

IN THE COURT OF ADDL. CHIEF JUDICIAL MAGISTRATE, DHUBRI

Case no : GR 387 of 2007

State of Assam

-Vrs-

1. Md. Ahmed Ali Sarkar
2. Md. Ekramul Haque
3. Md. Safiul Haque
4. Md. Aminul Haque
5. Md. Rafiqul Haque

.....Accused Persons

Present : Shri S. Datta, AJS

Learned Advocates appeared :

For the prosecution---- Shri U. K. Sarkar, Addl. PP

For the defence ----- Shri R. Mondal

Evidence recorded on : 21.10.10, 06.10.12, 07.11.12 & 04.3.13

Argument heard on : 04.7.13

Judgment delivered on : 10.7.13

Penal law involved : u/s 379/34 IPC

J U D G M E N T

1. A complaint was lodged on 19.7.07 by one Md. Mahibul Haque to the effect, *inter alia*, that on 17.7.07 at about 4-00 AM the above-named accused persons alongwith others caught fishes from a pond of which the complainant had been the owner & possessor by inheritance. The witnesses named in the complaint offered resistance but the accused persons & their companions continued to catch fishes from there. On receipt of information of the occurrence, the complainant proceeded towards the pond seeing which the accused persons fled away with fishes worth Rs.10,000/-.

2. The complaint was forwarded for investigation u/s 156(3) CrPC and the police, after investigation, submitted Final Report which was not accepted. Cognizance was taken of the offence punishable u/s 379 IPC against the above-named five accused persons vide. order dated 10.6.09 passed by my learned predecessor. On appearance of the accused persons in response to the summons issued, a charge under the same Section of Law was framed against and read over & explained to them by my learned predecessor, after supplying copies u/s 207 CrPC and hearing both sides, to which they pleaded not guilty and claimed to be tried, as the order dated 14.9.10 shows.

3. The prosecution, in course of trial, examined five witnesses and the incriminating materials so brought into the evidence on records were put to the

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accused persons u/s 313 CrPC ; they denied the allegations and declined to adduce any evidence. I have heard the argument of both sides at length. But while perusing the CR for preparation of the judgment, it caught by notice that the Form of the Charge available on records was not filled in by my learned predecessor, perhaps by inadvertence. Hence, I have framed the charge under the same Section of Law i.e. u/s 379/34 IPC. The charge could not be explained to the accused persons today since they are physically absent. But both parties have submitted that they shall not feel prejudiced for the omission since the same charge was properly explained to the accused persons at the appropriate stage and the accused persons are thus aware of the facts & circumstances of the case. It has also caught my notice that Ext.1 (ejahar) was not signed by my learned predecessor and I have signed the exhibit today with consent of both parties.

4. The sole **point for determination** in this case is whether on 17.7.07 at about 4-00 AM the accused persons, in furtherance of their common intention, stole away fishes worth Rs.10,000/- from the pond (located in Suparikuthi) owned & possessed by the complainant (now informant) namely Md. Mahibul Haque and thus committed an offence punishable u/s 379/34 IPC and, if so, what punishment the accused persons deserve.

Decision & reasons therefor :

5. As already noted, the prosecution has examined five witnesses in this case out of whom PW-4&5 are the I.Os and PW-1 Md. Mahibu Haque is the informant. PW-1 proved his ejahar as Ext.1 and deposed to the effect that one day about three years before the date (21.10.10) of his evidence at about 4-00 AM he saw the accused persons catching fish from the pond situated on his paternal land by using fishing-net. PW-1 enquired into the matter whereupon the accused persons threatened him. He admitted during cross-examination that he had a civil suit with the accused persons over the pond.

6. PW-2 Md. Manser Ali testified that one day about five years before the date (06.10.12) of his evidence at about 5-00 AM he saw six/seven persons including accused Safiquil & Aminul to have caught fishes from the pond of PW-1. PW-2 saw fishes on the bank of the pond and a "Hundy" (urn for keeping fish) on the carrier of a bicycle kept there ; those persons stated to him that they caught the fishes. PW-2 admitted during cross-examination that the accused persons claim ½ share over the pond.

7. PW-3 Md. Nazaruddin Ahmed @ Nizamuddin Ali Ahmed deposed that one day about five years before the date (06.10.12) of his evidence at about 4-00 AM, when he was going to the mosque for offering his morning prayer, he saw the accused persons catching fish from the pond of PW-1. He informed the matter to PW-1 but the latter, thought went to the place of the occurrence, did not find the accused persons there. He admitted during cross-examination that there is a dispute between PW-1 & the accused persons over the pond and that they had a civil suit over that matter.

8. PW-1 claimed in his evidence that he saw the accused persons catching fish from the pond by using fishing-net and that they threatened him. But PW-3 testified that PW-1 did not find the accused persons at all in the place of the occurrence. PW-3, though supported the allegation of catching of fish, has not implicated the accused persons except accused Safiquil & Aminul.

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9. The evidence on records clearly shows that there is a civil dispute between PW-1 & the accused persons over the pond and, hence, even agreeing for a moment that the accused persons caught fishes from the pond concerned, it is quite likely that they did so not 'dishonestly' (vide. Sec.378 IPC) but on a *bona fide* belief that they had a right over the pond. In this context, I may beneficially refer to the decision of the Hon'ble Supreme Court in Chandi Kumar Das Karmakar & Another -Vrs- Abanidhar Roy reported in MANU/SC/0289/1963 : AIR 1965 SC 585].

10. Situated thus, I acquit the accused persons of the charges u/s 379/34 IPC and direct that they be set at liberty forthwith. Their bail-bonds shall stand discharged on expiry of six months from today vide. 437-A CrPC.

Typed & corrected by me and given under my hand and seal of the Court on this 10th Day of the Month of July in the Year 2013.

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Addl. Chief Judicial Magistrate,
Dhubri : Assam