

GR CASE NO: 1716/2011
PROSECUTOR: STATE OF ASSAM
ACCUSED: MD HASEN ALI & ORS

DISTRICT: SONITPUR

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, TEZPUR

GR CASE NO 1716/2011

(Arising out of Dhekiajuli PS Case No 329/2011)

U/S 411 r/w 34 IPC

PROSECUTOR: STATE OF ASSAM

VERSUS

ACCUSED: 1.) MD HASEN ALI

2.) MD FAIZUL HAQUE

PRESENT: Ms Meenakshi Sarmah, AJS

Judicial Magistrate First Class, Tezpur

APPEARED:

ADVOCATE FOR THE PROSECUTION: SRI J ADHIKARI, Asst PP

ADVOCATE FOR THE ACCUSED: MD F HAQUE & ORS

CHARGE FRAMED ON: 21/03/2014

EVIDENCE RECORDED ON: 13/10/2014, 13/11/2014, 23/12/2014,

20/04/2015, 8/05/2015

ARGUMENT HEARD ON: 21/5/2015

JUDGMENT HEARD ON: 28/05/2015

TYPED BY ME: MS M SARMAH, AJS
JMFC, TEZPUR

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J U D G M E N T

1. The prosecution in this case was set in motion by lodging of an ejahar with the Officer in Charge of the Dhekiajuli Police Station on 14/8/2011 by Md Nekibur Rahman (*hereafter referred as informant*) to the effect that he was the care taker of the bridge which was being constructed between Bhagamandir and Balijaan. However several instances have arose wherein the construction materials of the bridge used to get frequently missing which includes seven quintals rod, water hand pump, a generator etc. The informant alleges that the aforesaid things must have been stolen by some unknown thieves.
2. The police upon receipt of the ejahar registered Dhekiajuli Police Station case no: 329/2011 under section 379 of the Indian Penal Code (IPC) and entrusted SI Sri RD Gowalla to conduct the investigation of the case. The I/O then visited the place of occurrence, conducts the search operation, recorded the statement of the witnesses, prepared the sketch map and after arrest forwarded the accused persons to the Court. Upon completion of the investigation, the police submitted chargesheet against the accused persons namely, Md Hasen Ali and Md Faizul Haque (*hereinafter referred as accused persons*) under section 379 r/w 34 IPC.
3. The accused persons, was called upon to enter trial and accordingly the said accused persons appeared and the copies of the relevant documents were furnished to them. Thereafter after hearing the learned Counsels for both the sides at length the formal charge under section 411 r/w 34 IPC was framed against the accused persons and

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the same was read over and explained to them, to which they pleaded not guilty and claimed to be tried. It is pertinent to mention that both the accused persons were discharged from the charge under section 379 r/w 34 IPC.

4. The prosecution in support of its case examined as many as eight witnesses and exhibited seven documents; whereas the defence declined to adduce evidence.
5. Since there were incriminating materials against the accused persons, they were examined under section 313 CrPC. The defence case is of total denial as evident from the statement of the accused recorded under section 313 CrPC.
6. Upon the case set up by the prosecution I have framed the following point for determination in this case in order to arrive at a definite finding as regards the matter in dispute-

(i.) Whether the accused persons Hasen Ali and Faizul Haque had dishonestly retained the stolen water pumping machine and the iron rods respectively which when missing from the bridge construction site in furtherance of their common intention and thereby committed offence under section 411 r/w 34 IPC?

7. I have heard the learned Asstt P.P and the learned counsel of the aforesaid accused persons. The learned counsel for the accused persons had prayed to acquit the accused persons as there are no materials

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against them. He further submitted that the prosecution had failed to prove the charge against the accused persons beyond all reasonable doubt.

DISCUSSION, DECISION AND REASONS THEREOF:-

8. Now let me discuss the materials on record and try to arrive at a definite finding as regards the point for determination.
9. The prosecution has examined as many as five witnesses in support of its case including the investigating officer.
10. ***PW 1, Sri Lalit Das (hereinafter referred as PW 1)*** who has been declared hostile by the prosecution had stated in his evidence that police had told him that the stolen articles of the bridge that was getting constructed between Dhaloguri and Balijan was recovered and then the police asked his father's name and went away. He further stated that he had come to know from the police only that the stolen articles were recovered from Dhologuripotha. In his ***cross examination by the prosecution***, PW 1 denied stating before the police that the stolen articles of the bridge were recovered from the pond of accused Faizul Haque and the water pumping machine was recovered from the compound of the accused Hasen Ali. He further denied that the stolen articles were recovered in front of him by the police and later on handed over to the care taker of the bridge Nekibur Rahman.
11. In his ***cross-examination*** by the defence, PW 1 had stated that he is not aware about the articles of the bridge and therefore is not available about what articles were stolen. He only came to know from the police

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that the articles of the bridge were stolen. He further admitted that he is not aware from whose pond and whose house what was recovered. The police had only stated him that the stolen articles of the bridge where recovered. He stated that there is no pond in his village. He also stated that although the accused persons belong to his village but they are not his relatives.

12. ***PW 2, Nekibur Rahman (hereinafter referred to as PW 2)*** had stated in his evidence that bridge construction works were going on between Dhaloguri and Bhangamandir; however the materials of the bridge used to get missing frequently. Since the articles were frequently missing, he informed the said matter to the police. Thereafter police recovered stolen articles from the house of accused Faizul (surname forgotten) and water pumping machine from the house of accused Hasen. He further stated that other articles like vibrating machine, generator etc was not recovered. PW 2 also stated that almost one quintal rod was recovered from the fishery of accused Faizul. After recovering all the stolen articles, the police have handed over the same to him. He proved Exhibit 1 as the ejahar lodged by him. He also proved Exhibit 2 as the seizure list.
13. In his ***cross examination, PW 2*** had stated that the police after recovering the stolen articles brought it to the police station and then have prepared the seizure list in the police station. PW 2 had admitted that he has no idea about what was written in the seizure list since it was prepared in English. Further PW 2 had stated that he had only lodged the case after the stolen articles were recovered and the police insisted him to lodge an ejahar. He further admitted that he had not written the Exhibit 1 himself. Further PW 2 had stated that he had only written about the water pumping machine in Exhibit 1. He also admitted

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that although the articles of the construction bridge used to frequently get missing, he did not lodge any ejahar on earlier occasions. He also stated that the water pumping machine which had gone missing was of Kirloskar Company. He also admitted that although he was present at the time of recovery but he had signed the seizure list only in the police station.

14. ***PW 3, Nazrul Islam (hereinafter referred to as PW 3)*** had stated in his evidence that he has no detail knowledge about the alleged recovery but he have only heard that someone had kept the water pumping machine in the house of accused Hasen Ali and the police have found the same from the said accused house. Further he stated that police had seized almost 7 pieces of rod from the pond of accused Faizul Haque.
15. In his ***cross examination PW 3*** had stated that the water pumping machine was used for draining out the water of the bridge and during the flood time, the said machine was kept in high land area. He further stated that he had been seeing the said water pumping machine from long time before any seizure was done in connection with this case; as the said water pumping machine was usually kept in a particular area and not near the bridge. However he had not seen the police seizing the water pumping machine from anyone's house. He came to know later that police had lodged a case.
16. ***PW 4, Halaluddin (hereinafter referred to as PW 4)*** has stated in his evidence that the police had seized some rods from a pond which is located a little distance away from the house of the accused Faizul Haque; the said rods being the rod which was used for building a bridge

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in their village. The police then took away the rods to the police station. He proved Exhibit 3 as the seizure list.

17. In his ***cross examination, PW 4*** has stated that he is not aware what was written in Exhibit 3 since it was written in English and police also did not read over the same to him. However he had signed Exhibit 3 in the police station. The police had only told him that some rods were recovered from someone's pond. He also stated that the pond is a little distance from the house of accused Faizul Haque and it is located in an open area. PW 4 also stated that there is a bamboo fence and betel nut trees between the house of the accused Faizul Haque and the pond and other villagers also use the said pond.

18. ***PW 5, Md Abdul Gofur (hereinafter referred to as PW 5)*** has stated in his evidence that the police had seized a water pumping machine from the compound of the accused Hasen Ali. He further stated that the said machine was usually kept in the compound of accused Hasen Ali after the bridge work was done.

19. In his ***cross examination, PW 5*** had stated that since there was flood in the bridge, the workers of the bridge had kept the water pumping machine in the compound of accused Hasen Ali and he has also seen the water pumping machine being kept there whenever he used to go that side. He stated that the police have seized the water pumping machine from the compound only.

20. ***PW 6, Md Burhamal Islam (hereinafter referred to as PW 6)*** has stated in his evidence that while he was working in the bridge construction site at Dholaguri, some rods were missing from the construction site of the bridge. Thereafter the informant who was working as an in charge of the bridge construction site, informed the said matter to the police. PW 6 further stated that when the police

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started investigation of the case then they recovered the rods from four to five fisheries near the Dhologuri pothar. Further he stated that the water pumping machine was recovered from in front of the house of the accused Hasen Ali. PW 6 further stated that the workers of the bridge kept the water pumping machine in front of the house of the accused Hasen Ali. He proved exhibit 2 and Exhibit 3 as the seizure list.

21. In his ***cross-examination PW 6***, had stated that he was an employee of the bridge construction company. He further stated that after the water pumping machine work used to get completed, the company workers used to keep the water pumping machine in front of the house of accused Hasen Ali since the construction site used to get flooded; the said water pumping machine was almost kept for one and a half years until it was seized by the police. He further stated that the accused Hasen Ali used to request them several times to remove the water pumping machine which was kept in front of his house; the said accused Hasen Ali neither kept the water pumping machine inside his house nor has he hidden it anywhere. The police have seized the water pumping machine from the place where the workers have kept the machine. Further PW 6 stated that he will not be able to state from whose pond the rods were seized since it was seized from two ponds. He also stated that the pond's from where the iron rods were recovered was almost 400 to 500 meters away from the house of the accused FaIzul Haque and are located in open spaces which are easily accessible to anyone. Further he stated that he is not aware of what is written in Exhibit 2 since it is written in English. He also stated that the brand of the water pumping machine which was seized was Kirloskar.

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22. ***PW 7, Md Abdul Hasen (hereinafter referred to as PW 7)*** has stated in his evidence that police had asked him to bring three to four persons in order to conduct search operation. He also stated that after conducting the search operation police recovered iron rods from the pond of the accused person Faizul Haque. Thereafter the police had recovered and seized a water pumping machine from the compound of accused Hasen Ali. He proved Exhibit 2 and Exhibit 3 as the seizure list.

23. In his ***cross examination PW 7*** has stated that the pond from where the iron rods were recovered was on the western side of the accused Faizul Haque's house; the said pond is located in a field and on a open space without any kind of fence or boundary wall. He also stated that the said pond was used by the other people of the village and it is almost 400 to 500 meters away from the accused Faizul Haque's house. He also clearly stated that it is difficult for the accused Faizul Haque to see the said pond from his house because there bamboo trees and betel nut trees between both the places. He also admitted that he is not aware what is written in Exhibit 2 and Exhibit 3.

24. ***PW 8, Sri Ram Dulal Dulal Gowalla (hereinafter referred to as PW 8)*** is the investigating officer of this case. He has stated in his evidence that after being entrusted with the investigation of this case, when he went to the place of occurrence, he had searched the pond's located within 200-250 meters of the place of occurrence. Thereafter he found a water pumping machine from the house of the accused Hasen Ali and iron rods from the fishing pond of the accused Faizul Haque. After recovery of the aforesaid stolen articles, he handed over the same to the informant, who was the care taker of the bridge construction site. He proved Exhibit 4 as the chargesheet, Exhibit 5 as the sketch map,

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Exhibit 6 as the accused forwarding report and Exhibit 7 as the statement of hostile witness PW 1 made before him.

25. In his ***cross examination, PW 8*** has stated that he had not mention in Exhibit 5 from whose pond the iron ponds were recovered. He also admitted that he had not mentioned from where the theft had taken place in Exhibit 5. He further admitted that he has not mention the exact place of recovery of the water pumping machine in his Exhibit 5. PW 8 also stated that the brand of the water pumping machine seized vide Exhibit 3 was of Bharat Shakti. PW 8 although had stated that the people of the village had only helped him to take out the iron rods from under the pond , but he had failed to mention the names of those persons as witnesses in this case. He clearly admitted that no GD entry was made in connection with this case.

26. After going into the entire evidences on record, it is very important to discuss Section 410 of the IPC which will give a clear understanding about what is a "***stolen property***" which is defined under the aforesaid section of law which states-

410. Stolen property – Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which ¹ [] criminal breach of trust has been committed, is designated as "stolen property", ² [whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without³[India]]. But, if such property subsequently comes into the possession of a person legally***

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entitled to the possession thereof, it then ceases to be stolen property.

Thus on the perusal of the definition of "stolen property" it has come out clear that it is very important that unless the right of possession in the property was lost to the owner by the commission of any of the offences enumerated in section 410, the property could not be said to be stolen property. It is elementary that there can be no offence of dishonestly receiving stolen property unless the property which is alleged to be the subject of such receiving, answers the description of stolen property given in section 410 IPC. Therefore, it is very important to see whether the possession of the missing articles of the bridge which were subsequently recovered by the police was possessed by the accused persons knowing it to be a stolen property as alleged by the prosecution.

27. With regard to the accused Hasen Ali, the main allegation made against him is that the water pumping machine was recovered from his house. On a detail view of the entire prosecution witnesses it has come out that the water pumping machine was usually kept openly outside his house by the workers of the construction site after the bridge work used to get over. PW 3, who happens to be the resident of the village from where the water pumping machine was seized had clearly stated in his evidence that he has seen the water pumping machine prior to the date of seizure as it was kept openly and the said water pumping machine was not seized from inside the accused Hasen Ali's house. PW 4 who also happens to be another resident of the said village had stated that the water pumping machine was usually kept in the compound of the said accused Hasen Ali's house by the workers of the bridge construction site due to flood near the bridge area. In fact PW 6 who

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happens to be an employee of the bridge construction site had clearly stated in his evidence that the workers of the bridge have only kept the water pumping machine in front of the accused Hasen Ali's house; in fact he has clearly indicated that the said accused Hasen Ali have only requested them several times to remove the water pumping machine from nearby his house. PW 6 also clearly stated in his evidence that the accused Hasen Ali has neither kept the water pumping machine inside his house nor had he hidden it anywhere. Thus, in my opinion there is nothing doubtful in their evidence so as to disbelieve them because PW 3 and PW 4, being the resident of the said village and PW 6 being the employee of the bridge construction site, they are quite acquainted with the surroundings of the village. Also in my view, there is no question of keeping something so openly and visible to every person if the particular thing is a stolen property specially. The keeping of the water pumping machine in front of the house of the accused Hasen Ali was a regular affair and just because on the date of seizure, that the said water pumping machine was found near the house of the accused Hasen Ali will not hold the accused liable for possessing the said water pumping machine.

28. Further if one views the Exhibit 1, there is no detail description of the brand of the water pumping machine which has been missing from the bridge construction site. Although PW 1 and PW 6 has stated that the brand of the missing water pumping machine was of Kirloskar Company as per their knowledge but the water pumping machine seized in connection with this case was stated to be of "Bharat Shakti" as stated in Exhibit 3. Therefore on what basis seizure was made by the police is unexplainable when the description of the missing water pumping machine is itself very vague.

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29. Further with regard to the allegations of seizing of the iron rods from the fishery pond of the accused Faizul Haque, it is important to discuss what has been stated by the prosecution witnesses in their respective evidences in this regard. PW 4 had stated in his evidence that the iron rods were seized from a pond which is situated a little far away from the house of the accused Faizul Haque and after recovery the rods were taken to the police station. Further the said PW 4 had stated that the said pond from where the recovery was made is located in an open area and there are trees between the house of the accused Faizul Haque and the said pond. He also clearly indicated that the said pond is used by the other people of the village. PW 6 who happens to be the employee of the bridge construction site have also stated in his evidence that the rods were recovered from 4 to 5 fisheries located in the Dhologuri pothar; although he has no knowledge about the fact that exactly from which two ponds the iron rods were recovered. PW 6 also admitted that he has no knowledge about the owner of the fisheries from where the rods were recovered; however he has knowledge that the house of the accused Faizul Haque is almost 400 to 500 m away from the said ponds which were located in open spaces and is easily accessible to anyone. PW 7 had also stated in his evidence that although the iron rods were seized from the pond of the accused Faizul Haque but the said pond is located almost 400 to 500 meters away from the house of the accused Faizul Haque in an open area that too without any kind of fencing and boundary around it and he had also clearly stated that the said pond was used by the other villagers also. Therefore, an important fact has come out from the evidences of prosecution witnesses is that firstly, the said pond although it is claimed to be that of the accused Faizul Haque but he was not the sole user of the said pond; it was used by the other villagers also. Secondly, the aforesaid pond was located in an open space without any kind of boundary and was a little distance

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away from the house of the accused Faizul Haque. All this clearly indicates one thing that the said pond was easily accessible by anyone and there are high chances that any other person may also hid the iron rods in the aforesaid pond claimed to be that of the aforesaid accused by the prosecution side. Thus after a detailed discussion in this regard, I am of the considered view that there is no materials on the record to prove that the accused Faizul Haque is only the sole user and had the sole access to the aforesaid pond from where the iron rods were recovered.

30. In fact PW 8 i.e., the Investigating Officer had also failed to give any material document along with the case record to show that the accused Faizul Haque is only the owner of the said pond from where the iron rods were recovered so as to prove his guilt beyond all reasonable doubt and he had admitted the same in his evidence.
31. Lastly, after the detail discussion with regard to what is a stolen property and whether the aforesaid accused persons were in possession of stolen property (if any), it is immensely important to discuss section 411 IPC which states –

411. Dishonestly receiving stolen property – Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to 3 years, or with fine, or with both.

A close reading of the above section of law, gives us a clear understanding that to bring home the guilt of the accused persons under this aforesaid section, it is the duty of the prosecution to prove, -

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(a) that the stolen property was in the possession of the accused,

(b) that some person other than the accused had possession of the property before the accused got possession of it, and

(c) that the accused had knowledge that the property was stolen property.

Thus after discussing the evidences on record in a detailed manner, it has come out clear that the accused person Faizul Haque was not in conscious possession of the iron rods recovered from pond which belongs to him as alleged by the prosecution. Mere recovery of the hidden iron rods from the pond alleging to be that of the accused Faizul Haque is not a proof that he had either committed theft or is the receiver of the stolen goods because the prosecution had failed to give any cogent evidence to establish that the accused Faizul Haque was only the sole user and the sole accessible person to the aforesaid pond. With regard to the recovery of the water pumping machine, it had clearly come out that the machine was kept near the house of the accused Hasen Ali as a regular affair as such there is no question of him possessing the aforesaid water pumping machine.

32. Further when the property whose possession itself is not known to the accused person than the question of whether it was a stolen property or not does not arise. In fact there is nothing on record which could anywhere show that the accused persons had any idea of the missing articles of the bridge construction site, therefore the question of

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dishonestly receiving or retaining any stolen property does not comes in question.

33. Further on perusal of the Exhibit 5 prepared by the investigating officer there is no clear description of the place of occurrence, no specific indication of the place of recovery and also the place of theft which thereby clearly shows the casual attitude of the investigating authority in this case.

34. Another serious lapse on the part of the Investigating Officer in this case is that he had failed to submit any extract copy of the GD entry; rather the investigating officer had admitted that he had not made any GD entry. Although both PW 2 and PW 6 had clearly stated in their evidences that PW 2 being the care taker of the bridge had orally intimated the police about the aforesaid matter but it was the carelessness on the part of the concerned Investigating authority who had failed to make a GD entry. Also it has come out clearer that the seizure list was prepared in the police station and not in the place where the seizure was made; in fact all the seizure witnesses who have been examined as prosecution witnesses have clearly stated that they are not aware about the contents of the seizure list. Thus, all these loopholes of the prosecution case had totally uprooted their credibility to prove the guilt of the accused persons beyond all reasonable doubt.

35. Thus on the basis of the above discussion, it is crystal clear that the prosecution had miserably failed to prove the guilt of the accused persons beyond all reasonable doubt.

36. **DECISION:** The prosecution has failed to prove that the accused persons have committed the offence of retaining stolen property in

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furtherance of their common intention at that relevant point of time as alleged in the ejahar, as such the point for determination is answered in the negative, and in favour of the accused persons.

ORDER

37. In view of the discussions made above and the decision reached in the foregoing points for determination it is held that the prosecution has failed to prove the charges against the accused person namely Hasen Ali and Md Faizul Haque; as such the accused persons are acquitted from the charges under section 411 r/w 34 IPC and are set at liberty.

38. The bail bond of the accused persons and their surety shall remain in force for six months from today.

39. The case is disposed of on contest without cost.

Given under my hand and seal of this court on this 28th day of May, 2015 at Tezpur .

(Meenakshi Sarmah)
Judicial Magistrate First Class,
Sonitpur, Tezpur.

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APPENDIX

PROSECUTION EXHIBITS:

1. EAHAR
2. SEIZURE LIST OF IRON RODS
3. SEIZURE LIST OF WATER PUMPING MACHINE
4. CHARGESHEET
5. SKETCH MAP
6. ACCUSED FORWARDING REPORT
7. STATEMENT OF HOSTILE WITNESS PW 1

DEFENCE EXHIBITS:

NONE

COURT EXHIBITS:

NONE

PROSECUTION WITNESS:

1. SRI LALIT DAS
2. NEKIBUR RAHMAN
3. NAZRUL ISLAM
4. HALALUDDIN
5. MD ABDUL GOFUR
6. MD BURHAMAL ISLAM
7. MD ABDUL HASEN
8. SRI RAM DULAL GOWALLA

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DEFENCE WITNESS:

NONE

COURT WITNESS:

NONE

(Ms Meenakshi Sarmah)

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