

IN THE COURT OF THE SESSIONS JUDGE:: DIBRUGARH.

Present: Ms. A. Ajitsaria, AJS,
Sessions Judge,
Dibrugarh.

Criminal Appeal No. 13(2) of 2021

- (1) Sri Nakul Gogoi @ Nakul,
S/o- Late Tankeswar Gogoi,
R/o- Longsu Gaon,
PO, PS- Lahowal,
District- Dibrugarh, Assam.
- (2) Sri Mahesh Gogoi,
S/o- Late Muhidhar Gogoi
R/O- Moderkhat Tiniali,
P.S. – Lahoal,
Dist.- Dibrugarh, Assam
- (3) Sri Ganesh Kurmi
S/o-Late Magan Kurmi
R/o- Longsu Gaon,
PO, PS- Lahowal,
District- Dibrugarh, Assam.
- (4) Sri Ramchandra Kurmi,
S/o – Late Durga Cheran Kurmi
R/o- Longsu Gaon,
PO, PS- Lahowal,
District- Dibrugarh, Assam.
- (5) Sri Dipen Hazarika @ Dwipen,
S/o- Sri Mahananda Hazarika
R/O- Moderkhat Tiniali,
P.S. – Lahoal,
Dist.- Dibrugarh, Assam

... Petitioner

-VS-

(1) The State of Assam.

(2) Sri Dipankar Singh,

... Respondents

For the Petitioners : Sri Bakhtawar Hussain.

For the respondent No. 1 : Smt. Runumi Devi.

For the respondent No. 2 : None appeared.

Date of Argument: 31-03-2022.

Date of Judgment: 11-04-2022.

ORDER

1) The appellant has challenged the judgment dated 03-04-2021, passed by Smt. S. Khanikar, the learned Judicial Magistrate 1st Class, Dibrugarh in GR Case No. 851/2014, whereby the appellant was sentenced to undergo rigorous imprisonment for a period of 3 (three) months and also to pay a fine of Rs. 500/- each under section 379 IPC.

2) The facts of the case, in brief, is that an FIR was lodged by one Sri Dipankar Singh stating that on 03.04.2014, a truck bearing registration No. WB15B6689 which was loaded with goods was coming from Siliguri to Tinsukia when, one of its tyres was punctured at Madarkhat Road, Dibrugarh, at about 11 p.m, in the night of 02-04-2014. At that time, about five to seven persons came to the spot where the said truck was

punctured and took away the battery, jack, tools and cash amount of Rs. 5,300/- from the truck. It was also mentioned in the F.I.R. that driver of the truck, had fled to Tinsukia.

3) The said FIR was registered as Lahowal PS Case No. 62/2014 corresponding to which GR Case No. 851/2014 was registered. Subsequently, charge-sheet against the accused persons, namely, Sri Nakul Gogoi, Sri Dwipen Hazarika @ Dipen, Sri Ganesh Kurmi, Sri Ram Chandra Kurmi, Sri Mahesh Gogoi, Sri Dipak Gogoi @ Prodip Gogoi and Sri Budheswar Chetia under Section 379 IPC was laid against the accused persons. It deserves mentioned that accused Budheswar Chetia and Dipak Gogoi expired during trial.

4) In the trial before the learned Judicial Magistrate First Class, Dibrugarh, charges under Section 379 IPC was framed against the appellants to which they pleaded not guilty. During the course of the trial, prosecution examined as many as seven witnesses whereas the accused/appellant adduced none. Upon conclusion of trial and hearing the parties, learned Judicial Magistrate First Class, Dibrugarh passed the judgment impugned in the present appeal whereby the accused persons/appellants were sentenced to undergo rigorous imprisonment for a period of 3 (three) months and also to pay a fine of Rs. 500/- each under section 379 IPC.

5) The grounds, inter alia, on which the appellants have assailed the judgment dated 03-04-2021 are that, the learned

trial Court failed to appreciate the evidence, in as much as, PW-1 to PW-6 clearly deposed that they did not know from whose possession, articles were seized; that signatures were obtained on blank paper from them in the police station; that ownership of seized articles were not established; that the complainant was not examined. That the learned trial Court, erred in relying only on the evidence of the IO and by assuming that the potatoes which were found in the house of the accused persons were the alleged stolen potatoes, when the complainant himself in the FIR had not complained of potatoes being stolen from the truck in question and therefore submitted that the appellants be acquitted and impugned judgment and order be set aside.

6) Ld. Public Prosecutor for State has submitted that the prosecution has been able to prove its case beyond all shadow of doubt, in as much as, the stolen potatoes were recovered from the house of the accused persons and hence, there is merit in the appeal. In the alternative, learned Public Prosecutor further stated that prosecution has been able to prove its case under Section 411 IPCV, if not under Section 379 IPC.

7) I have perused the record, memorandum of appeal and heard the learned Counsel for the appellant and learned Public Prosecutor.

8) Before appreciating the submissions so advanced, evidence on record is recapitulated herein below.

9) PW 1, Gaurango Gogoi deposed that he knew Nakul Gogoi who was his father and he knew the other accused persons. One day in 2014, on being called by the police, he had gone to the police station and seen his father Nakul Gogoi there. On being asked by the police, he had put his signature (Ext 1(1)] on the seizure list (Ext 1). In cross examination PW 1, stated that when he had signed on Ext 1, at the relevant time, the said paper was blank.

10) PW 2, Suraj Gogoi deposed that only the accused Budheswar Chetia was known to him, neither the informant nor the other accused persons were known to him. In 2014, when he was passing by the police station, the In-charge of Dikom police station, asked him whether he knew Budhewasr Chetia and when he answered in the affirmative, his name and address were recorded. PW 2 stated that he did not know anything about the occurrence. The defence declined to cross examine PW 2.

11) PW 3, Satyajit Gogoi deposed that accused Nakul and Mahesh (his father) were known to him and the others were not known to him, neither was the informant Dipankar Singh known to him. PW 3 deposed that he knew nothing about the occurrence. One day, when he was returning from duty, the incharge Dikom OP took his signatures on 2 papers. PW 3

stated that he had heard from others one incident had taken place and potatoes were taken from one truck. PW 3 exhibited the seizure Lists as Ext 1 and 2 and his signatures as Ext 1(1) and Ext 2(1). Defence declined to cross examine PW 3.

12) PW 4, Abinash Pator deposed that he knew the accused Ganesh Kurmi. PW 4 stated that he did not remember whether he had signed on the papers showed to him in the Court on the date of deposition. The defence declined to cross examine PW 4.

13) PW 5, Namita Kurmi deposed that she knew Ram Chandra Kurmi (her father) and that she knew nothing about the occurrence. PW 5 identified her signature on the seizure list (Ext 3) as Ext 3(1). In cross examination PW 5 stated that when she had signed on Ext 3, the paper was blank and she did not know why her signatures had been obtained.

14) PW 6, Smt Ambika Hazarika deposed that she knew accused Dipen Hazarika only, as he was her husband and that she knew nothing about the occurrence. PW 6 identified her signature on the seizure list (Ext 4) as Ext 4(1). In cross examination PW 6 stated that when she had signed on Ext 4, the paper was blank and she did not know why her signature had been taken.

15) PW 7, SI Toseswar Baruah deposed that on 3.4.2014 while he was posted as IC Dikom OP, at about 6 PM Sri Dulu Gogoi informed him over phone that one truck had been

punctured at Modarkhat Road and after receiving the information he registered GDE No.41 dated 3.4.2014 and proceeded to the place of occurrence (Modarkhat Tiniali towards Tinsukia). PW 7 stated that he had seen that front left side tyre of Truck No. WB-15B 6687 was punctured, the plastic cover on top of the truck was removed. PW 7 stated that he was informed by people who had gathered there that some potatoes had been stolen from the truck. He prepared sketch map (Ext 5), recorded the statement of informant Dulu Gogoi. PW 7 stated that people informed that stolen potatoes were kept in houses of some person. During investigation he searched the house of accused Ganesh Kurmi, Dipak Gogoi, Mahesh Gogoi, Dipen Hazarika, Ram Chandra Kurmi, Budheswar Chetia and recovered 50 kgs of sack of potato from each of the said houses of Ganesh, Dipak, Mahesh and Dipen and 40 kg sack of potato from house of Budheswar and seized the same vide Seizure-List Ext 6, Ext 1, Ext 2, Ext 4, Ext 3, Ext 7 respectively wherein his signatures appeared as Ext 6(1), 1(a)(2), Ext 2 (3). Ext 4 (2), Ext 3 (2), Ext 7 (1), respectively. PW 7 further deposed that he recovered 10 kg of potato bag from the house Nakul Gogoi, vide Ext 1 wherein he signed as Ext 1(2). PW 7 further stated that he recorded the statement of seizure witnesses and found that the bags of potatoes which were recovered and seized from the houses of the accused persons were the same bags of potatoes which were stolen from the truck. PW 7 stated that the accused persons were

apprehended, FIR was lodged by the owner of potato bags which the truck was carrying, namely, Dipankar Singh on 3.4.2014, GDE No. 47 dated 3.4.2014 was entered and the FIR (Ext 8) forwarded to Lahoal PS for registration which was ultimately registered as Lahoal PS Case No. 62 of 2014 u/s 379 IPC. Subsequently, he was entrusted to investigate the case. PW 7 stated that he recorded the statement of the informant, driver of the truck Satindra Roy and handyman of the truck Bikas Kumar. On completion of investigation, charge sheet was laid against the accused persons. PW-7 further stated that from their statements, it transpired that on 02-04-2014, at about 11:00 pm, the truck had punctured and on being threatened by 5-6 persons, they had fled the scene, only to come in the morning and see the battery, jack, cash of Rs. 5,300/- and some potato bags missing from the truck. PW-7 stated that jimma of the potato were given to Dipankar Singh. The accused Dipak and Ganesh were arrested, accused Nakul Gogoi appeared before the IO on 13-04-2014 with an anticipatory bail order, Budheswar Chetia appeared in the police station and was arrested on 30-05-2014, Mahesh Gogoi was arrested on 15-06-2014 and subsequently released on bail, Nakul Gogoi appeared in the police station on 22-08-2014 with an interim bail order, was arrested and released on bail. On completion of investigation, Charge Sheet (Ext. 9) was laid.

16) During cross-examination, PW-7 stated that he had not found the statement of Dulu Gogoi in the case diary; the FIR

was received at 5:00 pm on 03-04-2014; GDE No. 41 was recorded on 03-04-2014 in the morning at 6:00 am; the fact that potato bags were stolen had not been stated in the FIR. However, it was specifically mentioned that 'Maal' were loaded on the truck. PW7 denied the suggestion that about 40-50 kgs potatoes were normally found in every household. PW-7 stated that the bags of potatoes in the truck were marked as 'TSK' and those found in the house of the accused were also so marked with same lettering and ink. PW-7 denied the suggestion that he had conducted the investigation perfunctorily.

17) From the evidence narrated hereinabove, it is seen that the prosecution story is that Dipankar Singh lodged FIR on 03.04.2014 to the effect that battery, one jack, tool set and cash of Rs. 536 were stolen from Truck No. WB-15-B-6689 on 02.04.2014 , at about 11 PM, when it got punctured and which they had to leave and go as they had been threatened by 5-7 persons. In the FIR no mention has been made of theft of sacks of potatoes. That sacks of potatoes had been "stolen" has for the first time come on record through the IO, who in answer to the query whether anything about theft of potatoes was mentioned in the FIR, he replied that in the FIR it was mentioned that the truck was loaded with "maal" (things). The IO went on to depose that the other sacks of potato which was there in the truck and the sacks which were recovered from the individual houses of each of the accused persons namely, Nakul

Gogoi, Mahesh Gogoi, Ganesh Kurmi, Ram Chandra Kurmi, Dipen Hazarika, were identical in as much as, both had words "TSK" inscribed on them with similar ink and letter.

18) It is on the basis of the said evidence of the IO that the learned trial court had brought into play the presumption under section 114 (Illustration a) of the Indian Evidence Act and held that since the accused persons did not have any explanation in respect of the "stolen property" which was "recovered" from their possession, having been found in their houses, the presumption in law, was sufficient to bring home the charge.

19) When presumption of law is to be brought into play, the prosecution has to prove the foundational facts first, as held by the Hon'ble Gauhati High Court in Bhupen Kalita vs. State of Assam, CrI. Appeal (J) 87/2017 dtd. 05-06-2020, on the touchstone of the principle of preponderance of probability and thereafter bring into play the presumption, where after, wherever applicable, the question of rebuttable evidence comes in.

20) Coming to the facts at hand, it is seen that there is no eye witness to the occurrence. Hence, the case rests on circumstantial evidence. Out of seven witnesses examined by the prosecution, PW-1, PW-3, PW-5 and PW-6 have been portrayed as witnesses to the recovery and seizure witnesses of "stolen" potato sacks. Out of the said prosecution witnesses, PW-1 is the son of accused Nakul Gogoi, PW-3 is the son of accused Mahesh Gogoi, PW-5 is the son of accused Ram

Chandra Kurmi and PW-6 is the wife of accused Dipen Hazarika. These witnesses have only stated that they were asked to sign on blank papers in the police station and accordingly they signed. Clearly, none of the said witnesses can be said to be a witness either to the purported recovery or to the seizure of sacks of potatoes.

21) Now, coming to the sacks of potatoes. The "stolen property" which is said to have been "recovered" from the "possession" of the accused persons are a sack of potatoes each, from the house of the appellants. From the FIR it is clear that no complaint with regard to theft of potato were lodged. It has come in evidence of the IO/ PW-7 that it was informed by 'some people' that potato sacks were missing from the truck and that some persons had taken the sacks of potatoes. Subsequently, on search, IO found the "sacks of potatoes" as already detailed hereinbefore, in the house of the accused persons. The said 'some people' have not been examined. The informant Dipankar Singh, to whom zimma of potatoes was shown to have been given, too has not been examined. None of the independent witnesses who have been examined identified the "sacks of potatoes" said to have been recovered from the houses of the accused persons/appellants to be the same "sacks of potatoes" allegedly missing from Truck No. WB-15-B-6689. Version of the Investigating Officer/PW 7 in his cross examination to the effect that the words "TSK" in similar ink and letters is nothing but surmise.

22) Hence, it is seen that the property (sacks of potatoes) allegedly recovered from the possession of the appellants have not been identified before the court as the stolen property. In fact there is no evidence with regard to identifying the property otherwise also.

23) On analysis, it is therefore seen that the prosecution failed to prove the foundational facts, be it the fact of the property (sacks of potatoes) allegedly recovered, to actually be the stolen property or be it the fact of recovery and seizure per se, from the possession of the accused persons. In absence of the latter, the presumption u/s 114 Indian Evidence Act could not and cannot be invoked.

24) Coming to the submission of the learned Public Prosecutor that prosecution was able to prove its case u/s 411 IPC, if not section 379 IPC, as already stated herein above, none of the independent prosecution witnesses supported the recovery or seizure of sacks of potatoes from the house of the accused persons, moreover it was not even the informant's case that potatoes had been stolen. To attract section 411 IPC too, it has to be first proved that the goods recovered were "stolen property", which has not been proved in the instant case. Hence, the said submission too, is found to be without merit.

25) Thus, this Court, has no hesitation to conclude that in absence of evidence with regard to identification of the

property, it cannot be held that the appellants were found in possession of "stolen property".

26) In view of the discussion aforesaid, the instant appeal succeeds. Conviction of the appellants for the offence under section 379 I.P.C and the sentence imposed thereon, are hereby set aside. The appellants are acquitted of the offence under section 379 I.P.C and they are set at liberty forthwith.

27) The bail bonds executed by the Appellants and their surety before the Trial Court stands extended for another six months u/s 437A CrPC.

28) Copy of judgment along with trial court record be sent back.

29) Let the record of appeal be consigned to Record Room.

Given under my hand and seal of the Court on this the 11th day of day of April, 2022.

Sessions Judge
Dibrugarh.