

**IN THE COURT OF ADDITIONAL SESSIONS JUDGE
SONITPUR :: TEZPUR**

Criminal Appeal No. 27 (S-4) 2011.

Md. Naushed Ali Accused Appellant.

- Versus -

State of Assam Respondent.

**Present : Mrs. M. Nandi, AJS,
Addl. Sessions Judge,
Sonitpur, Tezpur.**

Appearance :

For the Appellant : Md. A. Aziz,
Advocate.

For the State : Mr. H.P.Sedai,
Addl.Public Prosecutor.

Date of argument: 06-02-2012.

Date of judgment : 10-02-2012.

J U D G M E N T

1. This appeal is directed U/s. 374(3) (A) of Cr.P.C against the judgment and order dated 23-09-2011 passed by learned Chief Judicial Magistrate, Tezpur, Sonitpur in G.R. Case No. 241/2009 under section 379 of IPC convicting and sentencing the accused/appellant Noused Ali to pay a fine of Rs. 2000/- and in default Simple Imprisonment for 3 months.

2. The facts leading to the case in brief is that on 11-02-2009 the complainant Mozibullah Ali lodged an FIR at Borghat Police Out Post under Tezpur PS stating that on 09-02-2009 at about 11.30 a.m. one cycle belonged to the complainant was stolen away while it was kept near the State Bank, Tezpur. On 11-02-2009 at about 3.30 p.m the said cycle was recovered in Napam Centre from the possession of the accused person and the accused was caught red handed and lateron he was handed over to police. A case was registered against the accused U/s. 379 of IPC. Police arrested the accused and after completion of investigation, chargesheet was submitted against the accused person U/s. 379 of IPC. During trial, the accused put his appearance before the Court. He was enlarged on bail. Charge U/s. 379 of IPC was framed against the accused person which was read over and explained to him, to which he pleaded not guilty and claimed to be tried.

In this case, prosecution examined 3 witnesses including the complainant and the I.O. The defence declined to adduce any witness in support of plea and took the plea of denial. After recording the statement of the accused U/s. 313 Cr.P.C the learned CJM, Sonitpur, Tezpur found the accused/appellant guilty U/s. 379 of IPC and accordingly convicted and sentenced him to pay a fine of Rs. 2000/- i/d SI for 3 months.

3. Being highly aggrieved and dissatisfied with the said impugned order, Judgment and conviction, the appellant has preferred this appeal on the following grounds :

- i) for that the learned Magistrate has erred both in law and facts in convicting and sentencing the appellant;

- ii) for that the prosecution has miserably failed to prove the ingredients of charge made against the accused/appellant;
- iii) for that the learned CJM, Sonitpur, Tezpur is solely based on presumption, surmise and outside the purview of the evidence on record which is unjust, illegal and liable to be set aside;
- iv) for that the learned trial Magistrate has not discussed the points for defence available on record and as such the order and judgment may be set aside;
- v) for that the learned Magistrate has also not discussed the points under which circumstances the stolen bicycle is recovered from the possession of the accused/appellant;
- vi) for that the learned trial court arrived at his wrong finding in holding the accused/appellant to be guilty without any conclusive proof of the charge, so the impugned order of conviction is liable to be set aside.

4. I have perused the judgment and order passed by the learned Chief Judicial Magistrate, Sonitpur, Tezpur in GR Case No. 214/09, memo of appeal and the case record of GR Case No. 214/09.

5. Let me discuss the evidence of the witnesses in case of GR Case No. 214/09.

6. It is seen that in this case complainant was examined as PW1. He deposed in his evidence that the occurrence took place on 09-02-2009 when he came to State Bank of India, Tezpur

Branch to draw his salary. He kept his bicycle Hero make 22" green colour at the cycle stand and entered into the bank. At about 12: 30 p.m. when he came out from the bank he did not find his cycle in the said cycle stand. On 11-02-2009 he purchased a new cycle and went to the shop of mechanic at Napam. Then it was 3 to 3:30 p.m. When he was there he had noticed his lost cycle which was standing just beside the mechanic shop. The accused was found standing beside his lost cycle. When he claimed said cycle to be his own some young people arrived there and caught the accused and the accused was apprehended. After some time police came and brought the cycle to Borghat Out Post and asked him to come to the Out Post. Accordingly, he went there and then he lodged the ejahar.

In his cross-examination, PW 1 replied that he could not say who kept his lost cycle at the mechanic shop. Prior to that date he did not know the accused person. The public apprehended the accused on suspicion and handed over him to police.

7. PW 2 is Md. Osman Ali who deposed in his evidence that he did not know the accused or the informant. He has a one cycle repairing shop at Napam. On the date of occurrence someone kept one cycle on the other side of the road in front of his shop. On the date of the occurrence, the accused was apprehended by public and lateron police came to the spot and the accused was handed over to the police. He could not say who was the owner of the cycle.

8. These two witnesses were examined by the trial Court and on the basis of their evidence accused was convicted and sentenced him to pay a fine of Rs. 2000/- i/d SI for 3 months. It

appears from the evidence of PW 1 and 2 that they did not see the accused to commit theft of the bicycle of the informant. From the evidence of PW 1, it is crystal clear that on 11-02-2009 when he noticed his lost cycle beside the mechanic shop of PW 2, the accused was found standing beside his lost cycle. But PW 2 did not support the statement of PW 1. According to PW 2 on the date of occurrence someone kept one cycle on the other side of the road in front of his shop. He did not say anything regarding the presence of the accused near the cycle. It is also not clear from the statement of PW 1 that the alleged cycle was recovered from the possession of the accused person. PW 1 replied in his cross-examination that he could not say who kept his lost cycle at the mechanic shop and the public apprehended the accused on suspicion and handed over him to police.

9. It was urged by the learned counsel for the accused/appellant that the appellant's exclusive and conscious possession of the alleged bicycle has not at all been able to proved by the prosecution as because the seizure was made near the mechanic shop and the accused was found beside the said cycle and thus in absence of cogent evidence established beyond doubt, as to conscious possession of the appellant with the theft of article, the appellant can not be saddled with penal liability U/s. 379 of IPC.

10. On the other hand, learned Addl.P.P has also supported the contention of learned defence counsel. He has stated that the alleged stolen cycle was not recovered from the possession of the accused person and therefore, the accused/appellant can not be held liable for the offence U/s. 379 of IPC.

11. The word 'possession' in its ordinary sense connotes a state of mind, in particular some awareness of the existence of the thing that was in fact in the possessor's physical control. In the ordinary use of word "possession" one has in one's possession, whatever is, to one's own knowledge, physically in one's custody or under one's physical control. Possession is a deceptively simple concept. It denotes a physical control or custody or control.

In any theft case, possession of article is quite relevant. It is necessary for the prosecution to establish in a case of theft that certain movable property was taken out of the possession of a person without his consent and that for the purpose of such taken the said property was moved. When the above facts are established there is another ingredient which has to be established and that is much important in a case of theft. It is that the accused had intention to take the said property dishonestly. Dishonest intention has to be established by the prosecution.

Dishonesty in criminal law is not what is in common parlance. It has a technical meaning as defined in Section 24 of IPC. A person is said to do a thing dishonestly if he did it with the intention of causing wrongful gain to himself or wrongful loss to another person. The terms wrongful gain or wrongful loss have again be defined in Section 23 of IPC. A person is said to cause wrongful gain for himself if he obtains the gain by unlawful means of property to which he is not legally entitled. Again a person is to said to cause wrongful loss to another person, if he causes the loss by unlawful means of property to which the latter is legally entitled.

In the case in hand, no one has seen the accused to commit theft of alleged bicycle of the complainant. He was found near the mechanic shop of PW 2 where the alleged stolen cycle was noticed by the complainant. Under such circumstances, it can not be said that the accused was found in possession of the alleged bicycle which the complainant claimed to be his own. Hence, the Judgment and order passed by the learned Chief Judicial Magistrate, Sonitpur, Tezpur on 23-09-2011 by sentencing the accused/appellant to pay a fine of Rs. 2000/- is set aside.

13. In the result, the Judgment of conviction and sentence passed by the learned trial Court is hereby set aside and the appeal is accordingly allowed. The appellant is acquitted of the charge levelled against him.

14. Return the LCR along with a copy of this judgment to the Court below.

15. Given under my hand and seal of this Court, on this day, the 10th day of February, 2012.

(M. Nandi)
Addl. Sessions Judge,
Sonitpur, Tezpur.

Dictated and
Corrected by me.

(M. Nandi)
Addl. Sessions Judge,
Sonitpur, Tezpur.

Transcribed and typed by me.

(R. Hazarika)
Steno.