

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 8303 of 2020

Md. Dulal Hawlader

...Appellant

-Versus-

The State and another

...Respondents

Mr. Md. Mamunor Rashid, Advocate

...For the appellant

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan, A.A.G

...For the State

Mr. ASM Kamal Amroohi Chowdhury, Advocate

...For the Respondent No. 2,

Anti-Corruption Commission

Heard on 20.02.2024, 03.03.2024 and 22.04.2024

**Judgment delivered on 28.04.2024**

This appeal under Section 10 of the Criminal Law Amendment Act, 1958 is directed challenging the legality and propriety of the impugned judgment and order of conviction and sentence dated 11.03.2020 passed by Divisional Special Judge, Barishal in Special Case No. 3 of 2013 convicting the appellant under Section 409 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947 and sentencing him thereunder to suffer rigorous imprisonment for 7(seven) years and fine of Tk. 1,00,000(one lakh), in default, to suffer rigorous imprisonment for 1(one) year.

The prosecution case, in short, is that the accused Md. Dulal Hawlader is the project chairman of the project namely “মাদারকাঠী দক্ষিণ প্রান্ত শান্তি দেউরী বাড়ির ইছানী খাল হতে মাদারকাঠী সুভাষ বসুর বাড়ির সীমানা পর্যন্ত রাস্তা পুনঃনির্মাণ প্রকল্প” under No. 5 Soliabakpur Union Parishad, Banaripara, Barishal for 1999-2000 under food for work programme and total 25 metric tons of wheat was allotted by the L.G.D. As Chairman of the said project, the accused had withdrawn 10 metric tons of wheat on 12.05.2000, but he did not submit the muster roll. The Supervising Officer, Sub-Assistant Engineer Md. Delwar Hossain, in the presence

of the Project Chairman, accused Md. Dulal Hawlader, took the final measurement of the project on 09.07.2000 and found that the project committee completed the work for 4.002 metric tons of wheat and misappropriated total 5.998 metric tons of wheat valued at Tk. 62,034/01. The value of per metric ton of wheat was 10,342.45 at the relevant time and thereby he committed offence under Section 409 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947.

The Assistant Inspector Md. Altaf Hossain of the Bureau of Anti-Corruption initially took up the investigation of the case and during investigation the Bureau of Anti-Corruption was abolished. After the formation of the Anti-Corruption Commission, Assistant Director P.W. 6 Md. Bahadur Alam was appointed as Investigating Officer. He recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and after completing investigation, he found that the accused misappropriated total 5.998 metric tons of wheat valued at Tk. 62,034/01 and obtained sanction on 27.03.2013 for submitting charge sheet and accordingly, he submitted the charge sheet on 03.04.2013 against the accused under Section 409 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947.

After that, the learned Magistrate sent the case record on 08.05.2013 to the Senior Special Judge, Barishal and the case was registered as Special Case No. 3 of 2013 and the Senior Special Judge, Barishal took cognizance of the offence against the accused on 11.06.2013 under Section 409 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947 and thereafter, the case was transferred to the Divisional Special Judge, Barishal. On 29.06.2015, the charge was framed against the accused under Section 409 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947 which was read over and explained to the accused present in Court and he pleaded not guilty to the charge and

claimed to be tried following the law. The prosecution examined 6(six) witnesses to prove the charge against the accused. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he declined to adduce any D.W. After concluding the trial, the trial Court by impugned judgment and order convicted the accused and sentenced him as stated above against which the accused Md. Dulal Hawlader filed the instant appeal.

P.W. 1 Md. Altaf Hossain is the Sub-Assistant Director, ACC, Head office. He is the informant. He stated that earlier he was posted at the Bureau of Anti-Corruption in 2002. The accused Md. Dulal Hawlader was the elected Member of No. 5 Salia Bakpur Union Parishad and he was the project chairman of the project namely মাদারকাঠী দক্ষিণ প্রান্ত শান্তি দেউড়ি বাড়ির ইছানী খাল হইতে মাদারকাঠী সুভাষ বসুর বাড়ীর সীমানা পর্যন্ত রাস্তা পুনঃ নির্মাণ প্রকল্প under food for work programme in 1999-2000. Total 25 metric tons of wheat was allotted and the accused misappropriated total 5.998 metric tons of wheat for which an allegation was made against the accused. The complaint was registered as E/R No. 32 of 2002 in the Register of Bureau of Anti-Corruption, Barishal. The accused Md. Dulal Hawlader as Chairman of the said project had withdrawn 10 metric tons of wheat on 12.05.2000 but he did not submit the muster roll after completing the work for which the Project Implementation Officer Md. Delwar Hossain measured the project on 09.7.2000 in the presence of the accused Md. Dulal Hawlader. During the final measurement, Md. Delwar Hossain found that the project committee completed the work for total 4.002 metric tons of wheat and he misappropriated 5.998 metric tons of wheat valued at Tk. 62,034.01 and thereby he committed offence under Section 409 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947. He lodged the FIR with Banaripara Thana on 31.08.2002. He proved the FIR as exhibit 1 and his signature as exhibit 1/1. On recall by the prosecution, he stated that during the

investigation, the accused admitted the occurrence and submitted a written statement which is kept with the C.D. and has been mentioned in the charge sheet. The seized document was handed over on 19.02.2009 to Md. Abdula Al-Mamun, Court Assistant, Anti-Corruption Commission, Barishal. Now he is posted in the Law Section as an ASI (Court Assistant). The defence declined to cross-examine P.W. 1.

P.W. 2 Md. Abdul Jabber is a Computer Operator (retired). He stated that on 06.07.2002, he was the Clerk-Cum-Typist of the LGED, Banaripara Upazilla. On that day at 3.30 pm, the note sheet and the records of the reconstruction project total 1-63 pages were seized from him. He proved the seizure list as exhibit 2 and his signature as exhibit 2/1. The defence declined to cross-examine P.W. 2.

P.W. 3 Abdus Sadik is the Officer-in-Charge, LSD, Banaripara. He stated that the occurrence took place in 2000 and the accused Dulal Hawlader was the Member and Chairman of the project committee. On 11.05.2007, the accused withdrew 10 metric tons of wheat based on DO No. 3975172. During cross-examination, he stated that no document was produced before him. It is a fact that the DO letter is not available in Court.

P.W. 4 Md. Delwar Hossain is the Sub-Assistant Engineer of Banaripara Thana. He stated that the accused was the Chairman of the Project namely মাদারকাঠী দক্ষিণ প্রান্ত শান্তি দেউরী বাড়ির ইছানী খাল থেকে মাদারকাঠী সুভাষ বসুর বাড়ীর উত্তর সীমানা পর্যন্ত রাস্তা পুনঃ নির্মাণ প্রকল্প। Total 25 metric tons of wheat was allotted and the accused had withdrawn total 10 metric tons of wheat but he did not complete the work for which a letter was issued upon the accused to complete the project but he did not complete the work. After the expiry of the project period, he and others measured the project and found that total work of 4.002 metric tons of wheat was done and the accused misappropriated 5.998 metric tons of wheat. The concerned office requested the accused to complete the work or to return the value of the wheat but he did not take any steps or he did not

return the wheat. During cross-examination, he stated that there is no measurement sheet in Court. He could not say when the accused took the delivery of the wheat. The accused took the delivery of 10 metric tons of wheat. He denied the suggestion that he deposed as he wished.

P.W. 5 Hemayet Uddin Khan is the Upazilla Engineer. He stated that from 1999-2000 the accused was the project chairman of the project namely মাদারকাঠী দক্ষিণ প্রান্ত শান্তির দেউরীর বাড়ির দক্ষিণ পার্শ্বের ইছানী খাল থেকে মাদারকাঠী সুভাষ বসুর বাড়ীর সীমানা পর্যন্ত রাস্তা পুনঃ নির্মাণ প্রকল্প and total 25 metric tons of wheat was allotted for the project. At that time, he was the Upazilla Engineer, Banaripara. Total 10 metric tons of wheat were withdrawn by the project chairman accused Dulal Hawlader. He completed the work for 4.002 metric tons of wheat and misappropriated total 5.998 metric tons of wheat. On 09.07.2002, they took the measurement. On 12.05.2000 the accused had withdrawn 10 metric tons of wheat. During measurement, he found the work for 1387.82 cubic meters of soil. Before starting the work, he took the measurements. He denied the suggestion that the measurement was not correctly taken.

P.W. 6 Md. Bahadur Alam is the Assistant Commissioner (Tax). From 23.10.2011-January, 2015 he discharged his duty as Assistant Director, Anti-Corruption Commission, Combined Office, Barishal. On 24.05.2012 he was appointed as Investigating Officer. Earlier Md. Altaf Hossain, Assistant Inspector of the Bureau of Anti-Corruption partly investigated the case. On 27.03.2013 he obtained sanction for submitting charge sheet. On 03.04.2013 he submitted charge sheet under Section 409 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947. The previous Investigating Officer completed the investigation. He (P.W. 6) did not investigate the case. In the charge sheet submitted by him, nothing is stated as regards the alamat. He had no personal knowledge about the occurrence.

Learned Advocate Mr. Md. Mamunor Rashid appearing on behalf of the appellant submits that the Project Implementation Officer is the supervisor of the project and after completing the reconstruction of the road, the muster roll for the work was submitted to the Project Implementation Officer. The prosecution neither cited the Project Implementation Officer as a witness in the charge sheet nor examined him as a witness in the case. He further submits that before starting the project and after completing the project, the measurement was taken twice but the prosecution did not prove any measurement book to show that the project committee did not complete the work for 10 metric tons of wheat. The prosecution failed to prove the charge against the accused beyond all reasonable doubt and the trial Court without proper assessment of the evidence illegally convicted the accused. In support of his submission, the learned Advocate cited a decision made in the case of Abdul Motaleb Mia Vs. State reported in 6 BLC 5. He prayed for allowing the appeal.

Learned Advocate Mr. ASM Kamal Amroohi Chowdhury appearing on behalf of respondent No. 2, Anti-Corruption Commission, submits that admittedly the accused Md. Dulal Hawlader as Chairman of the project committee withdrew 10 metric tons of wheat but he did not submit the muster roll of the project. During measurement on 09.07.2000, P.Ws. 4 and 5 found that the accused only completed the work for 4.002 metric tons of wheat and misappropriated 5.998 metric tons of wheat valued at Tk. 62,034.01. He further submits that since the accused had withdrawn 10 metric tons of wheat, he is bound to prove that he completed the work and submitted the muster roll. The prosecution witnesses proved the charge against the accused beyond all reasonable doubt. Therefore, he prayed for the dismissal of the appeal.

I have considered the submissions of the learned Advocates who appeared on behalf of both parties, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the records, it appears that the accused Md. Dulal Hawlader is the project chairman of the project namely “মাদারকাঠী দক্ষিণ প্রান্ত শান্তি দেউরী বাড়ির ইছানী খাল হতে মাদারকাঠী সুভাষ বসুর বাড়ির সীমানা পর্যন্ত রাস্তা পুনঃ নির্মাণ প্রকল্প” under food for work programme 1999-2000. The prosecution case is that the accused Md. Dulal Hawlader as chairman of the said project had withdrawn 10 metric tons of wheat but he did not submit the muster roll. The defence case is that the muster roll was submitted to the Project Implementation Officer but he was not examined in the case.

On perusal of the evidence of the prosecution witnesses, it appears that P.W. 4 Md. Delwar Hossain is the Sub-Assistant Engineer and P.W. 5 Hemayet Uddin Khan is the Upazilla Engineer, LGED, Banaripara and they took the pre-measurement and post-measurement of the project. During cross-examination, P.W. 4 affirmed that the measurement sheet was not produced before the Court. The prosecution neither proved the pre-measurement sheet nor proved the post-measurement sheet of the project taken by P.Ws. 4 and 5. In each Upazilla, Project Implementation Officer is assigned to implement the project. A Project Implementation Officer deals with the project and all the documents relating to a project are lying with the Project Implementation Officer but the prosecution neither cited the Project Implementation Officer as a witness in the charge sheet nor he was examined in the case. It is only the Project Implementation Officer who is competent to say whether the muster roll was submitted or not. Except the Project Implementation Officer, no one is competent to depose as regards the submission of the muster roll by the project committee.

At this stage, it is relevant here to rely on the decision made in the Case of Abdul Motaleb Mia Vs. State reported in 6 BLC 5 wherein a Division Bench of this Court has held that

“In all 130.661 metric tons of wheat were allotted in four instalments for construction and

re-construction of a road and the project implementation officer, PW 8 was in charge of supervision of the said project but he failed to state as to when he visited the project in question nor has he come in Court with any measurement book showing pre-measurement and post-measurement of the said project and hence the prosecution has hopelessly failed to prove about the alleged work done by the accused persons and the alleged misappropriation of the wheat in question is also not proved and as such there is no scope to hold that the appellants are guilty for the alleged offence”

In the absence of the pre-measurement book and the post-measurement book, it cannot be held that the project committee did not complete the work for the wheat withdrawn by the project committee. Furthermore, the Project Implementation Officer was not examined in the case. Although P.W. 1 stated that P.W. 4 Sub-Assistant Engineer Md. Delwar Hossain is the Supervising Officer of the project but P.W. 4 did not say that he was the Supervising Officer of the project. P.W. 4 stated that he measured the project.

In view of the above evidence, facts and circumstances of the case, findings, observation and the proposition, I am of the view that the prosecution failed to prove the charge against the accused Md. Dulal Hawlader beyond all reasonable doubt.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order passed by the trial Court against the accused Md. Dulal Hawlader is hereby set aside.

Send down the lower Court's records at once.