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defendant-appellant being arrayed on the same side as defendants is a matter of no consequence and that the equitable principle embodied in Order XXXIV, rule 9 of the Code of Civil Procedure should apply to the present case also.

For the above reasons we uphold the decision of the lower Court and dismiss the appeal with costs.

The cross-objections are not pressed. They are also dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty

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February, 5

RAM AUTAR AND OTHERS (APPELLANTS) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

Indian Penal Code (Act XLV of 1860), sections 395, 411 and 412—Stolen property produced by accused from a field not belonging to him—No other evidence—Receiving and possessing stolen property, offence of—Evidence of exclusive possession, if essential—Conviction under sections 395, 411 and 412, whether good.

Where in a case of dacoity the only evidence against an accused is that he produced stolen property from under a tree in a certain field not belonging to him, the evidence is not enough to prove his complicity in the commission of the dacoity.

The possession contemplated by sections 411 and 412 of the Indian Penal Code is exclusive possession; otherwise the receiver or the possessor of the stolen property would run the risk of losing the stolen property, if some one else could get hold of it. In the circumstances of the case the accused cannot be said to be in exclusive possession of the stolen property as anybody could have access to the tree in the field where it was buried, and so he could not be convicted under these sections.

Mr. *Matinuddin*, for the appellants.

The Assistant Government Advocate (Mr. *H. K. Ghose*), for the Crown.

*Criminal Appeal No. 676 of 1935, against the order of M. Humayun Mirza, Sessions Judge of Bara Banki, dated the 18th of October, 1935.

NANAVUTTY, J.:—This is an appeal filed by Ram Autar, Mahesh and Machan against the judgment of the learned Sessions Judge of Bara Banki convicting each of them of an offence under section 395 of the Indian Penal Code and sentencing each of them to undergo seven years' rigorous imprisonment. I have heard the learned counsel for the appellants as also the learned Assistant Government Advocate and perused the evidence on the record. The fact of the commission of the dacoity has not been challenged by the learned counsel for the appellants and it has been satisfactorily proved by the evidence on the record. The only question for determination in this appeal is whether the charge of dacoity has been brought home to each of the appellants by reliable evidence on the record.

I will first take up the case of Machan Kurmi. Against him the only evidence on the record, as framed by the learned Sessions Judge, is that he produced a silver ornament known as *tanria* (an armlet) belonging to the complainant's sister-in-law from under a tree in a certain field not belonging to him. There is no other evidence to connect this accused with the commission of the dacoity, and in my opinion this evidence is not enough to prove the complicity of Machan Kurmi in the commission of the dacoity. The dacoity took place on the 26th of May, 1935, and the silver ornament was recovered a month later on the 25th of June, 1935 through the help of Machan Kurmi. The fact that Machan knew where this ornament belonging to the sister-in-law of the complainant had been buried would not go to show that he actually took part in the commission of the dacoity; for aught I know to the contrary he may have seen the actual dacoit or some other person to whom the dacoit had handed over this ornament burying it under a tree in the field. The learned Assistant Government Advocate argued that even if Machan could not be convicted of an offence under section 395 of the Indian Penal Code, he, at any rate,

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might be convicted of the minor offence of receiving or being in possession of the stolen property knowing it to be stolen property and punished either under section 411 of the Indian Penal Code or under section 412 of the Indian Penal Code. The possession contemplated by sections 411 and 412 of the Indian Penal Code is exclusive possession; otherwise the receiver or the possessor of the stolen property would run the risk of losing the stolen property, if some one else could get hold of it. In the circumstances of this case, I am clearly of opinion that Machan cannot be said to be in exclusive possession of the stolen property (*tauria*). Anybody could have access to the tree in the field where it was buried. Although strong suspicion attaches to Machan Kurmi that he either had something to do with the commission of the dacoity or in the disposal of the stolen property obtained by the commission of this dacoity, still the evidence on the record is not legally sufficient to justify his conviction either of an offence under section 395 of the Indian Penal Code or under section 411 or 412 of the Indian Penal Code, and I am therefore compelled to allow his appeal. I accordingly allow his appeal, set aside the conviction and sentence passed upon him, acquit him of the offence charged and order his immediate release.

As regards the appellants Ram Autar and Mahesh, their conviction is based upon the testimony of P. W. 9 Debi Datt complainant, P. W. 11 Mst. Mohana, daughter of the complainant, and P. W. 23 Musammat Manjhalka, wife of the complainant's brother. It is true that all these three prosecution witnesses named four persons. Ram Autar, Mahesh, Mata Prasad and Jagannath. The learned Sessions Judge has acquitted Mata Prasad and Jagannath although a *dhoti* was recovered from the house of these two accused, and it is argued on behalf of the appellants Ram Autar and Mahesh that if the learned Sessions Judge disbelieved the evidence of these

three eye-witnesses as against Mata Prasad and Jagannath, there was no reason for him to have believed the same evidence as against the appellants Ram Autar and Mahesh. In the present appeal, I am not concerned with the question of the correctness or otherwise of the acquittal of Mata Prasad and Jagannath by the learned Sessions Judge. All I am concerned with is to see whether there is sufficient evidence on the record to justify the conviction of the appellants Ram Autar and Mahesh. The names of Mahesh and Ram Autar have been mentioned in the first information report. The fact that there is some enmity between Mahesh and Debi Datt complainant will not go to discredit the testimony of the complainant Debi Datt. I see no reason to disbelieve the evidence of Musammat Mohna, the daughter of the complainant Debi Datt who has deposed that she recognised the appellants Mahesh and Ram Autar when they were catching hold of her and snatching away her ornaments. Musammat Manjhalka has also deposed that she knew Ram Autar and Mahesh even from before the occurrence, that she recognised them at the time of the dacoity and that Ram Autar and Mahesh had actually snatched the ornaments from her person. The evidence of these two witnesses has also not been shaken in cross-examination. I am therefore of opinion that the conviction of these two appellants is amply justified by the evidence on the record. I would therefore uphold the conviction and sentence passed upon each of the appellants.

Nanavutty, J.

The result therefore is that while I allow the appeal of Machan Kurmi, set aside his conviction and sentence and order his immediate release, I dismiss the appeal of Ram Autar and Mahesh and uphold the convictions and sentences passed upon them.

Appeals dismissed.