

District : Bongaigaon

IN THE COURT OF ASSTT. SESSIONS JUDGE :::::::::::BONGAIGAON.

Present:- Smti M.C. Bordoloi, M.A, LL.B (AJS)
Asstt. Sessions Judge,
Bongaigaon.
Sessions Case No. 16(M)/2016.

U/S 328/380/34 IPC (Arising out of G.R case no.219/10)

State

Vs.

1. Anser Ali, 2. Md. Roushan Ali,
3. Makkar Ali, 4. Tosher Ali and 5. Abbas Ali..... Accused.

Committed by : Smti S. Handique, Sub-Divisional Judicial Magistrate (S),
Bongaigaon.

Appearance:- Mr Nazir Hussain, Additional Public Prosecutor for the State.

Mr. Kamal Chakraborty,

Mr. Kunal Sarkar, Advocate for the accused.

Date of Charge : 19.3.2016.

Date of Commitment : 11.2.2016.

Date of evidence : 6.6.16,8.8.16,31.8.16,15.9.16,23.3.17.

Statement recorded on : 23.3.2017.

Date of argument : 4.4.2017.

Date of judgment : 7.4.2017.

J U D G M E N T

1. The wheel of prosecution against the accused Makkar Ali, Roushan Ali, Anser Ali, Tosher Ali was set in motion, with the informant lodging an 'ejahar' with the Manikpur Police Station on 12.6.2010 alleging inter-

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alia that on 10.6.2010, at about 9 P.M accused Makkar Ali had entered into the kitchen of the informant and had mixed some poisonous substance in the prepared food, consuming which preparation, the informant party became unconscious and in the process the accused persons removed cash, gold and silver ornaments from his house. Hence the case.

2. Upon receipt of the 'ejahar' a case vide Manikpur Police Station Case No 72/10 U/S 328/34 IPC was registered and investigated upon.

3. Upon completion of investigation, charge-sheet being No. 54/11 dated 31.5.2011 was laid before the learned Sub-Divisional Judicial Magistrate, Bijni. Who having taking cognizance of the offence, issued processes for securing the presence of accused persons in the Court. Thereafter in pursuance of the order dated 7.4.2015 passed by the Hon'ble Gauhati High Court in WP(C) No. 5463/14 in respect of defining of jurisdiction the Court of Chirang and Bongaigaon, the jurisdiction of the Court at Bijni having ceased, the case record was transmitted therefrom to the Court of the learned Chief Judicial Magistrate, Kajalgaon, for onward transmission, to the Court at Bongaigaon.

4. The learned Chief Judicial Magistrate Bongaigaon upon receipt of the case record made over the case to the Court of Learned Additional Chief Judicial Magistrate, Bongaigaon, but owing to his transfer the learned Chief Judicial Magistrate withdrew the case record therefrom and made over the case record to the Court of learned Sub-Divisional Judicial Magistrate (S)

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Bongaigaon, who after receiving the same secured the attendance of the accused persons at the Court and finding that the exercise of the service of copies of the case to the accused being completed and further finding that the offence was one exclusively triable by the Court of Sessions, vide order dated 11.2.2016 committed the case record to the Court of Hon'ble Sessions Judge, Bongaigaon.

5. Upon receipt of the case record from the learned committal Court, the Hon'ble Sessions Judge Bongaigaon, transferred the case record to the instant Court for trial and disposal.

6. Accused persons presence was secured in the instant Court. Prima-facie materials U/S 328/380/34 IPC were disclosed against the accused persons. Accordingly a formal charge under the aforesaid sections of law was framed against the accused persons vide order dated 19.3.2016 and the said charge when read over and explained to the accused persons they pleaded not guilty, claiming trial.

7. The prosecution side in order to prove its case, adduced the evidence of 11 numbers of witnesses.

PW 1 was declared hostile by prosecution and was cross-examined by the prosecution side with leave of the Court. All the prosecution witnesses were cross-examined by the defence side. But the defence declined to adduce evidence evidence.

8. The statement of the accused persons U/S 313 Cr.P.C was recorded, wherein the accused persons pleaded complete innocence and

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submits that the articles seized by the Investigating Officer were their personal property. The accused prays for acquittal.

Arguments :

9. Heard the arguments advanced by the learned counsels of both sides.

9.(a) Learned Additional Public Prosecutor submits that the Court shall pass appropriate order of conviction of the accused persons on perusal of the case record in its entirety.

9.(b) Per contra, learned counsel for the accused persons submits that the prosecution has failed to prove the guilt of the accused persons beyond all reasonable doubt and that the accused deserves acquittal.

10. Heard both sides. Perused the record.

11. The points for determination that has arisen for consideration in the instant case are as follows :

Points for determination :

i) Whether the accused persons in furtherance of their common intention on the 10th day of June 2010 at about 9 P.M at No. 2 Jaraguri village administered certain poisonous substance to the informant party by mixing it in their food and caused the same to be taken by the

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informant party with intent to cause hurt to the informant party or knowing it likely that it would cause hurt thereby, with intent to commit or facilitate the commission of the offence of theft and thereby committed an offence punishable U/S 328/34 IPC ?
ii) Whether the accused persons in furtherance of their common intention on the same date, time and place committed theft in the dwelling house of the informant and thereby committed an offence punishable U/S 380/34 IPC ?

12. My decision on the above points for determination alongwith reasons is given hereinunder :

Discussion, Decision and Reasons therefor

To address the points for determination so framed above, it will be necessary to peruse the evidence on record and I proceed to do so.

13. PW 1 is the informant Abdur Rahim. PW1 turned hostile and deposed that he had not lodged the ejarah against the accused persons on his own will and had only acted as advised by the co-villagers.

Prosecution in his cross-examination failed to illicit the fact that PW1 was deposing under any duress.

14. PW 2 - Abdul Salam, and PW 5 - Alek Miya testified to the effect that the informant party after having consumed prepared food became

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unconscious and that they had to be taken to the hospital for treatment.

15. PW 3 also a victim deposed in respect of his loosing consciousness after consuming food and in respect of his removal to the hospital for treatment.

16. PW 4 - Mainul Hoque Choudhury and PW 6 - Hasan Ali, also deposed to the effect of the informant party becoming unconscious and their removal of the hospital. PW 4 further added that he was reported by one Mainuddin that accused Makkar Ali and Tosher Ali had been found conversing in a suspicious manner on the village embankment and that the people of the village apprehended the two. PW 4 had identified the seizure list being Ext 1 vide which the police had seized cash, gold, silver, fish carrying carton, money bag etc. He identified his signature on Ext 1 as Ext 1 (1) and the material exhibits viz Material Ext 1 being the seized cash and Material Ext 2 being the fish carrying carton.

17. PW 7 deposed that he was reported by one Mainuddin that on the evening preceeding the alleged occurrence he had seen a congregation of 4 or 5 people including accused Makkar Ali and Tosher Ali and Mainuddin suspects that the involvement of Tosher Ali in the alleged occurrence, hearing about which the people apprehended accused Tosher Ali and that during the course of search of the house of the accused Tosher Ali, a seizure of silver chain, ring and cash had been made vide Ext 1.

However, PW 7 confirmed in his cross-examination that he had not seen the alleged occurrence himself nor he had seen the seizure of

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the articles.

18. PW 8 Aksar Ali only deposed in respect of informant Rahman purchasing medicine from the pharmacy and in respect of Rahman's removal to the hospital for treatment.

19. PW 9 Abdul Rezzak, another victim deposed that on the fateful night after having taken his night meal he immediately fell asleep and in the immediate next morning he was taken to the hospital for treatment and that articles had been stolen from their house on the said night.

20. PW 10 - Mainuddin, is the one vital witness of the instant case. PW 10 deposed that on the evening preceeding the fateful night he had seen accused Makkar Ali and some others talking amongst themselves on the village embankment and that when he had neared them they shoed him away and on the said night the alleged occurrence took place, a fact which he had reported to Abdul Aziz.

PW 10 also deposed that he had seen Rahman with an upset stomach on the subsequent morning . In his cross-examination however PW 10 confirmed that he had not heard the conversation of the accused Makkar Ali and others.

21. PW 11 is Rokibul Islam, who also is a seizure witness. PW 11 witnessed the seizure of articles from the house of accused Tasser Ali by the police vide Ext 1.

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22. PW 12 is Bhubaneshwar Talukdar, the Investigating Officer of the instant case. PW 12 clarified in his examination that accused Tosher Ali and Makkar Ali had confessed their guilt and that the two accused had revealed the names of the other accused in the alleged occurrence, whereafter he had submitted charge-sheet against the accused persons. PW 12 identified the seizure list as Ext 1 and his signature thereon as Ext 1 (4), the charge-sheet as Ext 3 and his signature thereon as Ext 3 (1).

In his cross-examination PW 12 had disclosed that he had not seized any edible items, or collected samples from the informant's house, nor he had sent the same for chemical examination to FSL. PW 12 admitted that he had purely on the basis of suspicion submitted charge-sheet U/S 328 IPC against the accused persons and he had not collected the medical report of the victims either.

23. Now, perusal of the evidence narrated herein before discloses that the informant who also happens to be a victim did not utter any word to incriminate the accused persons in any manner, and that he was deposing under fear or favour also could not be brought out by the prosecution through effective cross-examination. The other victims being PW 3, also failed to incriminate the accused persons in any manner.

24. It was the prosecution version that accused persons had administered poison into the edible items of the informant party. But the prosecution witnesses so examined failed to testify, in respect of the act of the accused persons mixing poisonous substance into the food of the informant party. Infact, none of the witnesses had testified that they had seen the accused

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persons coming even for a visit to the informant's home prior to the alleged occurrence. Further that some stupefying or poisonous substance was mixed in the food items also was not being proved by prosecution.

25. The Investigating Officer failed to seize the alleged food sample and send the same for chemical analysis to prove the presence of any poison therein. In fact he had even failed to collect the medical report of the victims who had reportedly under gone treatment at the hospital to show the presence of poison, in the stomach of the victims during the treatment. In fact prosecution witnesses could not show that the act of administering of poisonous substance, as the handiwork of the accused persons.

26. Now PW 7 and PW 4 had testified that one Mainuddin had reported about the factum of his witnessing accused Makkar and Tosher Ali on the river embankment, conversing in a suspicious manner. PW 10 - Mainuddin however confirmed the fact of his reporting about his witnessing the act of the accused persons being Tosher Ali and Makkar Ali talking at the village embankment to PW 7, but PW 10, had stated in respect of the circumstances which led him to form an opinion that the accused Tosher Ali or Makkar Ali were involved in the alleged occurrence. PW 10 deposed that he had been shooed away by Makkar Ali and he was prevented to over hear the conversation. The crux of the conversation between the accused persons alleged to have taken places was not reported by PW 10. In fact PW 10 had admitted that he had not overheard any conversation taking place.

27. It is natural that co-villagers can converse with each other

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and may not allow a third party to hear their talk. But the very fact of the accused Makkar Ali sending Maiuddin away and preventing him from over hearing them would not be a ground to hold the accused persons guilty, in the absence of any other circumstances against the accused person.

28. Now coming to the fact of seizure of articles vide Ext 1. It is apparent that the articles being cash, fish carrying carton, gold and silver jewellery were seized by the police from the house of accused Tasser Ali. But prosecution failed to show that the said articles were the ones which were stolen from the house of the informant party. Rather the informant/PW 1 denied his case in its entirety. In fact the ownership of the alleged items also could not be proved by the prosecution.

29. Further the Investigating Officer/PW12 had testified that the accused persons being Makkar Ali and Tasser Ali had confessed their guilt in front of him. But no confessional statement recorded by the learned Magistrate on requisition, is available on record. Extra Judicial confession can be acted upon and relied on, only if it is proved to have been done voluntarily. But in the instant case there is no evidence forthcoming on record to show that in fact the accused persons had confessed their guilt and that they had done so voluntarily. Hence in the above circumstances, I am constrained to hold that prosecution has miserably failed to prove the guilt of the accused persons beyond all reasonable doubt. The faulty investigation has proved fatal for the prosecution case.

Accused persons deserves acquittal.

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The seized articles, are to be confiscated to the state, their ownership not being ascertained.

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O R D E R:

In the light of the above discussions, accused persons namely Anser Ali, Md. Roushan Ali, Makkar Ali, Tosher Ali and Abbas Ali are acquitted of charge U/S 328/380/34 IPC and are set at liberty forthwith.

The cash amount, gold rings and silver chain, seized be confiscated to the state.

The seized fish carrying carton and money wallet be destroyed in due course.

Bail bond of the accused persons shall remain in force for a period of 6 months from today.

Judgment is pronounced in open Court on this 7th day of April, 2017 at Bongaigaon.

(M.C. Bordoloi)

Assistant Sessions Judge,
Bongaigaon,

Dictated and corrected by me,

(M.C. Bordoloi)
Assistant Sessions Judge,
Bongaigaon,

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APPENDIX

Prosecution witness :

- PW 1 - Abdur Rahim.
- PW 2 - Abdul Salam.
- PW 3 - Abdul Rahman.
- PW 4 - Mainul Hoque Choudhury.
- PW 5 - Alek Miya.
- PW 6 - Hasan Ali.
- PW 7 - Abdul Aziz
- PW 8 - Aksar Ali.
- PW 9 - Abdul Rezzak.
- PW 10 - Mainuddin.
- PW 11 - Rokibul Islam.
- PW 12 - Bhubaneshwar Talukdar.

Prosecution exhibit

- Ext 1 - Seizure list.
- Ext 1(1) - Signature of Mainul Hoque Choudhury.
- Ext 1(2) - Signature of Abdul Aziz.
- Ext 1(3) - Signature of Rokibul Islam.
- Ext 1(4) - Signature of Bhubaneshwar Talukdar (I/O).
- Ext 2 - Ejahar.
- Ext 2(1) -Signatures of then Officer-in-charge.
- Ext 3 – Charge-sheet.
- Ext 3(1) - Signature of Bhubaneshwar Talukdar (I/O).

Material Exhibit:

- Mat. Ext 1 - Seized cash.
- Mat. Ext 2 - Seized fish carrying carton.

Defence witness :

Nil

Defence exhibit:

Nil

(M. C. Bordoloi)
Assistant Sessions Judge,
Bongaigaon.