

GAHC010002342012



2024:GAU-AS:12331

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P./8/2012

HEMEN CHANDRA NATH
S/O LT. SENAI NATH R/O VILL- DUWANI P.S. MORIGAON, DIST.
MORIGAON, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR

2:DIMBESWAR MEDHI
S/O GULAP CHANDRA MEDHI R/O VILL- DUWANI
P.S. MORIGAON
DIST. MORIGAON
ASSAM

Advocate for the Petitioner : MR.A K HUSSAIN, MR.S ALIM,MD.B HUSSAIN

Advocate for the Respondent : , PP, ASSAM

BEFORE
HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Mr. B. Hussain, Advocate.

For the Respondents : Mr. P. Borthakur, APP.

Date of Hearing : 06.12.2024

Date of Judgement : 06.12.2024

JUDGMENT & ORDER (ORAL)

1. Heard Mr. B. Hussain, learned counsel for the petitioner. Also heard Mr. P. Borthakur, learned Additional Public Prosecutor for the State respondent.
2. The present application under Section 401/397 of the Code of Criminal Procedure, 1973 read with Section 482 of Cr.PC. is filed assailing the judgment and order of conviction dated 06.04.2011 passed by the learned Additional Chief Judicial Magistrate, Morigaon in SCR No. 44/2009 under Section 406/417 of IPC and convicted the accused petitioner under Section 406 of IPC and sentenced him to undergo R.I. for 1 (one) year and to pay a fine of Rs. 5,000/-. The further challenge is the Judgment and Order dated 18.11.2011, passed by the learned Sessions Judge, Morigaon in Criminal Appeal No. 11/2011, whereby the Judgment and Order of Conviction dated 06.04.2011 was modified and the accused was acquitted from the charges under Section 406 of IPC, however, he was convicted under Section 379 of IPC and was sentenced to undergo R.I. for 1 (one) year and also to pay a fine of Rs. 5,000/- and in default S.I. for another 2 (two) months.
3. Mr. Hussain, the learned counsel for the petitioner fundamentally argues that both the decision of the learned Court's below are ex facie illegal and perverse inasmuch as there is no iota of evidence to convict the accused either under Section 406 IPC or under Section 379 IPC and therefore, this is a fit case where this Court may exercise its revisional power to correct such patent defect and to avoid miscarriage of justice.
4. Per contra, Mr. Borthakur, learned Additional Public Prosecutor for the

State respondent submits that the prosecution has reasonably been able to prove, on the basis of circumstantial evidence that the petitioner had committed an offence under Section 379 IPC and therefore, such findings of fact may not be reversed by this Court in exercise of its revisional power.

5. This Court has given anxious consideration to the submissions advanced by the learned counsel for the parties. Also perused the materials available on record including the testimonies of the witnesses, in the backdrop of argument that the decisions are perverse
6. The prosecution story in nutshell and as discernible from the FIR is that the F.I.R. was lodged by one Dimbeswar Medhi on 07.12.2007 before the Officer-in-Charge of Jagiroad Police Station alleging that on 02.12.2007 at about 12:00 noon, the accused petitioner misappropriated his money amounting to Rs. 60,000/- from the tool box of his motor cycle. Accordingly, Jagiroad P.S. Case No. 196/2007 corresponding to G.R. Case No. 1266/2007 under Section 379 of IPC was registered.
7. Investigation was initiated. However, a closure report was submitted by the Investigating Officer on 30.10.2008 being F.R. No. 70/2008 under Section 173 Cr.P.C. for want of any evidence against the accused petitioner.
8. On receipt of such Final Report, the learned Chief Judicial Magistrate, Morigaon issued notice to the informant and subsequently, the informant filed an objection petition on 25.05.2009 in the form of a complaint, which was treated as a complaint by the learned Trial Magistrate and was registered as SCR No. 44/2009 under Section 406/417 IPC.
9. The informant/opposite party No. 2, was examined under Section 200

Cr.P.C., and thereafter, the learned Magistrate took cognizance of offence under Section 406/417 IPC and process was issued against the accused petitioner.

10. During the course of trial, the complainant examined himself as PW-1 and his wife as PW-2. Statement of the accused petitioner was recorded under Section 313 Cr.P.C., however, the accused petitioner did not adduce any evidence in support of his defence.
11. After conclusion of the trial, the learned trial Court convicted the accused petitioner under Section 406 IPC and discharged the accused for the offence under Section 417 IPC and sentenced him to undergo R.I. for 1 (one) year and to pay a fine of Rs. 5,000/- by a judgment and order dated 06.04.2011 passed in SCR No. 44/2009, which is one of the subject matter of challenge in the present criminal revision petition. Being aggrieved, the accused petitioner preferred an appeal before the learned Court of Sessions Judge, Morigaon, which was registered as Criminal Appeal No. 11/2011 and the said appeal was also dismissed by the learned Sessions Judge, Morigaon, by the impugned Judgment and Order dated 18.11.2011, however, the conviction of the accused petitioner under Section 406 IPC was reversed and he was convicted under Section 379 IPC, however, sentence remained the same.
12. This Court has perused the testimonies of the witnesses in the backdrop of argument of perversity by the learned counsel for the parties.
13. From the FIR, the evidence of PW-1 and PW-2, if are accepted to be correct, what is describable from the aforesaid testimonies of the witnesses

including their cross-examination is that on 02.12.2007, the informant (PW-1), his wife (PW-2) and their child along with the accused petitioner went to Jagiroad. The PW-1 and the petitioner went in the newly purchased bike of the informant as the informant did not know how to ride a bike and it is the petitioner who did know to ride a bike and they are friends since long. The informant (PW-1) and accused went to a Bank, the PW-1 withdrew an amount of Rs. 75,000/- from the bank and he kept Rs. 15,000/- in his pocket and rest of Rs. 60,000/- was kept in the tool box of the bike. The key of the bike was with the accused. Thereafter, the PW-2, (wife of the informant) and their child joined them at Jagiroad and the PW-2 went to Doctor. Thereafter, all of them went to purchase some medicines in a pharmacy. At that time, the accused expressed that he was hungry and accordingly, the accused, PW-2 and the child were sent by PW-1 to have their food and they went in the bike together and PW-1 stayed back in pharmacy.

14. From the evidence of PW-2, what is established is that PW-2, the accused and the child of the PW-2 went to a restaurant to have their lunch and entered the restaurant, keeping the bike locked outside the restaurant. After taking the food, when they came back, the tool box of the bike could not be opened. Subsequently, another colleague of PW-1 tried to open the tool box of the bike and they also could not open the same and thereafter, they went to the bicycle store of one Jayanta Nath, who broke opened the lock of the tool box and then they found that though the documents of the bike was there, however, the amount of Rs. 60,000/- was missing. All this happen on 02.12.2007 and the FIR was lodged on 07.12.2007. The PW-1 deposed that he lodged the FIR on suspicion.

15. The learned trial Court though convicted the petitioner under Section 406 of IPC on the conclusion that the money was entrusted to the accused as the bike was entrusted to him. However, the learned appellate Court did not find any entrustment, rather according to the appellate Court, it was the accused who had stolen the amount of Rs. 60,000/- kept in the bike and accordingly, convicted the accused petitioner.
16. To convict a person under Section 379 IPC requires 4 essentials, firstly, that the accused had taken movable property dishonestly, secondly, property was taken out of the possession of the complainant, thirdly, property was taken out without consent of the complainant and finally, property was moved out. It is true that in the case under Section 379 IPC, there may not be any direct evidence to establish the aforesaid requirements and there may be circumstantial evidences, which will point the guilt to none other than the accused only. In the case in hand, from the evidence of PW-1 and PW-2, as recorded hereinabove, it is seen that when the bike was in possession of the accused, either PW-1 or PW-2 were also present. As per the evidence of PW-1, money was taken from the bank, he himself kept it in the tool box of the bike and they were together till the accused left in the bike along with PW-2 and their child. Therefore, there is no circumstance during this period even to remotely suggest that the bike was left alone with the accused by the PW-1 for any period of time suggesting a scope of the accused to take away the money from the tool box having the key of the bike in his possession. From the evidence of PW-2, it is seen that they were together in the bike to the restaurant, they went together inside the restaurant and had their food and came back to the bike together. Therefore, there is also no scope for the accused petitioner

as per the prosecution evidence to take out the money from the tool box of the bike during the period when the possession of the bike was handed over to him to take PW-2 and the child to have their meal. It is also the evidence of the prosecution that bike could not be opened with the key which was in the hand of the accused and same was also tried by other two persons, though they were not brought to the witness box. The prosecution also adduced evidence to the effect that ultimately the lock of the tool box was broken in the cycle shop of one Jayanta Nath, (who was also not brought to the witness box by prosecution) and then only they could also learn that money was missing. Therefore, from the aforesaid evidence, the prosecution has been failed to even remotely suggest that the money was taken out from the tool box by the accused person or any circumstances which shows that the accused person had any opportunity to take away the money from the tool box and that there is no other person, which could have taken out money from the tool box inasmuch as it is the evidence of PW-2 that bike was kept under lock when all of them inside the restaurant.

17. In view of the aforesaid, in the considered opinion of this Court, the prosecution has measurably failed to prove the guilt of the accused not to say beyond any reasonable doubt. That being the position, this Court is of the view that the learned trial Courts below has committed patent error as well as ignored the settled propositions of law, that it is the burden of the prosecution to prove the guilt of the accused person beyond all reasonable doubt.
18. Accordingly, the present criminal revision petition stands allowed by setting aside and quashing the judgment and order of conviction dated

06.04.2011 passed by the learned Additional Chief Judicial Magistrate, Morigaon in SCR No. 44/2009 under Section 406/417 of IPC and impugned Judgment and Order dated 18.11.2011 passed by the learned Sessions Judge, Morigaon in Criminal Appeal No. 11/2011. For the reasons recorded hereinabove, the accused is acquitted from the charges under Section 406/379 of IPC. Bail bond stands discharged.

19. LCR be returned back.

JUDGE

Comparing Assistant