

**G.R No-2387 of 2011  
(State of Assam Vs Md. Suraj Ali)**

**IN THE COURT OF CHIEF JUDICIAL MAGISTRATE, SONITPUR:: TEZPUR**

**G. R. Case No. 2387 of 2011**

Under section-379 of I.P.C

Present:- **Sri N. J. Haque, AJS,  
Chief Judicial Magistrate,  
Sonitpur, Tezpur**

State of Assam  
-Vs-  
Md. Suraj Ali  
S/O:-Late Jamir Ali  
R/O:-Gudamghat Mirigaon  
P/S:-Chariduar  
Dist:-Sonitpur, Assam .....Accused

**Advocate appeared:**

Mr. N. K. Mishra, Addl. P.P..... For the State

Mr. S. Khan & Ors, Ld. Advocates.....For the accused person

Evidence recorded on	:- 06.06.2018, 18.07.2019, 31.08.2019, & 11.10.2019
Date of Statement of defence	:- 12.02.2021
Argument heard on	:- 12.02.2021
Judgment delivered on	:- 25.02.2021

**J U D G M E N T**

**History of Prosecution's Case**

1. Prosecution case appears to be in a nutshell is that one Sri Manuj Mech lodged an ejahar before the O/C, of Tezpur PS through I/C of Salonibari OP on 02.11.2011, alleging inter alia that on 26.10.2011 at about 8 PM, he along with his brother Jayanta Mech were returning from Ghorghora T.E. in his motor cycle bearing Regd. No. AS-12/H-0506 and when they reached near Singrijan T.E. he went for nature's call. It is stated that when he returned he saw his motor cycle was missing.

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**"INVESTIGATION"**

2. On receipt of the ejahar, Tezpur P.S Case No. 1221 of 2011 u/s-379 of I.P.C was registered and investigation into. On completion of the investigation, the I.O. of this case submitted charge sheet u/s-379 of I.P.C against the accused person, named, Md. Suraj Ali.

**CHARGE & TRIAL**

3. In pursuant to the court's process, the accused person appeared before the court and he was allowed to go on bail. Copies u/s-207 of CrPC was furnished to the above-named accused person. After hearing both sides, charge of offence u/s-379 of I.P.C. was read over and explained to the accused person by my Ld. Predecessor in office, to which he pleaded not guilty and claimed to be tried.

**STATEMENT OF DEFENCE**

4. The prosecution side to prove the guilty of the accused person examined as many as 07 (Seven) numbers of witnesses in support of this case. The informant of this case could not be examined as he was reported to be died. Considering the testimonies of witnesses, prosecution side declined to adduce further evidence before this court. Hence, the evidence of prosecution side is closed. Accused is examined u/s-313 CrPC and his pleas of denial were recorded in separate sheet and the same kept with the case record. Accused declined to adduce evidence on his defence.

**ARGUMENT**

5. I have heard arguments of both sides, gone through the case record in the backdrop of evidences presented before this court by prosecution side.
6. **The points for determination in this case are:-**

**Whether on 26.10.2015 at about 8 PM, accused intending to take dishonestly movable property i.e. motor cycle bearing Regd. No. AS-12/H-0506 out of the possession of the informant without his consent, moved that property in order to such taking and**

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**thereby committed an offence punishable u/s 379 of  
IPC?**

**EVIDENCES OF PROSECUTION SIDE**

7. In this case prosecution side to prove the contentions of the ejahar examined six numbers of witnesses. I have carefully travelled through the testimonies of each witnesses in the back drop of the entire case. PW-1, Md. Mainul Islam deposed before this court that he does not know the informant and the accused person of this case. He further deposed that the incident took place in the year 2011 and on the day of alleged incident, police took his signature along with his grandfather on the seizure list. But he does not know as to why police obtained their signature. Ext-1 is the seizure list and Ext-1(1) is his signature.
8. PW-2, Md. Idrish Ali deposed that he does not know the informant of this case. The accused is his neighbour. He further deposed that police took his signature in the seizure list but he does not know as to why his signature was taken. Ext-1 is the seizure list and Ext-1(1) is his signature. PW-2 was declared hostile at the instance of the prosecution. PW-2 in his cross examination testified that he had not given any statement before the I/O and he had not stated before the court what was being attributed to him by the Ld. Public Prosecutor. He deposed that his signature was taken on a blank paper. He also deposed that he along with Mainul Islam went for marketing which was about 2 KM away from his house. He also deposed that police had not recorded his statement.
9. PW-3, Sri Bhabiram Das deposed before this court that in the year 2011 in between 8 PM to 8:30 PM, the informant along with one pillion rider was moving from New Ghagra Grant to Rangapara and on their way, when the informant near Hingorijan Bagan halted for some time to attend nature's call. At that time, some unknown miscreants had stolen their motor cycle from there. He also deposed that on the next day, the informant reported the entire incident to him. So far his knowledge goes, the motor cycle was recovered by police and given zimma to the informant. PW-3 in his cross-examination testified that he had not seen the alleged incident. He also deposed that he

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does not know when the informant filed the case in connection with the above narrated incident.

10. PW-4, Sri Jiten Rabha deposed before this court that he knows the informant, who is his relative. He also deposed that the incident took place in the year 2011 on the occasion of Kalipuja. He further deposed that on the date of the alleged incident, when the informant was proceeding along with Jayanta from Ghagra Grant to Rangapara to do marketing, on their way he halted to attend nature's call and thereafter, somebody stole his motor cycle. He also deposed that on the next day, he came to know about the incident from the informant. He also deposed that the motor cycle was recovered from the possession of one Suraj Ali. PW-4 in his cross-examination testified that he had not witnessed the alleged incident. He further deposed that he had never seen the accused and the police had not called him to identify the accused person. Police had only asked his name and address and nothing else.
11. PW-5, Sri Triloikya Mech deposed that the incident took place in the year 2011. He also deposed that the motor cycle of the informant was missing at Singrijan. Later, police recovered the stolen motor cycle. He further deposed that the informant of this case named Manoj Mech had already expired.
12. PW-6, Constable Md. Arkum Ali deposed before this court that he identified the accused of this case. He also deposed that the incident took place in the year 2010-2011 and at that relevant time, he was posted at Salonibari Police Outpost. He further deposed that at the relevant time, he along with SI Dilip Bania went to Chariduar OP in connection with some other cases thereafter, with the help of Chariduar Police Outpost, they conducted a search operation at Gudamghat Mirigaon wherein they found one motor cycle vide No. AS-12/H-0506 "under the earth in front of the house of one Suraj Ali." He also deposed that they recovered the said motor cycle from the courtyard of the accused and thereafter, they brought the said motor cycle to Salonibari OP. He identified the seizure list as Ext-1 wherein he put his signature as Ext-1(3). PW-6 in his cross-examination testified that he along with SI Dilip Bania went to the place of

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occurrence with the help of the police personnel of Chariduar OP. He also deposed that he knows the accused person prior to the incident. He further deposed that Suraj Ali was not present at the time of recovery of the said motor cycle except his family members and the villagers. He also deposed that neither the village "Headman" nor "Panchayat" members were present at the place of occurrence. He deposed that the I/O seized the motor cycle at the place of occurrence and thereafter, he put his signature thereon. They recovered the said bike in between 10:30 AM to 11 AM.

13. PW-7, Inspector Dilip Bania who is the investigating officer of this case deposed before this court that on 02.11.2011, he was posted at Salonibari Police Outpost as I/C under Tezpur PS. He also deposed that on that day, one Manoj Mech lodged an ejahar before concerned Police outpost and thereafter, the same was forwarded to O/C of Tezpur PS for registering a case. Accordingly, the O/C of Tezpur PS registered the same as Tezpur PS Case No-1221/11 under section-379 of IPC and subsequently, O/C of Tezpur PS endorsed him to investigate the case. Thereafter, he started his investigation and visited the place of occurrence, prepared sketch map. He identified the sketch map as Ext-2 wherein he put his signature as Ext-2(1). He also deposed that he had also recorded the statement of the informant and the other witnesses and during investigation, he had seized the stolen motor cycle from the house of accused Suraj Ali. He deposed that the motor cycle was kept under the earth. Thereafter, he prepared seizure list and forwarded the seized bike along with seizure list before the Hon'ble Court. He identified the seizure list as Ext-1 and Ext-1(1) is his signature. He also identified the ejahar as Ext-3 upon which he started investigation. He further deposed that on being transferred, he handed over the case diary to O/C of Tezpur PS. He knows SI Lakshmi Prasad Kachari who subsequently concluded the investigation of this case and submitted charge sheet against the accused person u/s-379 of IPC. He identified that the charge sheet as Ext-4 and Ext-4(1) is the signature of SI Lakshmi Prasad Kachari, which is known to him.

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14. PW-7 in his cross-examination testified that the incident took place on 26.10.2011 and the ejahar was lodged on 02.11.2011 and the delay of lodging the ejahar was not mentioned in Ext-3. He deposed that on 04.11.2011, they have forwarded the ejahar before the Hon'ble Court. He also deposed that the distance between Tezpur PS to Court is about ½ KM. He deposed that he did not take any signatures of the family members of the accused person at the time of seizing the stolen bike. He further deposed that he had not recorded the statement of the family members of the accused. He also deposed that they have not recorded the statement of the person from whom they had received the information about the stolen motor cycle. He deposed that prior 16.11.2012 they had not visited the place of occurrence. He deposed that he had not recorded the statement of the persons whose houses situated surroundings to the place of occurrence. He deposed that the seizure list was seen before the Magistrate on 20.01.2012. He denied the fact that they have not seized any kind of vehicle mentioned in the seizure list.

**DISCUSSION, DECISION AND REASONS FOR SUCH DECISION**

15. In this case criminal law sets in motion against the accused person named Md. Suraj Ali immediately on lodging an ejahar by the informant named Sri Manoj Mech on 02.11.2011 alleging inter-alia that on 26.10.2011 at about 8 PM, he along with his brother named Jayanta Mech were returning from Ghorghora Tea Estate in his motor cycle bearing Regd. No-AS-12/H-0506 and at Singrijan T.E. when he went to nature's call his aforesaid motor cycle found missing. Accordingly, against the accused person trial sets forth on framing of charge under section-379 of IPC was framed by my Ld. Predecessor in office against the accused person.
16. To prove the case u/s-379 of IPC, the prosecution is required to prove the following facts:-
- (a) That the property in question was movable property,
  - (b) That such property was in possession of a person,

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- (c) That accused moved such property while in the possession of that person,
- (d) That accused did so without the consent of such person,
- (e) That accused did so in order to take the same out of the possession of that person,
- (f) That accused did so with intend to cause wrongful loss to that person or wrongful gain to himself.

17. In the present case, the prosecution side has examined as many as seven numbers of witnesses and on meticulous perusal of the evidences on record, this court finds that no witness has been examined by the prosecution who has seen that the accused committing the theft of the motor cycle belonging to the informant. In fact the informant also did not see the accused while committing theft of the said motor cycle. Without the evidence of eye witnesses the factum of commission of theft cannot be proved.
18. On meticulous perusal of the entire case record, it disclosed that this court on several occasions issued summons upon the informant Sri Manoj Mech and consequently, on 14.06.2017 one Sri Manash Mech nephew of the informant filed a Petition bearing No2417/17 stating that informant Sri Manoj Mech had expired around two years back. Accordingly, the informant could not be examined and as per the submission of prosecution side the evidence of the informant was closed.
19. However, the prosecution has alleged that the stolen motor cycle was recovered from the possession of the accused and to substantiate the fact of recovery of the stolen motor cycle from the possession of the accused person, the prosecution side only able to examine two numbers of witnesses including the Investigating Officer who deposed before this court that the seized motor cycle recovered from the possession of the accused person. PW-1, PW-2 and PW-3 in their evidences meticulously stated that they have not seen the alleged incident. PW-1 is the seizure witness who does not know as to why police took his signature in Ext-1 vide Ext-1(1). PW-2 in the same way stated that he does not know why his signature was taken and he also does not know what written

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in the seizure list. PW-3 heard about the incident and he does not know when the informant filed this case in connection with this case. But he heard that police has recovered the stolen motor cycle from the place of occurrence and the said motor cycle was given in zimma to the informant. Hence, it is seen that the witnesses whose signatures was obtained in the seizure list does not have any constructive knowledge about the contents of the seizure list. In fact, they don't know why the police obtained their signatures in the seizure list.

20. Now, coming to the evidence presented by PW-4, it disclosed before this court that he has deposed in his evidence that the alleged motor cycle was recovered from the possession of one Md. Suraj Ali but in the same time during his cross-examination he affirmed that he had not witnessed the alleged incident and he also never seen the accused and the police had not called him to identify the accused person. Police only asked his name and address and nothing else. The evidence of PW-4 has nothing to play in deciding the guilty of the accused as he simply displayed a goodbye to the entire prosecution story by stating that police only took his name and address and nothing else. If so, then his version regarding the fact of recovery of stolen motor cycle from the possession of Suraj Ali not appears to be trustworthy in nature. PW-5 only stated that the stolen motor cycle of the informant recovered by the police. But he did not state from where the stolen motor cycle was recovered and his evidence appears to be hearsay in nature.

21. Now, coming to the evidence of PW-6, who is a Police Constable accompanied the Investigating Officer at the relevant point of time in conducting search operation at Gudamghat Mirigaon from where they recovered the motor cycle bearing Regd. No.AS-12/H-0506 under the earth from in front of the house of one Suraj Ali. PW-6 also stated that the said motor cycle was recovered from in front of the house and also stated that the motor cycle was recovered from the courtyard of the accused and thereafter, they took the motor cycle to Salonibari Police OP. Ext-1 is the seizure list wherein Ext-1(3) is his signature. PW-6 who accompanied the Investigating Officer at the time of recovery of the stolen motor cycle deposed that the motor cycle was recovered from the

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courtyard of the accused under the earth. PW-7 being the Investigating Officer supported the fact of recovery of stolen motor cycle from the house of accused Suraj Ali and the motor cycle was kept under the earth. If we meticulously peruse the nature of evidence presented by PW-6 and PW-7, then it disclosed before this court that as per the version of PW-6 the motor cycle was recovered from in front of the house of the accused i.e. from the courtyard and PW-7 stated that the alleged recovery was made from the house of the accused. Hence, it is seen that both have deposed two separate versions regarding the exact place of seizure of the motor cycle and if the motor cycle was actually recovered from in front of the house or the courtyard of the accused then there should be verification of the place from an independent source that the motor cycle was actually recovered from the in front of the house of the accused or from his courtyard. The versions of PW-6 and PW-7 cannot be relied upon as both the versions are having full of discrepancies regarding the actual place from where the stolen motor cycle was recovered. More also, the version of PW-6 where he has claimed that at the time of recovery of the motor cycle the accused was not present but his family members were very much present along with the villagers. Investigating Officer (PW-7) in his cross-examination stated that although the family members and the villagers were present at the time of seizing the stolen motor cycle but he has not recorded the statement of the family members of the accused. PW-7 also admitted that he did not take any signatures of the family members of the accused at the time of seizing of the stolen motor cycle. The evidence presented by PW-6 and PW-7 makes it categorical that at the time of seizure the villagers including the family members were present but they failed to obtain the signature of the villagers and the family members of the accused at the time of the seizure of the stolen motor cycle. Why the I/O had failed to record the statement or obtain signatures of those persons who were present during seizure that was not clarified by the prosecution. The Investigating Officer also admitted that he had not recorded the statement of the persons whose houses were situated nearby the place from where the motor cycle was recovered.

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22. The fact of non-obtaining signatures of the persons including the family members of the accused who were present at the time of recovery of stolen motor cycle makes the version of the prosecution weaker as to place being a courtyard or being in front of the house of the accused appears to be an open place and there ought to have been a specific identification regarding the actual place to the extent of the fact that the said place from where the alleged recovery was made was under the possession of the accused person. There is no specific identification disclosed from the evidences of PW-6 and PW-7 upon which this court may presume that the place from where the alleged recovery was made actually belongs to the accused person. Undeniably, the alleged recovery was made not as per the information given by the accused to the I/O. If so, then at the time of recovery of the motor cycle the I/O ought to have made all the reasonable efforts of inducing the local inhabitants of the place for proper identification of possession of the accused from where the stolen motor cycle was actually recovered. However, the I/O in his charge sheet shown the accused to be an absconder.
23. In the aforesaid circumstances, this court finds that the place from where the alleged recovery was made appears to be an open place and which is accessible for all and it is very difficult to make a presumption under section-114 illustration (a) of Evidence Act that the accused either committed theft or had received the properties of theft knowing that to be stolen as the prosecution side failed to prove that the place from where the stolen motor cycle was recovered actually belongs to the accused person. In this case admittedly no person examined by the prosecution who have witnessed the alleged theft and in absence of any eye witness it is very difficult to ascertain that accused have actually committed theft of alleged motor cycle and in respect of the recovery of the stolen motor cycle upon which the accused may be convicted in absence of any charge u/s-411 of IPC as the court has already observed that the fact of recovery of the stolen motor cycle from the exclusive possession of the accused does not appear to be proved and established.

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24. Now, coming to the settled propositions of law, this court finds that Section-100 clause (iv) of CrPC postulates that before making a search the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality if no such inhabitants of said locality is available of which they are willing to be a witness to the search, attained and witnessed to the search and may issue an order in writing to them or any of them so to do. Hence, it is seen that the settled propositions of law casted duty upon the I/O for inducting atleast two or more inhabitants or respectable persons of the locality at the time of search and seizure, if it is a search u/s-104 CrPC. The search u/s-100 (4) of CrPC always in respect of recovery of stolen article and in this case the Investigating officer himself admitted that the family members of the accused including the villagers were present at the time of seizure but he failed to obtain their signatures and even he failed to record their statement. There is no proper explanation presented by the I/O for not inducting the local inhabitants of the locality. Although, the fact of non inducting the local inhabitants at the time of recovery of the stolen motor cycle does not makes the prosecution case weaker but in a case of like this nature where recovery allegedly made from the courtyard or from the place situated in front of the house of the accused, the I/O ought to have make all the reasonable efforts for inducting the persons who were present at the time of seizure. The alleged seizure as per the version of PW-6 (one police constable) was made between 10:30 AM to 11 AM and the family members and the other villagers were present and such fact does not help the court to draw a presumption that the neighbours or local inhabitants due to fear of life or any other reasons declined to stand as a seizure witness to avoid the recourses of the law enforcing agency.
25. In this case even police officer also failed to explain the circumstances upon which he failed to engage a local inhabitant of the locality from where the alleged seizure was made. It is true that a police officer after making endeavour if failed to induct a person in the entire process of seizure under

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compelling circumstances may his police personnels to remain as a seizure witness but in this case there is no evidence presented by the prosecution to substantiate the fact that the I/O under compelling circumstances failed to engage atleast two inhabitants from the locality in the aforesaid process of seizure. The Prosecution side even failed to adduce proper explanation as to whether the I/O had made reasonable efforts of engaging atleast two inhabitants from that locality and on being declined by those persons the I/O under compelling circumstances inducted PW-6 in the process of the seizure. There are many pronouncement of the Hon'ble Apex Court where it has been settled that non engaging any inhabitants or any respectable persons of the locality in the process of seizure of a stolen article does not make the prosecution's case weaker and simply the court cannot thrown the testimonies of the police officials. But in this case the I/O himself admitted that the alleged seizure was made during the day time and including the family members of the accused and other local inhabitants were present and he failed to record their statement and even failed to obtain their signatures in the seizure list. PW-6 stated that the alleged seizure was made in front of the house of the accused and he again deposed that the seizure was made from the courtyard and we have already observed there was no proper identification of the place from any independent source that the said place or courtyard actually belongs to the accused. Hence, under the aforesaid circumstances not inducting the local inhabitants even the family members of the accused during the process of seizure makes the entire case of the prosecution weaker.

26. Now, coming to the fact of delay in lodging the ejahar, it clearly reveals before this court that the alleged occurrence took place on 26.10.2011 and the ejahar was lodged on 02.11.2011. There is no explanation given by the informant Sri Manoj Mech for delay of lodging the ejahar. It is quite unreasonable that a person whose motor cycle had stolen away on 26.10.2011 and he would lodged the ejahar after 07 days of the alleged incident. Why the informant remained silent even after stolen of his motor cycle from a place called Singrijan T.E. at night till 02.11.2011. Hence, it is seen that the un-explained delay of lodging

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the ejahar for 07 (Seven) days makes the entire prosecution case weaker and afterthoughts.

27. Furthermore, in Ext-1 seizure list excluding the investigating officer and one police personnel Akram Ali and other two independent witnesses have put their signatures and they don't know about the alleged seizure even they don't know the contents of seizure that means the I/O obtained their signatures not from the place of occurrence which makes the entire process of seizure contradicted and doubtful in nature.
28. Hence, at this stage it difficult to ascertain the fact of involvement of the accused with the alleged occurrence. There is every possibility of making two views regarding the alleged incident pertaining to the involvement of the accused. The settled propositions of law says that whenever in criminal case two views are possible, the view that favours the accused needs to be adopted.
29. To sum up the evidences on record, it is seen that the evidence of prosecution being contradictory in nature makes the version of entire story to be not truthful. Hence, the contradictory nature of evidence coupled with fact of delay in lodging the ejahar makes the story of prosecution to be doubtful. Therefore, in the light of all the aforesaid discussion, this court finds that the prosecution has failed to prove the charges against the accused person beyond reasonable doubt and as such the accused person is acquitted from the charge u/s-379 of IPC and sets at liberty. Surety is extended for six months in view of section 437A of Cr PC.
30. Judgment is pronounced in the open court, which is given under my hand and seal of this court on 25<sup>th</sup> day of February, 2021.

**(Sri N. J. Haque)**  
**Chief Judicial Magistrate,**  
**Sonitpur: Tezpur**

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**ANNEXURE**

**1. Witnesses for Prosecution:-**

- PW-1:- Md. Mainul Islam
- PW-2:- Md. Idrish Ali
- PW-3:- Sri Bhabiram Das
- PW-4:- Jiten Rabha
- PW-5:- Troilokya Mech
- PW-6:- Constable Md. Arkum Ali
- PW-7:- Inspector Bijit Bania, I.O

**2. Witnesses for Defence: NIL**

**3. Court Witnesses: NIL**

**4. Prosecution Exhibits:**

- Ext-1           :- Seizure List
- Ext-1(1)       :- Signature of PW-1
- Ext-1(2)       :- Signature of PW-7
- Ext-1(3)       :- Signature of PW-6
- Ext-2           :- Sketch Map
- Ext-2(1)       :- Signature of PW-7
- Ext-3           :- FIR
- Ext-4           :- Charge Sheet
- Ext-4(1)       :- Signature of Lakshmi Prasad Kachari

**5. Defence Exhibits: NIL**

**6. Material Exhibits: NIL**

Chief Judicial Magistrate  
Sonitpur, Tezpur