

(2019) 05 GAU CK 0089

In the Gauhati High Court

Case No : Criminal Revision Petition No. 386 Of 2011

Bipul Bordoloi @ Sanju

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 23-05-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 397, 401
Indian Penal Code, 1860 — Section 380, 411
Probation Of Offenders Act, 1958 — Section 4

Citation : (2019) 05 GAU CK 0089

Hon'ble Judges : Ajit Borthakur, J

Bench : Single Bench

Advocate : N Zaman

Final Decision : Allowed

Judgement

1] Heard Ms. T. Chetri, learned counsel, appearing for the petitioner and Ms. SH Bora, learned Addl. Public Prosecutor, Assam.

2] This is a petition under Section 397 read with Section 401 of the Cr.P.C. directed against the judgment and order, dated 12.08.2011, passed by the learned Additional Sessions Judge, Nagaon, Assam in Crl. Appeal No. 13 (N)/2009, whereby modified the sentence passed against the accused petitioner from one year rigorous imprisonment to 6 months rigorous imprisonment and upheld the fine of Rs. 5000/- in default simple imprisonment for 6 months, passed by learned Sub-Divisional Judicial Magistrate (M), Kaliabor in G.R. Case No. 483/2006 under Section 380 of the IPC.

3] The prosecution case as unfolded in the FIR, dated 04.11.2006, lodged by one Smti Maya Rani Basu (Sarker), wife of Sri Sunil Kumar Basu, a resident of Missa, before the In-charge, Missa O.P. alleging that on 03.11.2006 at around 1 a.m., some unknown miscreants entered into their dwelling house and breaking the lock of the almirah, committed theft of R. 10,000/- one mobile phone handset and one gold ring.

4] Based on the above FIR, Kaliabor P.S. Case No. 63/06, dated 05.11.2006, under Section 380 of the IPC was registered and after completion of investigation, laid a charge-sheet under Section 380 of the IPC against the accused-petitioner.

5] On hearing learned counsel of both sides and consideration of the materials on the case diary, learned Sub-Divisional Judicial Magistrate (M), Kaliabor framed charges under Sections 380/411 of the IPC against the accused-petitioner, who, on being read over, denied the charges. Thereafter, the prosecution examined 6 witnesses and the defence cross-examined them. After completion of the evidence of the prosecution side, the statement of the accused petitioner was recorded under Section 313 of the Cr.P.C., wherein he pleaded innocent. Learned trial court, after hearing the arguments advanced by learned counsel of both sides and appreciation of evidence of the prosecution side held the accused petitioner guilty of the charge under Section 380 of the IPC and accordingly, convicted and sentenced him, as stated above. Against the aforementioned judgment and order, the accused petitioner preferred appeal to the court of learned Sessions Judge, Nagaon and on being transferred, learned Additional Sessions Judge, Nagaon affirmed the conviction, but modified the sentence as stated above.

6] Ms. T. Chetri, learned counsel for the accused petitioner contends that there are contradictions between the articles stolen and the articles seized by police and those seized articles were not satisfactorily identified to be that of the informant. Ms. Chetri further contends that the seized mobile phone handset was recovered from the possession of one Raju Baraik (PW.5), who alongwith one Hiteswar Orang came to the shop of Naresh Jaiswal (PW 3) for re-charging of a Motorola mobile phone handset, but said Hiteswar Orang was not examined in the case. On the other hand, Ms. Chetri contends that the case of the accused petitioner was prejudiced by the cryptic nature of recording of his statement under Section 313 of the Cr.PC and as the benefit of Section 4 of the Probation of Offenders Act, 1958 was not given to him.

7] Per contra, Ms. SH Bora, learned Additional Public Prosecutor, Assam submits that the informant's stolen article, one gold chain was recovered and seized out of the possession of the accused petitioner and the ownership thereof is proved to be of the informant. Ms. Borah further submits that learned trial court put all the incriminating evidence that emerged from the evidence to the accused-petitioner while recording his statement under Section 313 of the Cr.PC.

8] I have considered the above arguments advanced by the learned counsel of both the sides and perused the case record.

9] The FIR vide Ext. 1, dated 04.11.2006, revealed theft of cash amount of Rs. 10,000/-, one mobile phone handset (Motorola) and one gold ring from the dwelling house of the informant PW-1 Smti Maya Rani Basu Sarkar. Perusal of the seizure memo vide Ext. 2, dated 04.11.2006, shows that on the same day, the

police recovered cash amount of Rs. 3,500/-, 2 (two) Motorola mobile phone handsets and one gold ring from the possession of the accused petitioner.

10] The interesting aspect of this case is as to how those seized articles were led to be recovered. In this regard, P.W. 3 Sri Naresh Jaiswal, who owns a mobile phone shop at Missa, deposed that two boys of Diyu Basti handed over to him one Motorola Mobile phone handset for recharge, which displayed the name of Niranjana @ Moram (PW 4), which gave rise to his doubt on the said two boys, namely, Raju Baraik (PW 5) and Hiteswar Orang, who, on his enquiry, disclosed that the accused petitioner gave the same for recharge for Rs. 250/-. He (PW 3) thereupon informed the matter to PW 4, Niranjana. Niranjana (PW 4) came and identified the mobile phone handset to be his and therefore, all of them were handed over to the police. In cross-examination, he (P.W. 3) admitted that the accused petitioner did not deliver the mobile phone handset to him directly, but through P.W. 5 Raju and Hiteswar. The evidence of P.W. 4 Niranjana Das @ Moram shows that in the relevant night, he watched T.V. at the house of one Barun and passed the night there and on the following day, noticed the incident of theft at their home, which prompted his mother to file the F.I.R. Barun was not examined in the case. P.W. 4 identified the mobile phone handset at the said shop, but he (P.W.4) did not file any F.I.R. Although in his examination-in-chief, P.W.5 Raju Baraik deposed that the accused petitioner gave him the mobile phone handset to him for re-charge, in cross-examination, however, denied that he knew him and even could not say the colour of the said handset, which allegedly belonged to P.W. 4 Niranjana, that is, not belonged to P.Ws. 1 and 2. Surprisingly, in this case, the prosecution did not exhibit the seized articles to PWs 1, 2 and 4 for identification and instead thereof, exhibited through P.W. 6 ASI Sunil Kumar Medhi, the Investigating Officer. Thus, prima facie, the ownership of the seized articles was not established to link to the prosecution contention that the accused petitioner committed theft of those seized articles, which, of course, vehemently denied by him in his statement under Section 313 of the Cr.P.C., which appears to have cryptically recorded as no opportunity was apparently given to him to examine any witnesses in his defence. Therefore, this court is of the considered opinion that the prosecution failed to establish the ingredients of the offence under Section 380 of the IPC against the accused-petitioner beyond all reasonable doubt.

11. Accordingly, the impugned judgments and orders are set aside and the accused petitioner is acquitted of the offence under Section 380 of the IPC and set at liberty.

12. The revision petition stands allowed.

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