

(2011) 09 SHI CK 0230
In the High Court Of Himachal Pradesh
Case No : Criminal Revision No. 25 of 2005

Tara Chand

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 05-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Forest Act, 1927 — Section 33
Penal Code, 1860 (IPC) — Section 378, 379, 447

Citation : (2011) 09 SHI CK 0230

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Judgement

Kuldip Singh, J

1. Tara Chand, Budh Ram and Lok Bahadur were prosecuted for offences punishable under Sections 447, 379 Indian Penal Code and Section 33 of the Indian Forest Act, Budh Ram died during trial. The learned Sub Divisional Judicial Magistrate, Rampur Bushahr in case No. 12-2 of 2000 acquitted Tara Chand and Lok Bahadur for offence punishable u/s 447 Indian Penal Code and Section 33 of the Indian Forest Act but convicted them u/s 379 Indian Penal Code on 25.3.2004. Tara Chand has been sentenced to undergo simple 1 Whether reporters of Local Papers may be allowed to see the Judgment ? yes imprisonment for six months and fine of Rs. 1,000/-. Lok Bahadur was sentenced to undergo simple imprisonment for three months and fine of Rs. 500/-. In default of payment of fine, both of them were sentenced to undergo further imprisonment. Tara Chand and Lok Bahadur filed Criminal Appeal No. 3 of 2004 which so far Lok Bahadur is concerned has been allowed but appeal of Tara Chand was dismissed on 22.1.2005 by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, hence revision by Tara Chand.

2. The facts in brief are that Budh Ram since deceased at the relevant time was working as servant with one Duni Chand of village Salech. Lok Bahadur was

working as domestic servant with Tara Chand. On 23.1.1999 all of them illicitly felled two kail trees, one of IIA and another of II-B category from DPF C-72 notified government forest and converted them into logs. PW-3 Man Mohan Singh had seen them committing the theft. He tried to prevent them from cutting the trees but accused abused him and threatened to give him beatings. PW-3 reported the matter to his father PW-2 Beli Ram, complainant, who also visited the spot and found two kail trees illicitly felled from government forest.

3. The complainant reported the matter to the forest officials in writing. On receipt of complaint, PW-1 Devi Saran, Beat Guard was directed to verify the matter. On 28.1.1999 PW-1 Devi Saran accompanied by Gram Panchayat Member Dula Ram visited the spot and found the complaint correct. On 30.1.1999 PW-1 Devi Saran reported the matter to police at Police Post, Nankhari and thereafter FIR under Sections 447, 379 Indian Penal Code and Section 33 of the Indian Forest Act was registered at Police Station, Rampur Bushahr.

2. On completion of investigation, challan was submitted and the accused were charged for commission of offence under Sections 447, 379 Indian Penal Code and Section 33 of the Indian Forest Act. The accused pleaded not guilty. The prosecution has examined eight witnesses in order to prove its case. The statements of accused Tara Chand and Lok Bahadur were recorded u/s 313 Code of Criminal Procedure They denied the prosecution case and pleaded their innocence. They led no evidence in defence. On conclusion of trial, learned Sub Divisional Judicial Magistrate, Rampur Bushahr, convicted Tara Chand and Lok Bahadur u/s 379 Indian Penal Code but acquitted them u/s 447 Indian Penal Code and Section 33 of the Indian Forest Act. In appeal, the learned Sessions Judge upheld the conviction and sentence of Tara Chand but allowed the appeal of Lok Bahadur. The learned Sessions Judge has held that learned Sub Divisional Judicial Magistrate has erred in acquitting Tara Chand u/s 447 Indian Penal Code but has also held that appeal against acquittal of Tara Chand u/s 447 is not maintainable before him. In revision, legality of conviction and sentence of Tara Chand u/s 379 Indian Penal Code is left for consideration.

5. I have heard Mr. G.D.Verma, Senior Advocate appearing on behalf of theAppellant and Mr. J.S.Rana, Assistant Advocate General for the State and have also gone through the

record. It has been submitted on behalf of thePetitioner that the Courts below have erred in convicting and sentencing thePetitioner u/s 379 Indian Penal Code. The Courts below have misconstrued, misinterpreted the evidence and the legal position in convicting and sentencing thePetitioner. It has been submitted that thePetitioner is entitled to acquittal u/s 379 Indian Penal Code. The learned Assistant Advocate General has submitted that the two Courts below have appreciated the material on record. In revision, the scope is very limited, the evidence cannot be re-appreciated. He has prayed for dismissal of the revision.

6. The Section 378 Indian Penal Code defines theft and provides whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft. Explanation¹ thereof provides that a thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth. The illustration (a) of Section 378 further provides, A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft. The evidence led by the prosecution is to be considered in the light of definition of theft.

7. PW-1 Devi Saran, Block Officer, Sarahan is not an eye witness. He has stated that he received the complaint on 27.1.1999 and visited the spot on 28.1.1999 and found two kail trees of II-B and II-A were cut on the spot. On 30.1.1999 he gave complaint Ex.PW-1/A at Police Post, Nankhari. The police took into possession four logs vide Ex.PW-1/B. One axe and saw was recovered from Tara Chand vide memo Ex.PW-1/C, saw is Ex.P-1 and axe is Ex.P-2. PW-2 Beli Ram is also not an eye witness. He has stated that his son Man Mohan Singh on 23.1.1999 told him that Tara Chand, Lok Bahadur etc. had cut two kail trees from C-72 forest which were converted into logs. The accused were sitting in the house of Tara Devi with tools. He submitted a written complaint Ex.PW-2/A on 24.1.1999 to B.O. The trees were cut at a distance of 50 meters from his house where the house of Tara Devi is also situated. He has specifically stated that he had not seen the accused cutting the trees.

8. PW-3 Man Mohan Singh has stated that on 23.1.1999 three accused and one more at 5.30 p.m. had cut two kail trees. The accused converted the trees into logs. He informed his father. The house of Tara Devi is nearby and the remaining abadi is below the spot. PW-4 H.C. Dula Ram has proved FIR Ex.PW-4/A. PW-5 Udai Singh, Tehsildar, Nankhari has proved demarcation report Ex.PW-5/A and according to him the trees were cut from Government land. PW-7 Tara Devi did not support the prosecution and she was declared hostile. PW-8 S.I. Hari Singh is the Investigating Officer.

9. Ex.PW-1/A is the complaint dated 30.1.1999 of Devi Saran addressed to Incharge Police Post, Nankhari. In Ex.PW-1/A it has been stated that on 28.1.1999 Tara Chand was called on the spot where two kail trees II-A and II-B were illicitly cut which were lying there and were not sawn. No prosecution witness has stated that he had seen the accused carrying the cut trees or logs of the trees. PW-3 Man Mohan Singh has stated that on 23.1.1999 the trees were cut and their logs were prepared after cutting the branches. This statement is in contradiction to the fact recorded in complaint Ex.PW-1/A wherein it has been stated that two trees were on the spot on 28.1.1999 and those were not sawn. When on 28.1.1999 the trees were not sawn then how it is possible that on 23.1.1999 even the logs were prepared by the accused from the cut trees. This

creates suspicion in the prosecution story. The cutting of two trees and their conversion into logs must have taken some time. It is surprising that all this was not noticed by PW-7 Tara Devi the immediate neighbour of PW-3 Man Mohan Singh. It is not the prosecution case that PW-7 Tara Devi on the relevant date was not in her house, rather she is a prosecution witness but has not supported the prosecution.

10. In *Kuttiath Odayoth Veetil Komar Nambiar and Ors.* AIR 1916 Madras 1071 (1) it has been held that illustration (a) to Section 378 Indian Penal Code, shows that if a tree is cut with the intention of dishonestly taking it out of the possession of the person in possession, the offence of theft is complete as soon as the tree is severed in order to such taking. The appellate Court found that accused cut the trees "to annoy P.W. 1 and to get the better of him." The conviction of theft was set-aside but the conviction of mischief was upheld.

11. The prosecution case at its best is that two kail trees were cut by the accused. There is no evidence that the trees were cut with the intention to take them out of the possession of the Government. No prosecution witness has stated that trees were cut with the intention of dishonestly taking the trees from the possession of the Government. The simple cutting of the trees without intention of dishonestly taking them will not come within the definition of theft. Explanation-1 to Section 378 is only to the effect that thing attached to the earth becomes capable of being the subject of theft as soon as it is severed from the earth. For theft, cutting of the trees with the intention of dishonestly taking those was required to be established, which the prosecution has not established.

12. The learned Sessions Judge has recorded a finding that accused Tara Chand unauthorisedly and illegally felled two kail trees in DPF Manik Noon C-72. The learned Sessions Judge has not recorded a finding that the trees were cut with the intention of dishonestly taking the trees out of Government forest. The trial Court has observed that accused are proved to have tried to remove the logs after cutting the trees from the spot. There is no evidence that the accused made attempt to remove the logs. The simple cutting of trees may amount to mischief but accused have not been charged for the offence of mischief.

13. The learned Assistant Advocate General has submitted that scope of revision is very narrow and evidence cannot be re-appreciated in revision. He has relied *State of Kerala Vs. Putthumana Illath Jathavedan Namboodiri*, The Supreme Court in that case has held that ordinarily, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. *Raj Kumar v. State of H.P.* 2000 (2) SLC 422 has also been relied in support of the same principle by the learned Assistant Advocate General. The High Court in *Raj Kumar* has noticed *State of Kerala v. Puttumana Illath Jathavedan Namboodiri* (supra).

14. The two Courts below have missed the glaring gap in the prosecution case. In Ex.PW-1/A the cut trees were found on the spot on 28.1.1999 even though alleged occurrence is dated 23.1.1999. No prosecution witness has stated that trees were cut by the accused with the intention dishonestly taking the trees out of the possession of the Government from forest. The observations of the learned trial Court that accused tried to remove the trees is based upon no evidence. The two Courts below have misconstrued and misinterpreted the evidence on record in returning the finding thatPetitioner has committed offence punishable u/s 379 Indian Penal Code. The miscarriage of justice is obvious to thePetitioner in the face of his conviction for offence u/s 379 Indian Penal Code which he has not committed.

15. In these circumstances, the conviction and sentence of thePetitioner u/s 379 Indian Penal Code is not sustainable, the impugned judgment is set-aside and thePetitioner is acquitted of the charge. The fine amount, if any, deposited byPetitioner be refunded to him and his bail bonds are discharged.