

IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE(FTC)

SONITPUR AT TEZPUR

PRESENT : N. Goswami,
Addl. Sessions Judge(FTC),
Sonitpur, Tezpur.

CRIMINAL APPEAL NO. 25(S-3) OF 2019

1. Sri Birsha Karmakar,
S/O Sri Lalu Lohar,
Resident of Village – Dhulapadung Gaon,
PS – Rangapara,
Dist. Sonitpur (Assam).....the Appellant/accused.

- Versus -

1. State of Assam
2. Sri Arun Sashani,
S/o Not known,
Resident of village – Dhulapadung TE,
PS – Rangapara,
Dist - Sonitpur, Assam..... Respondents/OPs.

APPEARANCE

For the Appellant : Mr P.S. Sethi,
Ld. Advocate.

For the State : Mr A Baruah,
Ld Addl. P.P.

None appeared for the respondent No.2/ informant.

Date of Hearing : 23-08-2022.

Date of Judgment : 01-09-2022.

J U D G M E N T

1. This appeal was filed under section 374 (3) (a) of CrPC against the judgment in order dated 28.08.2019 passed by the Learned JMFC, Sonitpur Smt. S. Garg in G.R. Case No 164/2016 u/s 294/406/506 of IPC, convicting the accused/ appellant under section 406 of IPC and sentencing him to undergo simple imprisonment for one year and to pay a fine of Rs. 5000/-.
2. The facts of the case in brief, relevant for the disposal of this appeal, are that on 10.12.2015 the complainant Sri Arun Sasoni filed a complaint before the Chief Judicial Magistrate, Sonitpur stating therein that the accused Sri Birsa Karmakar borrowed Rs.80,000/- from him with the promise that he would return the amount within six months. The complainant paid the amount to the accused in good faith since the accused was his friend. However, even after six months the accused did not return the money borrowed by him and when the complainant asked him to return the money, the accused deferred the repayment on different pretexts. For the last time when the complainant approached the accused, he rebuked the complainant using obscene languages and he also threatened to kill the complainant if he asks the accused to return the money again.
3. The complaint petition was forwarded to the officer-in-charge of Rangapara PS for investigation. Police started investigation and after completion thereof a Charge Sheet was filed against the accused Sri Birsha Karmakar under section 294/406/506 of IPC.

Cognizance of the offence was taken. When the accused appeared before the court, charges were framed against him under section 294/406/506 of IPC. The accused pleaded not guilty and claimed to be tried. Thus the case proceeded to the trial stage.

4. During the course of the trial the prosecution said adduced evidence of four witnesses. The accused person was examined under section 313 of CrPC. No evidence was adduced by the accused. After perusal of the evidence and hearing the parties, the Learned lower court pronounced its judgment on 28.08.2019. The accused Sri Birsha Karmakar was convicted under section 406 of IPC and he was sentenced to simple imprisonment for one year and also to pay a fine of Rs.5000/-. In default of payment of the fine amount the accused was to undergo simple imprisonment for another three months.
5. Being highly aggrieved by the judgment and order dated 28.08.2019, the accused/appellant filed this appeal on the following grounds:
 - (i) The judgment and order dated 28.08.2019 is against the law, equity and facts of the case.
 - (ii) The Learned magistrate had erred in law as well as in facts in sentencing the accused since the prosecution had miserably failed to prove their case against the accused beyond reasonable doubt.
 - (iii) The evidence adduced by the prosecution witnesses were not properly appreciated.

- (iv) The PW 1 and PW 2, on which the Learned court placed reliance, are interested witnesses, PW 1 being the informant and PW 2 being his friend.
- (v) The PW 3, who is an independent and trustworthy witness, has not supported the prosecution case.
- (vi) The investigating officer of this case had not examined the witnesses in whose presence the loan agreement was executed.
- (vii) The case was purely of civil nature and no criminal liability can be fastened against the accused/ appellant. The ingredients of the offence under section 406 of IPC are absent in this case.
- (viii) In the complaint petition there was no mention that a loan agreement was executed and that the accused returned Rs.20,000/- to the complainant.
- (ix) The Learned magistrate had ignored the cross examination portion of the witnesses and had considered only the examination in chief.
- (x) The evidence of the prosecution witnesses is full of omissions and contradictions.
- (xi) The sentence of the accused is too harsh and excessive.

6. I have heard the Learned Addl. PP for the state and also the Learned counsel for the accused/appellant and I have perused the materials on record.

7. At this stage it would be apt to refer to the evidences adduced by the prosecution witnesses. The informant of this case Arun Sashani has stated in his evidence that the accused person was known to him. On 15.03.2015 he handed Rs. 80,000 to the accused in the house of his uncle at Dholapani Tea Estate Line No 2 since the accused was asking for money from him for a very long time. At the time of giving money, the informant's brother Samar Tanti and friend Krita Kandolana and Krishna Nayak were present. The amount of Rs.80,000/- was handed over by executing a deed on a stamped paper of Rs.10/-. The accused person promised to return the money within six months but he failed to do so. He cheated the informant several times taking the plea that he would return the money, but on 15.11.2015 when the informant visited the house of the accused at Nagapathar, the accused stated that he would not return the money to the informant and he also used slang languages. The accused also threatened to kill the informant. Thereafter the informant filed this case. He exhibited the complaint filed by him as Exhibit 1. The informant also exhibited the deed executed by him as material Exhibit 1.

8. In his cross examination the PW 1 has stated that the distance between Dholapani tea estate and Rangapara PS is 5 km, whereas the distance between the tea estate and the court is 30 km. He also stated that he went to the police station but they directed him to file the complaint before the court. The PW 1 has further stated that the material exhibit (deed) was not annexed with the complaint petition, though the complaint was written by an advocate and the document was shown to him. He has also

admitted that in the complaint petition he had not mentioned about the agreement, which took place between him and accused. Further, it was also not mentioned in the complaint petition that three witnesses were present at the time of handing over the money to the accused person. The PW 1 denied the suggestion that he did not inform the police about the agreement that took place between him and accused. The investigating officer (PW 4) has confirmed in his evidence that the informant (PW 1) had not stated before him that an agreement was made by him with the accused.

9. The informant (PW 1) also denied some suggestions given to him during his cross-examination. It is a settled position of law that mere suggestions, which are not supported by any evidence and denied by the witness, do not have any evidentiary value.
10. PW 2 Kirta Kandulana has supported the case of the complainant. He stated that he was present when the money was exchanged between the complainant and the accused. He said that he also signed the agreement. PW 2 also exhibited the agreement as material Exhibit 1. The PW 2 has also stated that the accused person returned Rs.20,000/- to the complainant and the remaining amount of Rs.60,000/- is yet to be returned. He has also clarified that the amount of Rs.20,000/- was returned after the institution of this case. The PW 2 was informed by the complainant that when he went to the place of the accused to ask for money, the accused refused to pay and abused him using slang languages.

11. In his cross examination the PW 2 again confirmed that the money was exchanged between the parties in his presence. He also stated that he had not informed the police that the accused person returned Rs.20,000/- to the complainant.
12. The PW 3 Dilip Karmakar has stated that he doesn't know anything about the incident.
13. The investigating officer Basanta Kr Bora (PW 4) has stated in his evidence that during the course of the investigation he visited the place of occurrence and prepared the sketched map. He also seized one stamp paper. The PW 4 has exhibited the seizure memo as exhibit 2, the sketch map as exhibit 3 and the Charge Sheet as Exhibit 6.
14. In his cross-examination the PW 4 has clarified that the place of occurrence is Dholapadum tea estate. He has also stated that the material exhibit was not sent to the forensic science laboratory for verification of the signatures.
15. During the course of the argument the learned counsel for the accused/ appellant has stated that the material exhibit (agreement between the accused and the complainant) was not annexed with the original complaint petition (Exhibit 1) though the same was drafted by an advocate. This, according to the learned counsel, is a lacuna in the prosecution case, which shakes the credibility of the prosecution story. However, I do not find much force in this submission of the learned counsel. A complaint before a Magistrate only needs to contain an allegation that some person

has committed an offence. The purpose of lodging a complaint is to set the criminal law in motion. This may be either oral or written. The Criminal Procedure Code does not mandate that the documents, if any, in the possession of the complainant and which the complainant may use as evidence at a later stage, must be annexed with the complaint, if the same is made in writing. We cannot presume the absence of credibility in the evidence of the complainant merely because that particular document was not annexed with the complaint petition. The complainant had exhibited the document in the Court when he came to depose before the Court.

16. Moreover there is no requirement of law that the complainant must approach the police first, before making a complaint before the Magistrate. The facts that the complainant had not informed the police of Rangapara PS and came directly to the Court to make the complaint, although the police station is nearer to the place of occurrence in comparison to the Court, are not so relevant. These facts do not make the prosecution case less credible.

17. During the course of the argument the learned defense counsel had submitted that there was no entrustment of property in this case and the dispute is purely of civil nature. Merely because a monetary transaction was involved, we cannot conclude that the dispute is only of civil nature. The evidence reveals that the complainant landed money to the accused in good faith, the accused being his friend. The PW 2 has corroborated this evidence

of the complainant (PW 1). The mere fact that the PW 2 was a friend of the complainant doesn't mean that he is an interested witness. He was present when the money was given to the accused. Hence he is natural witness in this case.

18. The accused has also stated, during his examination u/s 313 of CrPC, that he has already returned Rs.20,000/- to the complainant. This corroborates the evidence of the prosecution witnesses. The law is settled that the statement of the accused recorded u/s 313 of CrPC can lend credence to the prosecution evidence. In **Mohan Singh vs. Prem Singh and Ors. (2002) 10 SCC 236** the Hon'ble Supreme Court has observed that ...28. *The statement made in defence by accused under Section 313, Cr.P.C. can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code of Criminal Procedure cannot be made the sole basis of his conviction. The law on the subject is almost settled. The statement under Section 313 Cr.P.C. of the accused can either be relied in whole or in part. It may also be possible to rely on the inculpatory part of his statement if the exculpatory part is found to be false on the basis of the evidence led by the prosecution. (Emphasis supplied)*

19. The evidence of the prosecution witnesses, coupled with the explanation offered by the accused u/s 313 CrPC, squarely suggests that the accused was entrusted Rs.80,000/- with the condition that he would return the same within six months. The accused not only failed to return the amount within time, but he

also conveyed his reluctance to return the same; thereby signifying his dishonest intention to misappropriate the money taken by him. To constitute a criminal breach of trust, it is not required to create a trust in the technical sense. In **Jaswantrai Manilal Akhaney v. State of Bombay 1956 CriLJ 1116** , the Supreme Court had observed that *...when Section 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event.* (Emphasis supplied)

20. In view of the above, it appears that the prosecution had proved their case against the accused Birsha Karmakar u/s 406 beyond reasonable doubt. As such I do not find any infirmity in the appreciation of evidence made by the learned lower Court. However, considering the nature of the offence and the amount involved, imprisonment for one year appears to be disproportionate. Sentencing the accused/ appellant to pay a fine of Rs.10,000/- will, in my considered view, serve the ends of justice.

21. The appeal is partially allowed. The judgment and order dated 28.08.2019 passed by the learned JMFC, Sonitpur Smt. S. Garg, convicting accused Birsha Karmakar u/s 406 IPC is upheld. However, the sentence is modified. The accused is sentenced to

pay a fine of Rs.10,000/- In default of payment of fine, the accused shall undergo simple imprisonment for six months.

22. The accused/ appellant is directed to appear before the learned trial court within thirty days of this order to pay the fine amount or to serve the sentence in default of payment of fine.

23. Let the lower court record be sent back with a copy of this judgment.

24. Given under my hand and seal of this Court on this 1st day of September, 2022.

(Nisanta Goswami)
Addl. Sessions Judge, FTC
Sonitpur, Tezpur