

**(2012) 06 GAU CK 0051**

**Gauhati High Court**

**Case No:** Criminal Revision 759 of 2004

Sri Prafulla Saikia

APPELLANT

Vs

The State of Assam and others

RESPONDENT

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**Date of Decision:** June 5, 2012

**Acts Referred:**

- Assam Panchayat Act, 1994 - Section 127(P)(iv)
- Criminal Procedure Code, 1973 (CrPC) - Section 313, 360
- Penal Code, 1860 (IPC) - Section 378, 380

**Citation:** (2012) CriLJ 3889

**Hon'ble Judges:** Iqbal Ahmed Ansari, J

**Bench:** Single Bench

**Advocate:** T.J. Mahanta, Mr. P.P. Baruah and Ms. P. Bhattacharya, for the Appellant; Z. Kamar, Public Prosecutor, Assam, for the Respondent

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**Judgement**

Hon"ble Mr. Justice, I.A. Ansari

1. By judgment and order, dated 20.12.2003, passed by the learned Judicial Magistrate, 1st Class, Sivasagar, in GR case No. 1120/2001, the accused-petitioner was convicted, u/s 380 IPC, and sentenced to undergo simple imprisonment for 6 (six) months and pay fine of Rs. 500/- and, in default thereof, suffer simple imprisonment for a further period of 1 (one) month. The case of the prosecution, as unfolded at the trial, may, in brief, be described thus: Nareswar Senapati (PW1), a Junior Engineer, Department of E & D, Sivasagar, was entrusted with the responsibility of getting ballot papers printed, in Phukan Printing Press, Sivasagar Town, for election of the Panchayat President, 9 Lalim Chapari Gaon Panchayat, in the year 2001. On 14.12.2001, the accused-petitioner, an employee of the said Printing Press, was caught red-handed by PW2, a Security Guard, posted at the said Printing Press, when he (PW2) noticed the accused-petitioner taking a bundle, with him, which turned to be a bundle of 84 numbers of stolen ballot papers, at the time,

when the accused-petitioner was getting out of the said Printing Press. PW4, another Security Guard, also witnessed the said occurrence. On being informed about the occurrence, Nareswar Senapati (PW1) lodged a First information Report (in short, "FIR"). Based on the said FIR, Sibsagar P.S. Case No. 371/2001 was registered, u/s 380 IPC, against the present accused-petitioner. Police arrived at the place of occurrence, recovered 84 numbers of newly printed blank ballot papers from the accused-petitioner and seized the same, Exhibit 2 being the seizure list in this regard. On completion of investigation, police laid charge-sheet against the accused-petitioner u/s 380 IPC.

2. During trial, the accused-petitioner pleaded not guilty to the charge framed against him u/s 380 IPC.

3. In support of their case, prosecution examined as many as 6 (six) witnesses. The accused-petitioner was, then, examined u/s 313 CrPC, wherein he denied to have committed the offence, which was alleged to have been committed by him, the case of the defence being that of denial. No evidence was, however, adduced by the defence. At the end of the trial, the learned trial Court, having found the accused-petitioner guilty of the offence charged with, convicted him accordingly and passed sentence against him as mentioned above.

4. Aggrieved by his conviction and the sentence, passed against him, the accused petitioner preferred an appeal, which gave rise to Criminal Appeal 31(4) of 2003. By judgment and order, dated 08.10.2004, as the learned Sessions Judge, Sivasagar, has dismissed the appeal, the accused-petitioner is, now, before this Court with the present revision.

5. I have heard Mr. T. J. Mahanta, learned counsel for the accused-petitioner, and Mr. Z. Kamar, learned Public Prosecutor, Assam.

6. While considering the present revision, it needs to be noted that the evidence, adduced by the prosecution, is such as would leave no room for doubt that the accused-petitioner was an employee in the said printing press, where ballots papers were being printed, and that the accused-petitioner was found by the security guards, posted at the gate of the said printing press, in possession of a bundle of 84 stolen postal ballot papers.

7. As the evidence, against the accused-petitioner, is clinching inasmuch as he was caught red-handed with the ballot papers aforementioned, Mr. T. J. Mahanta, learned counsel for the accused-petitioner, has submitted that the conviction of the accused-petitioner, u/s 380 IPC, is misconceived in law inasmuch as no offence of theft can be said to have been committed by the accused-petitioner "even if he was found to be in possession of the ballot papers? According to Mr. Mahanta, learned counsel, the offence, if any, committed by the accused-petitioner, fell within the ambit of Section 127 (P) (iv) of the Assam Panchayat Act, 1994 (hereinafter referred to as the "Panchayat Act") and not within the meaning of "theft" as defined by

Section 378 IPC. As the accused-petitioner has not been tried for an offence, u/s 127(P)(iv) of the Panchayat Act, his conviction, u/s 380 IPC, is, contends Mr. Mahanta, bad in law and not sustainable.

8. In order to appreciate the correctness of the submissions, made on behalf of the accused-petitioner, it is apposite that one takes note of the provisions of Section 378 IPC, which defines "theft", vis a vis Section 127(P)(iv) of the Panchayat Act, which makes possession of ballot paper an offence and prescribes penalty therefor. Section 378 IPC read as under:

378. 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.

9. The relevant portion of Section 127 (P)(iv) of the Panchayat Act is reproduced below:

127-P (iv) A person shall be guilty of an election offence, if, at the Panchayat Election, he, without the authority, supplies any ballot paper to any person or receives any ballot paper from any person or is in possession of any ballot papers; or....

(Emphasis added)

10. From a bare reading of Section 127 (P)(iv) of the Panchayat Act, it is clear that if a person is found in possession of any ballot paper, without the authority of law, he will be treated to have committed an offence under the Panchayat Act and would be liable for penalty prescribed therefor.

11. The question, however, is: Can a person, who is found in possession of any ballot paper, be tried for having committed "theft? of ballot paper

12. The answer to the question, posed above, is not very far to seek inasmuch as Section 378 IPC, which defines "theft?", has the following ingredients, namely, (i) dishonest intention to take property; (ii) the property must be movable; (iii) it should be taken out of the possession of another person; (iv) it should be taken without the consent of that person; and (v) there must be some moving of the property in order to accomplish the taking of it. To bring home an offence u/s 378 IPC, the prosecution is to prove (a) that there was a movable property; (b) that the said movable property was in the possession of person other than the accused; (c) that the accused took it out or moved it out of the possession of the said person; (d) that the accused did it dishonestly, i.e., with intention to cause wrongful gain to himself or wrongful loss to another; (e) that the accused took the movable property or moved it without the consent of the possessor of the movable property.

13. It is also pertinent to note that in order to sustain conviction u/s 378 IPC, the prosecution shall prove the following ingredients:

(i) an intention to take some movable property;

- (ii) the taking must be dishonest;
- (iii) it must be from the possession of another;
- (iv) without his consent; and
- (v) in pursuance of it the property must be moved.

14. In other words, when a person intends to dishonestly take any movable property out of the possession of any person, without consent of that person, and moves that property in order to such taking, he will be said to have committed theft.

15. It is, therefore, more than abundantly clear that a person can be found in the process of committing theft or he can be found after he has already committed the theft. At any rate, if a person is found in possession of a ballot paper after committing theft of the ballot paper, he can be certainly tried u/s 380 IPC if the theft is committed in a building, which is used for the custody of the property, besides being, of course, liable to prosecution, in the present case, u/s 127(P)(iv) of the Panchayat Act.

16. In the present case, the accused-petitioner was found in possession of 84 numbers of ballot papers. He had already committed the offence of theft no sooner he, with dishonest intent, to take the said ballot papers, out of the possession of the owner of the press, without the consent of the owner of the press, moved the ballot papers in order to such taking.

17. Thus, the offence of theft, as defined by Section 378 IPC, in respect of the said ballot papers, was, in the present case, already complete, when the accused-petitioner was found, according to the clinching and unassailable evidence on record, by the Security Guards at the gate of the said Printing Press, in possession of he said 84 ballot papers. Therefore, merely because of the fact that the accused-petitioner was found in possession of ballot papers, the offence of theft, which had already been committed by the accused person, would not disappear or evaporate. To put it a little differently, when a person is found in possession of ballot paper by means of commission of theft, his prosecution, u/s 380 IPC, is sustainable in law, besides being, of course, liable to be prosecuted, u/s 127(P)(iv) of the Panchayat Act, for having been found in possession of the ballot paper without any authority of law.

18. In the case at hand, therefore, this Court finds no force or substance in the submissions, made on behalf of the accused-petitioner, that since he was found in possession of the ballot papers, he ought not to have been tried for an offence u/s 380 IPC; rather, he could have been, undoubtedly, tried, u/s 127(P) (iv) of the Panchayat Act, too. We must remember, in this regard, that the possession of ballot paper, in the present case, was only an evidence of theft and because of the fact that the accused-petitioner had already completed the commission of the offence of theft of the said 84 ballot papers before he was found in possession thereof, his trial

for offence of theft was not bad in law and he has been convicted, on the basis of the evidence, which are wholly reliable and trustworthy.

19. Mr. Mahanta, learned counsel, also submits that even if the accused-petitioner was found guilty of the offence u/s 380 IPC, he ought to have been given the benefit of Section 360 CrPC. While considering this submission of the learned counsel for the accused-petitioner, this Court is of the view that the offence, which the accused-petitioner has committed, is of a very serious nature and, in a case of this nature, where public interest was hugely involved, it would not have been appropriate to give the accused-petitioner the benefit of Section 360 CrPC or the benefit of the provision of the Probation of Offenders Act, 1958.

20. Considering, however, the fact that the case, against the accused-petitioner, has been pending since December, 2001, this Court is of the view that a sentence of simple imprisonment for a period of 3(three) months with a fine of Rs. 500/- would serve the interest of justice.

21. In the result and for the foregoing reasons, while the conviction of the accused-petitioner, u/s 380 IPC, is not interfered with, his sentence is hereby reduced from simple imprisonment for a period of 6 (six) months to simple imprisonment for 3 (three) months with fine of Rs. 500/- and, in default thereof, to suffer simple imprisonment for 15 (fifteen) days. The period of imprisonment, already undergone by the accused-petitioner, shall be set off against the sentence, which has, now, been passed.

22. With the above modification in the sentence, passed against the accused-petitioner, this Criminal Revision shall stand disposed of. Send back the LCR.