Though he was called upon to adduce evidence, he did not adduce evidence. Learned Magistrate after hearing the prosecution and the defence found the petitioner guilty of the offences under sections 457, 461 and 380 read with section 34 of IPC. Petitioner was sentenced to rigorous imprisonment for two years each for the offences under section 457 and 380 read with section 34 of IPC and rigorous imprisonment for six months for the offence under section 461 read with section 34 of IPC. Set off was allowed for the period he was in custody during the trial under section 428 of Code of Criminal Procedure. Case as against second accused was split up and refiled. Petitioner challenged the conviction and sentence before Additional Sessions Court, Alappuzha from jail as CrI.A.10/2007. A State brief was appointed. Learned Sessions Judge on reappreciation of evidence confirmed the conviction and sentence and dismissed the appeal. It is challenged in this revision which was also preferred from jail.

Advocate Mr. Rajeev was appointed to argue the revision.

2. Learned counsel appearing for the petitioner and learned Public Prosecutor were heard.

3. Evidence of Pws 1 to 3 establish that while they were sleeping in their house on 11.11.2001 at about 3 a.m. PW3 woke up and finding that somebody had stolen her gold chain she cried aloud. Hearing it, her brother PW2 and father PW1 rushed to the room. They found that gold anklet which was worn by PW3 and a gold chain and a bracelet worn by the grandson of PW1 and two wrist watches, currency notes of Rs.1860/- and gold ornaments kept in the jewel box were stolen and theft was committed by entering the room by removing the tiles of the roof. Ext.P1 First Information statement was lodged on the morning and based on it, Ext.P3 F.I.R was registered.

4. While the case was being investigated petitioner the two accused were arrested in crime 363/2003 which was registered under section 41(1)

(d) and Section 102 of Code of Criminal Procedure. While questioning the two accused in that case and getting information that they committed theft in this case also and sold the gold ornaments to PW6 as led by accused Pw8 reached the house of PW6. When PW6 produced M01 series of ornaments, after preparing Ext.P2 mahazar they were recovered. PW8 completed the investigation and PW11 the Circle Inspector of Police laid the charge.

5. The evidence of Pws. 1 to 3 establish that there was a theft in their house on the night of 11.11.2001 and theft was committed by entering the house after removing the tiles of the roof. Learned Magistrate and the learned Sessions Judge convicted petitioner based on the recovery of M01 series of ornaments under Ext.P2 recovery mahazar by PW8 the Investigating Officer holding that the recovery was effected on the information furnished by the petitioner. As rightly pointed out by the learned counsel appearing for petitioner, even if the evidence of PW8 with regard to the recovery

corroborated by Ext.P2 recovery mahazar is accepted and the evidence of hostile witnesses PW4 and PW6 were ignored, there is no evidence to connect the petitioner with the theft.

6. Petitioner could be implicated in this case only on the basis of the recovery evidenced by Ext.P2 recovery mahazar. Evidence of PW8 and the recitals in Ext.P2 recovery mahazar show that PW8 got custody of not only the revision petitioner but the second accused Dileep, who were the two accused in crime 363/2003. As is clear from the evidence of PW8 he questioned both the said accused and based on the information PW8 recovered M01 series under Ext.P2 from PW6. Therefore petitioner could be connected to the theft or even M01 only if it is proved that the information which led to the recovery of M01 was furnished by the revision petitioner. The evidence of PW8, which is the substantive evidence with regard to the recovery, is that he questioned the two accused and they disclosed the fact which led to the recovery. PW8

did not depose the statement made by each of the accused which led to the recovery. Ext.P2 also does not disclose it. On the other hand, evidence of PW8 is that the statement which lead to the recovery that the gold ornaments, mobile phone, wrist watch were given to Sudheer of Fort Kochi and if he is taken there, he will point out the said Sudheer and his house. Evidence of PW8 as well as the relevant portion of the information furnished as recorded in Ext.P2 mahazar is as a statement made by one person and not two persons jointly. Neither the evidence of PW8 nor Ext.P2 shows that the said information was furnished by the revision petitioner. It is possible that that the information was furnished by the second accused and not by the revision petitioner. In any event, it cannot be an information furnished by both the accused. If that be so, based on this information alone which is not proved to be made by the petitioner, it cannot be said that the recovery was effected on the information furnished by the



revision petitioner. If that be so, based on the said information and the recovery it is not possible to hold that petitioner committed the offences. As there is no other evidence against the petitioner to prove that he committed any of the offences, the conviction is not sustainable.

Revision Petition is allowed. The conviction and sentence passed by the Judicial First Class Magistrate-II, Cherthala in C.C.768/2006 as confirmed by the Additional Sessions Judge, Alappuzha in CrI.A.10/2007 is set aside. Petitioner is found not guilty of the offences. He is acquitted. If petitioner is not wanted in any other case, he shall be released forthwith.

M.SASIDHARAN NAMBIAR  
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

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W.P.(C).NO. /06  
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JUDGMENT

SEPTEMBER,2006