

**IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE,
UDALGURI**

CRIMINAL APPEAL NO: 07/2019

Present : **Sri Nisanta Goswami**
Addl. Sessions Judge, Udalguri

Appellant : **Sri Ranto Boro**

Respondent : **State of Assam**

Counsel for the Appellant: Sri Tarun Ch Boro, Advocate

Counsel for the Respondent: Sri Rajib Sharma, Addl. P.P

Date of Hearing : **23.11.2021 & 30.11.2021**

Date of Judgment : **14.12.2021**

JUGDMENT

1. This appeal has been filed U/S 374(3) of the Criminal Procedure Code against the judgment and order dated 28-03-2019 passed by the Ld. Chief Judicial Magistrate, Udalguri in G.R. Case No. 1233/2018 U/S 379 of IPC.

Facts of the Case:

2. The facts relevant, for disposal of this appeal, are that on 01-12-2018, the informant Sri Hassim Ali lodged an FIR at the Udalguri police station alleging therein that on 30-11-2018 at about 06:30 PM, when he went to attend a dinner invitation at the house of one Sri Rahul Boro, someone committed theft of his JCB vehicle, No.

AS-27C-4258 from Kahibari chowk of Udalguri. Based on that FIR, police started investigation. The stolen JCB vehicle was also seized. After completion of investigation, a charge-sheet was submitted U/S 379 of the IPC against accused/appellant Sri Ranto Boro, son of Sri Merga Boro, resident of village no.2 Jhargaon, P.S. Rowta, Udalguri.

3. A prima facie case was found against the accused Ranto Boro U/S 379 of IPC. Charge was framed against him under that Section. The accused pleaded not guilty and thus, the trial began. During the course of the trial, the prosecution side adduced evidence of 7(seven) witnesses and exhibited 4(four) documents. The defence side had not adduced any evidence.
4. The Ld. Trial Court, after considering the evidence adduced by the prosecution side and after hearing the parties, found the accused guilty of committing the offence U/S 379 IPC. The accused was accordingly convicted U/S 379 IPC. The Ld. Trial Court had heard the accused on the question of sentence and refused to provide him the benefit of the Probation of Offenders Act. The accused was sentenced to undergo simple imprisonment for a period of 2(two) years and to pay a fine of Rs. 1000/- U/S 379 of IPC. It was further provided that in default of payment of fine amount, the

accused shall undergo simple imprisonment for another period of one month.

5. Being highly aggrieved by that judgment and order, as referred above, the accused/appellant has filed this present appeal.

Grounds of Appeal:

6. The appellant has filed the appeal on the following grounds.

- i) For that the Ld. Trial Court erred in law and facts in convicting the appellant.
- ii) For that the evidence on record does not make an offence U/S 379 IPC, as such the conviction and order dated 28/03/2019 is liable to be set aside.
- iii) For that the Ld. Trial Court did not consider inherent improbabilities on the evidence on record and as such arrived at wrong findings.
- iv) For that the Ld. Trial Court did not properly recorded the statement of accused/appellant U/S 313 Cr.P.C., which is mandatory one, as such the judgment and order dated 28-03-2019 is liable to be quashed.
- v) For that the prosecution has examined Rohit Kr. Chetry as PW 1, who is the SI of police and immediately informed

the O/C of Udalguri Police station about the missing JCB. In cross he stated that he has no knowledge who has taken the JCB to Dhekiajuli and also did not know from where the stolen JCB was recovered.

- vi) For that the prosecution has examined Hassim Ali as PW2, who is the informant of the case. From the evidence of PW2, it is clear that the FIR was lodged after the recovery of the JCB and also put the signature on seizure-list at Udalguri police station. He has no knowledge from where the police personnel seized the JCB and also did not know who had taken the JCB from Kahibari.
- vii) For that the informant lodged the FIR after the recovery of the JCB but did not mention the name of accused person from whom the stolen JCB was recovered, as such the judgment and order dated 28-03-2019 is liable to be set aside.
- viii) For that the prosecution has examined Md. Asab Ali as PW3, who is the son of the informant and present with the driver of the JCB at the time when it was stolen. But he did not know who had stolen the JCB from Kahibari and also did not know from where the Kacharigaon O.P. had recovered the JCB. PW3 had put the signature at Udalguri police station, as such the order dated 28-03-2019 is liable to be set aside.

- ix) For that the prosecution has examined Md. Abbash Ali and Amir Ali as PW4 and PW5 respectively, but their testimony do not support the prosecution case.
- x) For that the prosecution has examined Md. Taher Ali as PW6, who is the driver of the stolen JCB. In cross examination he stated that he had not seen the person who has stolen the JCB and put the signature on seizure-list at Udalguri police station. He has no knowledge from where the Kacharigaon O.P. has seized the stolen JCB. As such, the judgment and order dated 28-03-2019 is liable to be set aside.
- xi) For that the prosecution has examined Ranjit Kalita as PW7, who is the IO of the case. During the course of investigation, the IO had not recorded the statement of any police officer of Kacharigaon O.P. without any explanation.
- xii) For that IO had not disclosed in seizure-list the name of the person from whom the JCB was recovered at the time of producing the seizure-list before the Ld. CJM at Udalguri. But filled up the name at the time of submission of CS by showing that the stolen JCB was recovered from the possession of accused/appellant.
- xiii) For that during the course of investigation, the IO has arrested the accused/appellant along with one Md. Ohab

Ali who was said to be the driver of the stolen JCB at the relevant time. The police personnel seized the vehicle from Ohab Ali but the IO has not charge-sheeted the case against the driver Ohab Ali without any explanation and also did not list the name of Ohab Ali in the charge-sheet.

- xiv) For that the prosecution had not made any attempt to examine the driver of JCB Md. Ohab Ali without any explanation.
- xv) For that the prosecution has failed to prove from whom the stolen JCB was recovered.
- xvi) For that the appellant has no prior criminal record and also the appellant is not likely to be a menace or threat or danger to the society or community.
- xvii) For that the Ld. Trial Court has arrived at wrong findings without taking into consideration the improbable points of law and facts available on record, as such it is liable to be quashed and set aside.
- xviii) For that from the trend of discussion, it is clear that the Ld. Trial Court prejudged the matter.
- xix) For that in view of the matter, the order and judgment dated 28-03-2019 passed in connection with GR. Case No. 1233/18, U/S 379 IPC, is not sustainable under the facts and circumstances of the case.

7. I have heard the Ld. Counsels for the appellant as well as the Ld. Addl. P.P. for the state and I have perused the materials on record, including the judgment delivered by the Ld. CJM, Udalguri, the evidence of the prosecution witnesses, statement of the accused recorded u/s 313 of CrPC etc.

8. In this case, the prosecution case is based entirely on circumstantial evidence. Nobody has witnessed the actual commission of the theft, but the materials on record suggest that the JCB vehicle of the informant was hired by the accused for digging a pond in his land. PW 2 Hassim Ali, who was the informant in the GR Case, has stated in his evidence that on the request of the accused he went to Kahibari village along with his JCB for digging a pond for the accused. His son and the driver of the JCB also went to Kahibari. After sometime, the PW 2 went to the Mosque to attend his Friday prayers. The accused prevented the driver and the informant's son from starting the digging work on the pretext that his elder brother will come and show the place where to dig the pond. Thus, the informant's son Asab Ali and the driver of the vehicle Taher Ali kept waiting till evening. This fact was also corroborated by PW 3 Ashab Ali and PW 6 Taher Ali. PW 3 Ashab Ali has stated that in the evening at about 7 PM, the accused took him and the JCB driver to his house for having

meal. But before reaching home the accused asked them to wait for sometime on the road and thereafter he disappeared. After waiting for some time, PW 3 contacted him over phone but then the accused enquired from him regarding the registration certificate of the vehicle. Thereafter, PW 3 and the driver came back to the place where the JCB was parked but they found the vehicle missing. They contacted the accused, but no response was received from him. Thereafter they informed the police and the police recovered his vehicle from a place near Dhekiajuli. The informant Hassim Ali, his son Ashab Ali and the driver Taher Ali went to Kacharigaon outpost and they identified the vehicle, which was seized by the police of Kacharigaon outpost. They also found the accused person being lodged at the lock up at the outpost.

9. PW 7 SI Ranjit Kalita has stated that on 30-11-2020 he was at Udalguri police station as the Attached Officer. On that day, at about 8 PM, in the evening he got the information that a JCB vehicle went missing from the place where it was parked at Kahibari. PW 7 made a GD entry and then he went to the place of occurrence. From GPS tracking they came to know that the JCB vehicle was moving towards Dhekiajuli. Immediately the PW 7 along with the informant and his driver went to Dhekiajuli. At about 12:10 AM, the vehicle was

intercepted at the Mission Chariali traffic point at Tezpur. Informant's son identified the vehicle and thereafter it was seized, a seizure-list was prepared. PW 7 has also stated that the JCB was seized from accused Ranto Boro, who was present in the vehicle at the time of its seizure. PW 7 has also exhibited the seizure-list as Ext.2. A perusal of Ext.2 shows that the vehicle was seized from the possession of the accused Sri Ranto Boro and the informant, his son and driver had witnessed the seizure.

10. When the accused person was examined U/S 313 of Cr.P.C., he admitted the fact that he hired the JCB of the informant for digging a pond in his land at Kahibari and thereafter the vehicle was made to wait for the whole day without any work. However, when the accused was asked about the seizure of the vehicle at Kacharigaon outpost and thereafter the handing over of the vehicle along with him to police of Udalguri police station, the accused explained that he went behind the JCB in search of it when the police apprehended him, mistaking him as the thief. The accused has also admitted the fact that the JCB went missing from the place where it was parked. However, he denied having any knowledge about the person who had taken away the vehicle.

11. While cross-examining the PW 7 SI Ranjit Kalita, who seized the vehicle at Mission Chowk, Tezpur, some technical points were raised regarding preparation of the seizure-list. However, the fact that the stolen vehicle was recovered from the custody of the accused was not challenged. The explanation offered by the accused, during his examination U/S 313 CrPC, that he went in search of the vehicle when the police apprehended him mistakenly, was also not suggested during the cross-examination of the IO. It is also difficult to understand why the accused person went in search of the vehicle without even informing the owner thereof.

12. The date and place of the alleged occurrence is not disputed by the defense. The factum of commission of the vehicle from the place where it was parked at the Kahibari area was also admitted. The only fact which needs proof is the person who has committed the theft of the vehicle. The evidence of PW 7 SI Ranjit Kalita and the seizure-list, marked as Ext.2, squarely suggests that the vehicle was seized at Tezpur from the possession of the accused Ranto Boro. The accused could not explain any valid reason for his presence at Tezpur, along with the stolen vehicle, at the relevant time. The evidence of PW 7 has also been corroborated by the evidence of PW 3 Ashad Ali and PW 6 Tahen Ali,

who saw the accused person at the lock up of Kacharigaon outpost, when they went there for identification of the vehicle.

13. In the present case, the following circumstances are proved.

I. Hiring of the informant's vehicle by the accused, for digging a pond in his land.

II. Deferring the digging work by the accused on some pretext.

III. The accused inducing the informant's son and his driver to leave the vehicle, at the place where it is parked, and to move away to a distant place on the pretext of offering them meal.

IV. Removing of the vehicle from the place where it was parked without the knowledge and consent of the informant and his son and driver, and

V. Subsequent recovery of the vehicle at a distant place from the possession of the accused.

14. These circumstances form a chain, which does not leave any reasonable ground for arriving at a conclusion, consistent with the innocence of the accused. The chain of circumstances suggests that in all human probability the theft of the JCB vehicle must

have been done by the accused Ranto Boro. The circumstances proved by the prosecution are consistent only with the hypothesis of the guilt of the accused. The Ld. CJM, Udalguri, while appreciating evidence in his judgment has referred to that chain of circumstances and has reached the conclusion that the conduct of the accused clearly establishes the fact that there was a dishonest intention on the part of the accused to remove the JCB vehicle without its owner's consent from its parking place.

15. The Ld. Counsel for the appellant has referred to a few judgments of the Hon'ble Supreme Court in support of the case of the appellant. I have gone through these judgments but have not found anything which can be of any help for the appellant. In **State of Rajasthan vs. Islam and Ors. (2011) 6 SCC 343** it was held that where two views are possible, one points to the guilt of accused and other to innocence, the view which is favourable to the accused should be adopted. In **State of TM vs. Sundar (2005) SCC (Cri.) 844**, it was observed that non-examination of material witnesses, in whose presence theft articles are recovered, amounts to a lacuna, making the prosecution case doubtful. In **State of Punjab vs. Harban Singh and Anr. (2004) SCC (Cri.) 75**, it was observed that non-examination of any independent witnesses affects

the prosecution case. In **Krisan Kr. Malik vs. State of Haryana (2011) 7 SCC 130**, it was held that non-examination of the name of the accused in the FIR can shake the credibility of the informant.

16. The Ld. Counsel for the appellant has submitted that though the FIR was lodged after recovery of the vehicle and the arrest of the accused, the accused was not named in the FIR. According to the Ld. Counsel, this fact shakes the credibility of the informant. In this context, it is worth mentioning that the FIR is not supposed to be an encyclopedia of the whole prosecution story. The basic purpose of lodging the FIR is to set the criminal law in motion. It is sufficient if the FIR reveals the commission of a cognizable offence. Mere non-mentioning of the name of the accused in the FIR cannot demolish the prosecution case, if the same is otherwise proved by credible evidence. The cases referred by Ld. Counsel needs to be understood in the context of the facts of those particular case. Moreover, in this case, all the material witnesses, who are supposed to be acquainted with the facts of the case, have been duly examined. The incident of theft occurred between 7-8 PM and thereafter the vehicle was recovered from a different district at about 12 midnight. How can one expect the presence of other witnesses in such circumstances, apart from the

informant, his son and the driver, who were present with the vehicle and the police officers who received the complaint and subsequently recovered the vehicle.

17. The Ld. Counsel for the appellant has underlined some defects in the preparation of the seizure-list. May be, there were some defects in the investigation process, but the law is well settled that the defect in the investigation by itself cannot be a ground for acquittal. In this context, we may refer to the case of **C. Muniappan and Ors. Vs. State of Tamil Nadu 2010 (9SCC) 567.**

18. The Ld. Counsel for the appellant has further submitted that in this case the key with which the vehicle was driven by the thief was not seized. This issue was also addressed by the Ld. Trial Court, which found this argument not sustainable since the actual taking away of the JCB in dispute was proved.

19. It appears from the above discussion, that in the present case, the incriminating circumstances are proved, the chain of circumstances is complete and it supports only one hypothesis, which is consistent with the guilt of the accused. Possibility of two views, one points to the guilt of the accused and other to his innocence, does not exist. As such, this Court does not find any infirmity in the appreciation of evidence made

by the Ld. Trial Court. So far as conviction of the accused Ranto Boro is concerned, it does not warrant any interference.

20. However, on the question of sentencing, this Court is of the view that since no previous conviction against the accused is proved, the manner in which the offence was committed does not reflect any notoriety on the part of the accused; the sentence of two years simple imprisonment appears to be slightly disproportionate in the present circumstances. It is a settled legal position that while sentencing an accused, the nature of circumstances in which the crime was committed, the nature of the offence and the manner in which it was executed needs to be considered. In the present case, the prosecution has failed to show any motive on the part of the accused. The manner in which the vehicle was stolen does not reflect that the accused was a habitual offender.

21. Considering all these aspects of the matter, this Court finds that a sentence of 6 (six) months simple imprisonment along with a fine of Rs. 1000/- U/S 379 of IPC will serve the ends of justice. Accordingly, the sentence for the accused Sri Ranto Boro is reduced to 6 months simple imprisonment and fine of Rs. 1000/-. In

default of payment of fine, the accused shall undergo simple imprisonment for another period of 1 month.

22. The period of detention undergone by the accused, if any, shall be set off as per Section 428 CrPC.

23. Accordingly, this appeal is allowed with the above alteration of sentence.

24. Let the LCR be sent back to the learned Court of CJM, Udalguri, along with a copy of this judgment.

25. Given under my hand and seal of this Court on this 14th of December, 2021.

(Nisanta Goswami)
Addl. Sessions Judge
Udalguri