

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL REVISIONAL JURISDICTION)

Present:

Mr. Justice M. Enayetur Rahim

And

Mr. Justice J.B.M. Hassan

Criminal Revision No. 101 of 2017.

Begum Khaleda Zia

....Accused-petitioner

-Versus-

The State and another.

..... Opposite parties

Mr. A. J. Mohammad Ali with

Mr. Md. Badruddozza with

Mr. Ragib Rouf Chowdhury with

Mr. Md. Zakir Hossain Bhuiyan, Advocates

..... For the petitioner

Mr. Md. Khurshid Alam Khan, Advocate

. For the opposite party No.2

The 14th December, 2016 and 12th January, 2017

This revisional application, under section 10(1A) of the Criminal Law Amendment Act, 1958, has been filed at the instance of the accused petitioner, Begum Khaleda Zia challenging the order dated 01.12.2016 passed by the learned Special Judge, Special Judge Court No.3, Dhaka in Special Case No. 05 of 2013 (previous No. Metro Special Case No. 30 of 2012) arising out of ACC G.R. No. 84

of 2011 corresponding to Tejgaon Police Station Case No. 15 dated 08.08.2011 under section 5(2) of the Prevention of Corruption Act, 1947 read with section 109 of the Penal Code rejecting an application filed by the petitioner for taking evidence of the witnesses afresh.

One Mr. Harunur Rashid, Deputy Assistant Director (Special Onu: O Tadanta-1), Durnity Daman Commission, Dhaka as informant lodged a First Information Report (FIR) with the Tejgaon Police Station against the accused petitioner and others alleging, *inter alia*, that the accused petitioner and others collusively and illegally collected Tk.3,15,43,000/- on several accounts in the name of Shahid Ziaur Rahman Charitable Trust and misappropriated the same. Accordingly, Tejgaon Police Station Case No. 15 dated 08.08.2011 was initiated under section 5(2) of the Prevention of Corruption Act, 1947 and read with section 109 of the Penal Code. After investigation charge sheet was submitted against the petitioner and others. Thereafter the case was transferred for trial before the learned Special Judge, Special Judge Court No.3, Dhaka who after framing charge examined as many as 32 witnesses and the case was fixed for examination of accused under section 342 of the Code of Criminal procedure (the Code).

At this stage, the accused petitioner filed an application on 01.12.2016 praying for taking evidence of witness afresh on the ground that the witnesses did not take oath in compliance with rules 686 and 687 of the Criminal Rules and Orders (Practice and Procedure of Sub-ordinate Courts), 2009, hereinafter referred to as Rules, 2009. After hearing, the said application has been rejected by the impugned order dated 01.12.2016 and hence the revisional application.

Mr. A. J. Mohammad Ali, the learned Advocate with Mr. Md. Badruddozza, Mr. Ragib Rouf Chowdhury and Mr. Md. Zakir Hossain Bhuiyan, the learned Advocates appearing for the petitioner submits that P.W. 32 as well as other prosecution witnesses (P.Ws) having not been examined in compliance with the rule 686 of the Rules, 2009, the entire evidence of the prosecution witnesses have become inadmissible. But the learned Judge on misconception of law failed to appreciate the legal issue in passing the impugned order and hence it is liable to be set aside. He further submits that the findings of the Court below as reflected in the impugned order that the customary oath in the name of God has extinct for many years, is baseless and contrary to the requirement of Rules, 2009. In support

of his submissions Mr. Ali relies on the case of Queen-Empress Vs. Maru and another reported in 10 ILR (1888) All page 207.

In reply, Mr. Md. Khurshid Alam Khan, the learned Advocate appearing for the Durnity Daman Commission (shortly, the Commission) contends that section 6 of the Oaths Act, 1873 (the Act, 1873) incorporates provisions for making affirmation instead of an oath and therefore, the words uttered by the witnesses being the contents of affirmation, there is no violation of law in examining the witness. Drawing our attention to section 13 of the Act, 1873, Mr. Khan further submits that evidence will not be inadmissible even for the omission to take oath or affirmation and as such, the learned Judge passed the impugned order in accordance with law. He also submits that the prosecution examined 31 witnesses during last 03(three) years while the petitioner neither objected nor raised this point. During cross examination of P.W32, the last prosecution witness and thereafter on conclusion of evidence, while the case is fixed for examination of accused under section 342 of the Code, at this fag end of the case, the petitioner has filed this malafide application in order to drag the trial.

We have gone through the revisional application along with the annexures as well as the provisions of law and the cited case.

It appears that section 4 of the Oaths Act, 1873 authorizes the Courts for administering oath to receive evidence. Section 5 of the said act provides that oaths or affirmations shall be made by all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court.

Section 7 of the Act, 1873 incorporates that all oaths and affirmations made under section 5 of the said act shall be administered according to such forms as the Supreme Court may from time to time prescribe. In this regard Rule 686 of the Rules, 2009 runs as follows:

“Rule 686. (1) The following Forms of oaths and affirmations are prescribed by the High Court Division under section 7, Act X of 1873:-

(1) Oath for witnesses

I swear that the evidence which I shall give in this case shall be true, that I will conceal nothing, and that no part of my evidence shall be false. So help me God.

(2) Affirmation for witness

I solemnly declare that the evidence which I shall give in this case shall be true, that I will conceal nothing and that no part of my evidence shall be false.

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From the materials on record and the application as well as the impugned order, it appears that the Court below read out the following words to the witnesses:

“আমি শপথ পূর্বক বলিতেছি যে, এই মামলায় যাহা সাক্ষ্য প্রদান করিব তাহা সম্পূর্ণ সত্য হইবে। কোন সত্য গোপন করিব না বা কোন মিথ্যা সাক্ষ্য প্রদান করিব না।”

English translation of aforesaid words are “I solemnly declare that the evidence which I shall give in this case shall be true, that I will conceal nothing and that no part of my evidence shall be false.” On plain reading of the aforesaid words, it is apparent that the Court below did not administer the oath to the witness by reading out the prescribed contents of the Oath for witness as provided in rule 686 of the Rules, 2009 and that the said words attract the prescribed contents of affirmation for witnesses incorporated in the said rule 686.

In view of aforesaid scenario question arises as to whether the depositions of witnesses recorded so far, would become inadmissible due to non- administration of oath in accordance with the contents provided in rule 686 of the Rules, 2009. In this regard, to appreciate

the submissions of Mr. Khan, we have scanned the section 13 of the Act, 1873 which runs as follows:

“No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth. ”

It appears from the aforesaid provisions that due to omission in taking any oath or making any affirmation the evidence recorded so far shall not be inadmissible. Therefore, in view of immunity given by section 13 of the Act, 1873, the evidence recorded so far by way of examination of witnesses shall not be rendered as inadmissible evidence due to non-administration of oath in accordance with the contents of rule 686 of the Rules, 2009. Regard to the above, we do not find any illegality in the impugned order refusing to take fresh evidence.

Further, it is the admitted position that all the 32(thirty two) prosecution witnesses were cross-examined at length on behalf of the

accused petitioner and therefore we do not feel that the accused petitioner would be prejudiced in any manner in this regard.

Having regard to the above, the revisional application is summarily rejected.

However, since it has been pointed out that the Courts below are not administering oaths in accordance with the contents provided in rules 686 and 687 of the Rules, 2009, the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Dhaka and the Registrar General, Supreme Court of Bangladesh shall ensure as to compliance of rules 686 and 687 of the Rules, 2009 in examining the witnesses in the criminal proceedings by the Court below.

Let a copy of this order be communicated to the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Dhaka, the Registrar General, Supreme Court of Bangladesh and the Court below at once.