

THE COURT OF SUB-DIVISIONAL JUDICIAL MAGISTRATE
(SADAR), TINSUKIA
P.R.C. CASE NO.- 714/2019
U/S 457/380 OF THE IPC

STATE

VS.

SRI AJOY KARMAKAR
S/O SRI BHULA KARMAKAR
R/O CHANDMARI T.E. KHER LINE
P.S. TINSUKIA
DISTT. TINSUKIA.

PRESENT:- KAUSHIK KAMAL BARUAH,
SUB-DIVISIONAL JUDICIAL MAGISTRATE
(SADAR)
AT TINSUKIA.

APPEARANCES:- SMT. BANTI HAZARIKA.....FOR STATE

SRI SWATCHATA SARMAH

AND

SMT. ROZY DAS.....FOR ACCUSED

DATE OF EVIDENCE:- 18/02/2020, 04/01/2021, 03/03/2021.

EXAMINATION OF ACCUSED PERSON:- 25/03/2021.

DATE OF ARGUMENT:- 05/04/2021.

DATE OF JUDGMENT:- 05/04/2021.

JUDGMENT

1. Accused Sri Ajoy Karmakar stood trial for offences punishable under sections 457/380 of the Indian Penal Code, 1860 (the IPC for short).
2. Material facts of the case as appears from the contents of the First Information Report (FIR for short) are as follows:- that, on 24/10/2019 at about 07:30 PM, when informant, Sri Sonu Joria, was in his shop, located at Chandmari Nepali Gaon under Tinsukia Police Station (PS for short), he

heard a creaking noise emanating from one of the rooms adjacent to his shop. Suspecting it to be a cat, when he went to the said room to chase it out, he saw above named accused quitting through a hole made out of the thatched wall of his shop, which was not made for human entrance, alongwith the betel nut which he had kept under a bed in the said room. Finding no alternative, above named informant called for help. Nearby people immediately collected at the place of occurrence and apprehended the accused person red-handed.

3. On same day, informant named above filed a written FIR before the In-charge of Gellapukhuri Outpost which was forwarded to the Officer-In-charge (OC for short) of Tinsukia PS for taking necessary action thereon. On receipt thereof, the FIR was registered and number as Tinsukia P.S. Case No- 1651/2019 under Sections- 457/380 of the IPC. During the course of investigation, the investigating officer (I/O for short) visited the place of occurrence, recorded statements of witnesses under Section 161 of the Code of Criminal Procedure, 1973 (the Cr.P.C. for short), seized half a gunny bag of betel nut, made a rough sketch map of the place of occurrence, arrest the accused and forwarded him to concerned Jurisdictional Magistrate for taking necessary action against the accused. The concerned Jurisdictional Magistrate was pleased to forward the accused to judicial custody.
4. After completing the investigation, the I/O submitted police report u/s 173(2) of the Cr.P.C. for prosecution of the accused person under sections 457/380 of the IPC. In the meantime, above named accused was allowed to go on bail.
5. Court processes were issued and on his appearance the accused was allowed to go on bail. Copies of all relevant documents were furnished to the accused person in compliance with section 207 of the Cr.P.C. Particulars of the offences under sections 457/380 of the IPC were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
6. Prosecution examined six (06) witnesses and closed evidence.

Thereafter, statements of the accused u/s 313 of the Cr.P.C. was recorded by putting questions to him from all incriminatory materials appearing against him on record, thereby, enabling him to explain the same. In response, the accused person's reply was one of total denial and he also declined to adduce evidence in his support.

7. Heard arguments advanced by learned Assistant Public Prosecutor and learned defence counsel.

POINTS FOR DETERMINATION

- a) Whether the accused, on 24/10/2019 at about 07:30 PM at Chandmari Nepali Gaon under Tinsukia PS, committed lurking house breaking by night by stealthily entering into the shop of Sri Sonu Joria in order to commit the offence of theft?
- b) Whether the accused on the same day, time and place committed theft of betel nut from the shop of said Sri Sonu Joria?

DISCUSSION, DECISION AND REASONS THEREON

8. In order to establish the allegations against the accused person, prosecution examined Sonu Joria, Bishal Joria, Tarun Joria, Md. Abdul Ali, Sanjay Kumar Mahananda and Mukut Gogoi as PW1, PW2, PW3, PW4, PW5, PW6 respectively and closed evidence.
9. PW1, Sonu Joria, was the informant. In his oral examination. He deposed as such:-

"I am the informant of this case. The incident took place about 4-5 months ago at about 6-7 P.M. At that time of the incident I was at my shop situated in Chanmari, Nepali Gaon, In a room adjacent to my shop where betel nut was kept and upon hearing a sound of a cat, I flashed my torch and saw the accused person inside the room. The accused person had entered after breaking the bamboo wall of the

room. When I shouted thief the neighbours came and came and when the accused fled away he was caught at a distance of about 10 ft. I informed the VDP people, who informed the police and police came to the P.O. and police took him to P.S. I also went to the police station along with the accused. The ejahar has been written by one person from the police station as per my dictation and the contents of the ejahar was read over to me.

EXT. 1 is the ejahar and EXT 1(1) is my signature.

Police recorded my statement.

The accused person had already taken two bags of betel nuts out of the room when I saw him inside the room.

EXT 2 is the seizure list and EXT 2(1) is my signature.

EXT 2 was prepared at the P.O. and my signature was also taken at the P.O. Police had taken one bag of seized betel nut with them to the P.S.

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"I do not know the contents of EXT 1. The dimension of my shop is 12 ft. X 12 ft. 4 bags of betel nuts were kept under the bed inside the room.

I have not stated before police that I had seen the accused when I flashed my torch. When police visited P.O. I did not handover the pieces of broken bamboo wall to the police.

It is not a fact that I did not state before police that the accused person entered into my shop by breaking the bamboo wall of my shop.

It is not a fact that I have not stated before the police that the accused had already taken two bags of betel nuts out of the room.

It is not a fact that I did not see the accused person and as such I have stated before the police that I saw the

accused person when I flashed my torch.

It is not a fact that I have falsely deposed that the accused person entered the room by breaking the bamboo wall and that is why I have not handed over the pieces of broken bamboo wall to the police.

EXT 2 was prepared before I lodged the ejahar.

There is a field behind my shop and there is a road adjacent to the field. The accused person goes to his house by that road. Police seized only one bag out of two bags by EXT 2.

I do not see any betel nut in court today. Police seized the betel nut from my shop and not from the accused person.

It is not a fact that the accused had not entered in my shop and neither did he commit any theft.

People had beaten the accused person and his nose was bleeding and sustained injury in his ears.

It is not a fact that on the day of the incident the accused was on his way to his house by the road adjacent to the field and we caught and assaulted the accused upon suspicion.

It is not a fact that I had lodged a false case against the accused person.

10. PW2, Bishal Joria, deposed as such:-

“The informant is my elder brother. I know the accused person since the day of incident.

The incident took place at the time of Kali Puja in the last year. At that time of the incident I was at the shop of the informant. We heard some noise and when we flashed our torch in that direction we saw the accused person. The accused had entered by breaking the wall of the room. When we raised hue and cry the neighbours came and we caught the accused person when he tried to run away. The

accused was trying to take away betel nut from the room. We informed the VDP and police came and took away the accused to the police station.

XXX

"I have not stated before the police that I was present at the shop at the time of the incident and that the accused had entered the room by breaking the wall of the room. The informant had seen only the legs of the accused person when he flashed the torch.

There is field behind my brother's shop adjacent to which there is a road and people use that road for commuting from one place to another.

It is not a fact that the accused had not entered the shop and he was on his way by the road adjacent to the P.O. and we caught him only upon suspicion."

11. PW3, Tarun Joria, deposed as such:-

"I know the informant as well as the accused person.

The incident took place at about 6-7 PM during the time of Kali Puja at the shop of informant. At the time of the incident I was at the tinali near place of occurrence and I went to the P.O. when I heard the noise of someone shouting thief. 15-20 persons had gathered at the P.O. and the accused was caught in the field. I heard the accused had committed theft of betel nut. The accused had taken out two bags of betel nut out of the shop of the informant by breaking the bamboo wall and there were another two bags of betel nuts inside the shop. Police did not recorded my statement.

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"I have not stated before the police that which I have deposed today in my evidence in chief.

There is a field behind the shop of the informant adjacent

to which there is a road and that road can be used to go to the house of the accused person.

It is not a fact that the accused had not committed any theft at the shop of the informant and we caught the accused only upon suspicion.

Informant had stated before me that he had only seen the footwear of the accused when he flashed his torch. Such footwear are available in the market and the footwear may also belong to some others persons."

12. PW4, Md. Abdul Ali, deposed as such:-

"I know the informant and the accused person. In the year 2019 at about 07:00 P.M. I came to know that a thief has been caught in the shop of the informant. I went to the P.O. with Sri Sanjay Kumar Mahanand and others. Both of us are members of VDP. When I reach the place of occurrence I saw gathering of many people. I saw the accused was tied to the pole outside the shop and there was a sack of betel nut. Police came to the P.O. and the informant show them one hole and the back side of the shop leading to inside of the shop. Police seized the betel nut.

EXT 2 is the seizure list and EXT 2(1) is my signature on it. Police has recorded my statement. Police arrested the accused person.

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"I put my signature on EXT 2 in P.O. at about 7:00-7:30 P.M. I put my signature EXT 2 as police apprehended the accused person. Police has seized two cement bags. Police has not shown me by opening the bags. I have seen that one sack was on the back of the accused. I have no knowledge from where the said betel nut bags have come to the P.O. and I have no personal knowledge about the

bag. I have not seen those two bags of betel nut in the Court today."

13. PW5, Sanjay Kumar Mahananda, deposed as such:-

"I know the informant and the accused person. In the year 2019 at about 7:30 P.M. I came to know that a betel nut thief has been caught in the shop of the informant. At that time I was the VDP Secretary. I asked Abdul Ali, member VDP, to reach the P.O. I reached the P.O. at 9:00 P.M. and I saw the accused was tied to the bamboo pole outside the shop. Many people gathered there. Police reached the P.O. and took the accused to the police station.

EXT 2 is the seizure list and EXT 2(1) is my signature on it. I have put my signature on the same day at the police station.

Police has recorded my statement."

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"I put my signature on EXT 2 as a member of VDP. PW 4 also put his signature in EXT 2 at the police outpost alongwith me. I do not know what is EXT 2."

14. And, finally, PW6, ASI Mukut Gogoi, deposed as such:-

"On 24.10.2019 I was posted at Gelapukur O.P. as in-charge. On that day Sri Paresh Gowala inform me over that one betel nut thief was caught red handed at Chanmari Nepali Gaon. After receiving the information I made Gelapukuri G.D. Entry No. 340 dated 24.10.2019 thereafter, I proceeded to the P.O. along with Police personnel. On reaching there I found the accused Sri Ajay Karmakar being apprehended at the P.O. with his hands bound with ropes. I also found about half gunny bag of betel nut from his possession which I seized in presence of witnesses.

EXT 2 is the Seizure list and EXT 2(4) is my signature there on.

I also prepared a rough sketch map of the P.O. vide EXT 3 and EXT 3(1) is my signature there on.

Later on, on that very day, informant Sri Sunu Joria filed a written FIR complainant about the occurrence which was forwarded to O.C. Tinsukia P.S. and the same was registered and numbered as Tinsukia P.S. No. 1651/2019 u/s- 457/380 of the IPC. I was entrusted with the task of investigating the occurrence. I had already recorded the statements of witnesses. The accused was brought to Police station premises. I recorded his statements, placed him under arrest and forwarded him to concerned jurisdictional Magistrate who was pleased to forward the accused to judicial custody. After completing the investigation I filed charge-sheet against the accused named above for his prosecution u/s- 457/380 of IPC.

EXT 4 is the Charge-sheet and EXT 4(1) is my signature there on.

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I received the information about the occurrence on 24.10.2019 at 9:00 P.M. and after making the G.D. Entry stated above I proceeded the P.O. at 9:10 P.M. On receiving an FIR at the Out Post we forward the same to O.C. of Sadar P.S. who after registering and numbering the same under appropriate section of law engage concerned investigating officer for investigation of the occurrence.

EXT A is the FIR form wherein it is mentioned that the time of receiving information about the occurrence is 11:50 P.M.

I entered the P.S. Case no in the seizure list later on,

during the investigation. It is not mentioned in the seizure list that same was prepared at the P.O. Left thumb impression (LTI) of accused was taken on the seizure list but I had not mentioned there in as to who took it.

It is not a fact that the LTI on the seizure list is not that of the accused.

I found the gunny bag at the verandah of informant's shop. I have not seen the seized bag in court today.

It is not fact that I had not seized any Gunny bag full of betel nut from the accused person's possession.

I had not showned in the sketch map the part of the shop that was allegedly damaged by the accused.

Informant's shop was made of bamboo. During the investigation I had not seized any broken bamboo pieces. Informant's shop was not actually damaged.

It is not a fact that I had filed charge-sheet against the accused u/s- 457 without any justification as informant's shop was not actually damaged during the occurrence.

I conducted the investigation entirely on the basis of Gellapukhuri G.D entry no. 340 dated 24.10.2019. Extract copy thereof has not been appended to the case record.

PW 1 Sri Sunu Joria had not stated before me that the accused entered into his shop by breaking open its bamboo wall. He had also not stated to me that the accused had already taken away two bags full of betel nut from his shop.

It is not fact that I am not authorized to independently investigate any occurrence as per Rules 36 of the Circle Inspector and Police Station Act.

15. Now, the above set of facts as narrated by the witnesses named above including the exhibits brought on record is the entire version of the occurrence available with the prosecution. Here, in the case at hand,

accused Ajoy Karmakar is prosecuted for stealthily breaking into the shop of Sonu Joria, located at Chandmari Nepali Gaon, at about 07:30 PM with intent to commit theft, and, actuated by such intention, the accused person committed theft of betel nut therefrom, thereby, arraigning him for offences punishable u/s 457/380 of the IPC.

16. A cursory look at the testimony tendered by informant, Sonu Joria, discloses that the accused person, before committing the offence of theft, first of all, surreptitiously entered into informant's shop located at the above-mentioned place, that, the crime scene was the informant's shop. The sketch map brought on record by the I/O and proved by the prosecution, vide Ext.3, confirms the location of the crime scene. It is, therefore, incumbent upon the prosecution to establish, primarily, the offence of *'lurking housebreaking by night'* before establishing the remainder of the offence.
17. Towards this end, prosecution examined PW Bishal Joria, informant's brother. Said Bishal Joria claims to have been present at the crime scene at the time the occurrence took place. He, thus, tried to impress upon the Court that he had, in-fact, seen the offences taking place. But, his testimony, when considered in its entirety, reveals an altogether different scenario. In his cross-examination, he had bluntly admitted of not stating to the I/O about his presence at the crime scene and, that, the accused had entered into the informant's shop by breaking its wall. In other words, the defence had, with dexterity, elicited this fact of utmost significance from said Bishal Joria which, in all probability, will lead a person of ordinary prudence to disbelieve his testimony. Such is my prudence as well and, in my considered view, said Bishal Joria's testimony cannot at all be acted upon, it being marred with considerable doubt.
18. Next, prosecution examined PW Tarun Joria. But, his evidence also does not inspire any confidence in me about the happening of the occurrence as projected, for the simple fact, that, he had not stated anything about the occurrence before the I/O during the course of the investigation.

19. Now, an offence as '*lurking housebreaking by night*' is a fact that can be seen, as well as, perceived. And, section 60 of the Indian Evidence Act, 1872 (hereinafter the Act for short) mandates that oral evidence of a fact which can be seen, or, perceived must be the evidence of a witness who says he saw it, or, perceived it. Definitely, neither PWs Bishal Joria, nor, Tarun Joria had seen, or, perceived the occurrence taking place. Thus, I am left with the sole testimony of the informant, Sonu Joria.
20. PW Sonu Joria, in his oral evidence, had tendered two different versions of the occurrence, *firstly*, in his examination-in-chief, and, *secondly*, in his cross-examination. According to the first version, he saw the accused in the room of his shop after he flashed his torch, that, the accused had entered therein by breaking the bamboo wall of the room. This testimony of his is the most vital fact in order to bring home the guilt of the accused u/s 457 of the IPC. He ought to have stated the same to the I/O when his statement u/s 161 of the Cr.P.C. was being recorded. But, he omitted to state the same to the I/O as reflected from his cross-examination.
21. For the offence of '*lurking housebreaking by night*' to be proved, prosecution must invariably prove to the hilt that the accused had entered into, or, exited through any passage of the house, or, any part of it not intended by any person, other than himself, for human entrance. The fact that accused Ajoy Karmakar had entered into the shop of PW Sonu Joria through a passage cut out of the shop's bamboo wall was a vital and significant fact. Obviously, PW Sonu Joria would not have used such a passage for his own ingress and egress to his shop. But, his omission to state this fact to the I/O during the course of the investigation and at the inception thereof amounts to contradiction to the effect that his testimony cannot be believed in all certainty. In other words, his statement on oath is blemished with doubt and not beyond reproach.
22. Besides, testimony of the I/O actually wrecks the prosecution version of the occurrence beyond repair and at the same time casts enough

doubt upon the oral evidence of PW Sonu Joria, as well as, in the happening of the occurrence itself when the I/O, in his cross-examination, stated that **"PW 1 Sri Sunu Joria had not stated before me that the accused entered into his shop by breaking open its bamboo wall."** This testimony tendered by the I/O had actually blown the prosecution version to smithereens.

23. To add to the woes of the prosecution, and as submitted by learned defence counsel during the course of hearing arguments, PW Sonu Joria had himself sounded the death-knell when he stated in his oral evidence that **"I do not know the contents of Ext.1"**. Though, at an earlier point of his oral evidence he made a statement to the effect that the FIR, Ext.1, was written as per his dictation and contents thereof were read over to him, yet, his cross-examination shows that he had denied his own FIR *in-toto*. To put it differently and as rightly submitted by learned defence counsel, the very edifice of the prosecution has crumbled beyond repair.
24. PWs Abdul Ali and Sanjay Kumar Mahananda were seizure witnesses. But, PW Sanjay Kumar Mahananda has no knowledge about the seizure list, i.e., Ext.2, and PW Abdul Ali affixed his signature thereon not on account of recovery of the subject-matter of the offence but for apprehension of the accused person by police. In the light of their testimonies available in the record, the seizure list mentioned-above, in my considered view, cannot be said to have been duly proved.
25. To cut a long story short, prosecution has failed to establish that the accused, viz., Ajoy Karmakar, had stealthily entered into the shop of Sonu Joria, located at Chandmari Nepali Gaon, at about 07:30 PM with intent to commit theft, and, actuated by such intention, the accused person committed theft of betel nut therefrom.
26. In a nutshell, prosecution had failed to establish that the accused person, viz., Ajoy Karmakar, had committed the offences alleged against him u/s 457/380 of the IPC beyond all shadow of doubt.

ORDER

27. As such, from the observation and discussion done hereinbefore, I arrive at the conclusion that the prosecution had failed to establish the allegations against accused Ajoy Karmakar for the offences under sections 457/380 of the IPC beyond all reasonable doubt. As such, the accused is acquitted of the offences under the sections of law indicated above.
28. Accused person be set at liberty forthwith. Bail bonds of the accused person stands effective for the next six months from today. Seized articles, if any, be disposed of in due course. The accused person may obtain copy of the judgment but not without payment.
29. Instant case is disposed of on contest.
Given under my hand and Seal of the Court this 5th day of April, 2021.
Typed and corrected by me and every page bears my signature.

Sub-Divisional Judicial
Magistrate (Sadar)
Tinsukia.

THE COURT OF SUB-DIVISIONAL JUDICIAL MAGISTRATE
(SADAR), TINSUKIA
P.R.C. CASE NO.- 714/19
APPENDIX

- 1) Prosecution exhibits:-
 - Ext.1:- Ejahar
 - Ext.1(1):- Signature of Sonu Joria
 - Ext.2:- Seizure list
 - Ext.2(1):- Signature of Sonu Joria
 - Ext.2(2):- Signature of Md. Abdul Ali
 - Ext.2(3):- Signature of Sanjay Kumar Mahananda
 - Ext.2(4):- Signature of ASI Mukut Gogoi
 - Ext. 3 :- Sketch Map
 - Ext. 3(1):- Signature of ASI Mukut Gogoi
 - Ext. 4 :- Charge-Sheet
 - Ext. 4(1) :- Signature of ASI Mukut Gogoi
- 2) Prosecution witnesses:-
 - PW1:- Sonu Joria
 - PW2:- Bishal Joria
 - PW3:- Tarun Joria
 - PW4:- Md. Abdul Ali
 - PW5:- Sanjay Kumar Mahananda
 - PW6:- ASI Mukut Gogoi
- 3) Defence exhibits.- NIL
- 4) Defence witnesses.- NONE

Sub-Divisional Judicial
Magistrate (Sadar)
Tinsukia.