

**Narayanan Vs. State of Kerala**

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**SooperKanoon Citation :** [sooperkanoon.com/718908](http://sooperkanoon.com/718908)

**Court :** Kerala

**Decided On :** Aug-12-1961

**Reported in :** AIR1962Ker81

**Judge :** P. Govinda Menon, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 238; [Indian Penal Code \(IPC\), 1860](#) - Sections 441, 456 and 457

**Appeal No. :** Calendar Revn.

**Appellant :** Narayanan

**Respondent :** State of Kerala

**Advocate for Def. :** Public Prosecutor

**Advocate for Pet/Ap. :** Chamakutty Mathew, Adv.

**Disposition :** Rule discharged

**Judgement :**

ORDER

**P. Govinda Menon, J.**

1. In Sessions Case No. 26/59 the accused who was charged for offences under Sections 457 and 380 read with Section 511 of the Indian-Penal Code was found

guilty but convicted under Section 456, I. P. C., by the Assistant Sessions Judge of Tellicherry. In appeal to the Sessions Court, the learned Sessions Judge quashed the conviction and acquitted the accused. On a perusal of the calendar, notice was issued by this court to the accused to show cause why the acquittal should not be set aside.

2. The facts material for the determination of the question raised in this case may be briefly stated:

On the night of 15-5-1959 while Pw. 1 was sleeping on the verandah of his house he heard cries from inside the room where his wife was sleeping that a thief has entered the house. He woke up and found a person getting out of the door and running. He gave chase calling out 'thief, thief and at a place about 150 yards from his house the accused was apprehended. Pw. 3 and some others who heard the cry also reached the place. The accused was then taken to one Pokkan's shop and in the morning Pw. 1 made a report Ext. P.1 to the Adhikari. Under instructions from him the accused was produced before the police. The police after investigation 'charged the accused.

3. The accused denied having entered the home of Pw. 1 and would have it that on that day at about nine in the morning there was an exchange of words between him and Pw. 1 and that Pw. 1 and others took him to the police station. In the committing Magistrate's Court he only denied that he had entered the house, but did not say anything about the morning incident: On a consideration of the evidence the learned Assistant Sessions Judge accepted the evidence of Pws. 1 to 3 and found that the accused had actually entered Pw. 1's house, but he found that there was no satisfactory evidence of house-breaking and no evidence of attempt to commit theft. According to the learned Assistant Sessions Judge there was also no evidence that the entry into house was with the object of committing theft and he, therefore, found the accused guilty only of the lesser offence under Section 456, I. P. C. .

4. The matter was taken up in appeal. The learned Sessions Judge concurred in the findings of the trial Judge that the accused did enter the house, but in view of the fact that the trial court found that there was no intention on the part of the

accused to commit theft and having found no other clear intention for the entry the conviction under Section 456 was set aside and the accused was acquitted.

5. The learned Sessions Judge relied on the decision in *Sankarasan Borbal v. The State*, 1957 Cri LJ 286 (Ori), for arriving at the conclusion that the conviction is unsustainable, but did not consider the further question whether a retrial of the accused was necessary. In the case referred to by the learned Judge that question was considered and on the particular facts of that case it was held that there is no need for a retrial.

6. The first question that arises for decision is whether a conviction under Section 456, I. P. C., on a charge under Section 457, I. P. C., is sustainable. The earliest decision on this question is in *Jhani Sheik, v. Emperor*, 16 Gal WN 696. There the accused was charged under Secs. 457 and 380, I. P. C. As regards the charge under, Section 457, the intent imputed to him was the commission of theft. The defence was a complete denial of the incident. The court held that no conviction could properly be made under Section 456 till the charge under Section 457 had been amended. The reason assigned was that the accused must have been seriously prejudiced by not knowing, what really was the charge against him.

7. This decision has been followed in *Mahomed Hossein v. Emperor*, AIR 1914 Cal 663 and in a later Patna decision reported in *Raghu Singh v. Emperor*, AIR 1920 Pat 590. These decisions were again reviewed in another Patna decision, reported in *Balkesar Singh v. Emperor*, AIR 1922 Pat 5, where it was pointed out that prejudice is generally caused if an accused is convicted of having entered a house with an intention different from that specified in the charge.

8. In a subsequent Calcutta decision reported in *Hajari Sonar V. Emperor*, 26 Cal WN 344, the same point was further emphasised and it was observed that when a charge has been definitely framed in which theft is alleged, the accused cannot be convicted of house trespass with some other object, without an amendment of the original charge unless the court is satisfied that he has not been prejudiced in his defence by the omission to amend the charge.

9. Following all these decisions the Orissa High Court in 1957 Cri LJ 286 (Ori) referred to by the learned Judge held :

'When a person is charged under Section 457 I. P. C., on the allegation that he entered the dwelling house of another person with the intention of committing theft it will not be legal to convict him under Section 456 on the ground that the entry was made with the intention of committing some other offence or with the intention of annoying or insulting the inmates'.

10. The decision in 16 Cal WN 696 and all the other cases that followed it do not formulate any inflexible rule of universal application that under no. circumstances can a conviction be made under Section 456 when the accused has been charged for the commission of an offence under Section 457 I. P. C. The decision must be limited to its special circumstances and. in this connection the warning given by Lord Halsbury L. C. in *Quinn v. Leathern*, 19011 A.C. 495 may be usefully borne in mind :

'Every 'judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such -expressions are to be found.'

It cannot, therefore, be held that merely because the intent imputed to the accused to sustain a conviction under Section 457 has failed, no conviction can be made under Section 456. Although the specific intent, namely, the intent to commit theft is not established yet it is competent to the court to convict an accused under Section 456 and the only consideration' would be whether the. accused had been prejudiced at the trial by the conviction for a minor offence, in conformity with Section 238 Cr. P. C.

11. Section 238 Cri. P. C. provides that when a person is charged with an offence and facts are proved which reduces it to a minor offence, he may be convicted of the minor offence. This view was adopted in *Queen Empress v. Bain*, (1866) Rat Un Cr. C. 293. There the accused had been convicted by the trial court under

Section 457; on appeal the conviction was altered to one under Section 414. The High Court held that Section 457 applied to what might be called a composite offence and consequently under Section 238 Cr. P. C. the accused might be convicted of any element of composite offence which constituted a minor offence.

12. A similar course was followed in *Emperor v. Ishri* ILR 29 All 46 where the accused was charged under Section 457, but convicted under Section 458 I. P. C. Reference may also be made to the decision in *Karali Prasad v. Emperor*, ILR 44 Cal 358: (AIRi 1917 Cal 824) where the entire case law has been reviewed and it was held that the conviction under Section 456 of the Penal Code was legal,

13. It is well-settled that to sustain a conviction under Section 450 it is not necessary to specify the criminal intention in the charge as it should be in a charge under Section 457 I. P. C.; it is sufficient if a guilty intention is proved, such as is contemplated by Section 441. Reference may be made to the case in *Koilash Chandra v. Queen Empress*, ILR 16 Gal 657 *Bahnakand Ram v. Ghansamram*, ILR 22 Cal 391, *Premanundo Shah v. Brindabun Chung*, ILR 22 Cal 994 and *Ram Rang v. Emperor*, 2 Cri LJ 279 (Lah).

14. I am unable to follow the reasoning of the learned Assistant Sessions Judge that no theft was committed and so his entry into the house could not have been with the object of committing theft. The learned Judge disbelieved the defence version and accepted the prosecution story that the accused did enter inside the house and ran away on feeling discovered and was apprehended. The accused belongs to a place about 10 miles away. He is a stranger to the locality and has no business to be there; According to Pw. 1 the accused is not even known to them. No explanation is offered by the accused as to why he entered the house. What then could have been his intention in entering into the house except to commit some offence or to intimidate, insult or annoy the persons in possession. The court can, under such circumstances, come to the necessary conclusion that the entry was effected with an intent such as is provided for by Section 441, I. P. C.

15. As stated by Bancrjee J. in ILR 22 Gal 391, the intention may be determined as well from direct evidence as from the conduct of the party concerned and the attendant circumstances for as Lord Ellenborough, C. J. said in *R. v. Dixon*, (1814)

3 M. and Section 611 at p. 15:

'it is universal principle that when a man is charged with doing an act, ..... the intention is an inference of law resulting from doing the act'.

16. A Division Bench of this court in *Kunju Moideen Methararu v. Kandan*, 1958 Ker LT 1048 : (AIR 1959 Kerala 146) had to consider this question, Iyengar J. discussing exhaustively the case law on the subject stated that the presumption of the necessary intention may be drawn where a person who has absolutely no interest in land in possession of others forcibly takes possession of the property.

In the words of Ayling J. in *Vullappa v. Bhee-ma Row* ILR 41 Mad 156: (AIR 1918 Mad 136 (2)):

'A mere knowledge that the trespass is likely to cause insult or annoyance to the owner of the property does not amount to an intent to insult or annoy within the meaning of Section 441, Indian Penal Code; but where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance to the owner of the property, it is open to the court to infer an intent to insult or annoy. It is a question of fact whether this presumption of intent is displaced by proof of any independent object of the trespass.'

Therefore if the circumstances of a particular case warrant the inference that the entry was with intent to commit any offence within the meaning of Section 441 I. P. C., conviction under Section 456 will be proper provided that the accused has not been prejudiced in his defence.

17. The learned Sessions Judge ought to have considered all these aspects and found out whether the accused was really misled in his defence by a conviction under Section 456, I. P. C. without a specific charge under that section. He has failed to do so and the order of acquittal is, therefore, not quite proper and normally ought to be set aside by this court and sent back for fresh disposal. However, I do not think a retrial is necessary in this case. The accused had already been in jail for a considerable period from 15-5-1959 on which date he was arrested until he was ultimately acquitted by the Sessions Judge on 31-3-1960 and I consider this would

be sufficient to meet the ends of justice. The rule issued by this court is therefore, discharged and the order of acquittal is confirmed.

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