

Present:

Mr. Justice Borhanuddin

and

Mr. Justice Md. Ruhul Quddus

Criminal Appeal No. 211 of 2004

Giash Uddin.

...Appellant

-Versus-

Md. Titon Mia and others

...Respondent

Mr. J. K. Paul, Advocate

... for the Appellant

Mr. Shah Abdul Hatem, A.A.G.

.... for the State-Respondent

No one appears for Respondent Nos.1-3

Judgment on 9.3.2011

Md. Ruhul Quddus, J.

This appeal under section 24(2) of the Jana Nirapatta (Bishesh Bidhan) Ain, 2000 is directed against judgment and order of acquittal dated 30.11.2003 passed by the Jana Nirapatta Bighnakari Aparadh Daman Tribunal, Sylhet in Jana Nirapatta Case No. 3 of 2002.

Prosecution case, in short, is that the informant Gias Uddin (herein appellant) had been working as a *Labour Sarder* in Manzil Major Flour Mills, Sylhet. Under instruction of the Mills authority, he

had deposited Taka 52,300/= (fifty-two thousand three hundred) only in Agrani Bank, Kuchai Branch at 9.15 hours on 23.10.2001. He was further instructed to deposit Taka 1,26,800/- (one lac twenty-six thousand eight hundred) only in the bank. Accordingly he was going to the bank at about 11 hours, keeping the said amount of money in a navy-blue coloured bag. He reached in front of BSIC office, when respondent No.1 Md. Titon Mia and others appeared in his front by a Motorcycle and snatched away the money showing him pistol and knife. The witnesses namely Sebul Mia, Ashik Mia and Nazir Mia saw the occurrence. He had gone back to the Mills, reported the occurrence to the Manager and others, received necessary instruction from the Mills authority and thereafter lodged the *ejahar* with Kotwali police station, Sylhet at about 21.50 hours. Because of taking necessary instruction from the Mills authority, there was a delay in lodging the *ejahar*.

The said *ejahar* gave rise to Kotwali Police Station Case No.66 dated 23.10.2001. The police, after investigation submitted charge sheet on 7.12.2001 under section 4 of the Jana Nirapatta (Bishesh Bidhan) Ain, 2000 (hereinafter referred to "the Ain") against the said Titon Mia and two others. In the said charge sheet, the age of accused Titon Mia was not mentioned. Meanwhile the Proprietor of Monzil Major Flour Mills, Kazi Mainul Hossain (P.W.10) had apprehended accused Titon Mia from his uncle's house in Sylhet and handed him over to the police on 12.11.2001. He was kept in police custody for a

day, and on the following day, made a confessional statement before the Magistrate of First class, Sylhet.

The case after being ready for trial, was sent to Jana Nirapatta Bighnakari Aporadh Damon Tribunal, Sylhet, wherein it was numbered as Jana Nirapatta Case No.3 of 2002. The learned Judge of the Tribunal framed charge under section 4 of the Ain against the accused by his order dated 12.2.2002, to whom they pleaded not guilty and claimed to be tried.

In course of trial, the prosecution examined fifteen witnesses. Out of them, thirteen were named in the charge sheet and two were examined on an application filed by the prosecution. After closing the prosecution, the learned Judge of the Tribunal had examined the accused under section 342 of the Code of Criminal Procedure. In response thereto, the accused Titon Mia (respondent No.1) made statement that because of land dispute between the Proprietor of the Flour Mills and his father, he was falsely implicated in the case. The police inhumanly tortured him in custody and he did not willingly make the statement under section 164 of the Code.

After conclusion of trial, the learned Judge found that the prosecution had failed to prove its case and accordingly, pronounced his judgment and order of acquittal on 30.11.2003. The informant filed the instant criminal appeal against the said judgment and order of acquittal.

Mr. J. K. Paul, learned Advocate appearing for the informant-appellant submits that the confessional statement made by the accused Titon Mia has been corroborated by P.Ws.1-5, who are eye-witnesses to the occurrence. The other witnesses have also proved the circumstances leading to the inference of guilt against the acquitted respondents. But the learned Judge of the Tribunal without considering the evidence in proper perspective passed the impugned judgment and order of acquittal and thereby committed gross illegality. He further submits that considering the law and order situation prevailing in the Country, the Court should not take a lenient view over such an occurrence.

On the other hand, Mr. Shah Abdul Hatem, the learned Assistant Attorney General appearing for the State, submits that the depositions of the prosecution witnesses are contradictory over the time, place and manner of occurrence, which casts a shadow of doubt over the prosecution case.

We have carefully examined the evidence and other materials on records. P.W.1 Giash Uddin, the informant and *Labour Sarder* of Manzil Major Flour Mills, supported the prosecution case in his examination-in-chief and stated that he was not allowed to cry at the time of occurrence. He raised hue and cry after the muggers had fled away, when the witnesses namely, Nazir Mia (P.W.5), Manik Mia (P.W.3), Satter Mia (P.6) Makbul Member (P.W.9) and Mallika Begum

(P.W.2) rushed to the place of occurrence and he reported the occurrence to them. In cross-examination he stated that it was not his duty to deposit money in the bank. The accused were not identified in any T.I. Parade, but were unofficially identified by the police. P.W.2 Mallika Begum, an eye witness, stated that she saw the occurrence, while washing cloths in a near-by pond. She admitted that her son-in-law Manik Mia (P.W.3) had enmity with the family of Titon Mia. P.W.3 Manik Mia, a taxi driver and son-in-law of P.W.2, stated that he saw the occurrence while taking bath in the said pond. In cross-examination, he admitted his enmity with the family of Titon Mia. He also stated that he used to go out from his house in the morning and come back at about 10/11 p.m. P.W.4, A. Shahid, a Sub-Inspector of Police, stated that on the date of occurrence he was on duty at the police station. He had filled up the form of FIR and recorded the *ejahar*. P.W. 5 Nazir Mia, an eye witness, stated that on hearing the hue and cry, he had come out from his tea-stall, rushed to the place of occurrence and saw that the muggers were snatching the bag. In cross-examination, he stated that none of them was present in the place of occurrence. P.W.6 Abdus Sattar, owner of a near-by shop, stated that he had rushed to the place of occurrence on hearing the hue and cry, and the informant reported him the occurrence. P.W.7 Riaz Uddin, an Assistant Manager of the Flour Mills and a circumstantial witness, stated in cross-examination that the deposit book was a new one, which was snatched away with the money. He

further stated that the seizure list was prepared after two months of the alleged occurrence and there was over writing on the seizure list. P.W. 8 Md. Zamirul Haque, Manager of the Flour Mills and a seizure list witness, stated in cross-examination that on the date of occurrence (23.10.2001) the Assistant Manager, Riaz Uddin (P.W.7) had recorded deposition of Taka 52,383/= in the account register, but there was no entry against the amount of Taka 1,26,850/=, which was to be deposited afterwards. He further admitted that on the date of occurrence he himself deposited Taka 7,000/=. P.W.9 Makbul Hossain, a former Member of Union Parishad, stated that on the date of occurrence he was having tea sitting at the tea-stall of Nazir Mia (P.W.5), when a Motorcycle passed through the front side of the tea-stall. On hearing the hue and cry, he had rushed to the place of occurrence, and the informant reported him the occurrence. P.W.10 Kazi Mainul Hossain, Proprietor of the Flour Mills, stated in cross-examination that the investigating officer did not meet him during investigation, and that the register of account was not supplied to the investigating officer. He further stated that Abdul Karim (father of Titon Mia) owned 32 decimals of land in plot Nos.126 and 107, adjacent to the Mills. P.W. 11 Utpal Kumar Shaha, an employee of Manzil Foods and an eye witness, stated that he saw the muggers fleeing away by a Motorcycle after commission of the occurrence. In cross-examination he stated that he was present in the tea-stall of Nazir Mia (P.W.5). P.W.12 Ismail Majumder, a Sub-Inspector of Police, stated that he had

inquired the address and identity of accused Zakir. He further stated that he found accused Zakir, a person of good moral. P.W.13 Md. Mahbub Hossain, the Magistrate of First class, stated that he had recorded the statement of accused Titon Mia under section 164 of the Code of Criminal Procedure. In cross-examination, he admitted that he did not ask the accused as to why he was confessing his guilt, or whether the police had tortured him in custody, and that he did not record anything in the prescribed form whether he physically examined the accused. P.W.14 Abdul Bari, a Sub-Inspector of police, stated that he had inquired the identity of Nurul Islam Lucky. P.W.15 Abdul Awal, the investigating officer, stated that during investigation he had visited the place of occurrence, recorded the statement of the witnesses under section 161 of the Code, prepared the index, sketch map and seized the *alamats*. He admitted in cross-examination that he did not find anything adverse about Titon Mia's activities.

The records show that the occurrence took place at 11 hours on 23.10.2001, but the *ejahar* was logged with the police station at 21.50 hours i.e. after ten and half hours, but any satisfactory explanation of such delay was neither given in the *ejahar* nor in deposition of the informant. In the confessional statement, accused Titon Mia claimed himself a student of class VIII, but his age was not determined to ascertain whether the Tribunal had jurisdiction to try the case against a juvenile offender. Names of three witnesses including Nazir Mia (P.W.5) were cited in the *ejahar*. Out of them, two were not examined,

and the other namely Nazir Mia (P.W.5) admitted in cross-examination that he was not present at the place of occurrence. The names of P.Ws.2-3, 6 and 9 were not cited as witnesses in the *ejahar*, but the informant, in his deposition, mentioned their names as eye-witnesses, which appears to be a subsequent embellishment. Out of the said "eye-witnesses" P.Ws.2-3 admitted their enmity with the family of accused Titon Mia. They did not corroborate P.W.1 that they rushed to the place of occurrence on hearing the hue and cry. P.W.1, the informant Giash Uddin stated that he was not allowed to cry at the time of occurrence and he raised hue and cry after the muggers had fled away. P.W.5 Nazir Mia stated that he rushed to the place of occurrence on hearing hue and cry. So it can be presumed that P.W.5 did not see the occurrence, as he rushed to the place of occurrence on hearing the hue and cry. P.Ws.6 and 9 did not state anything in their depositions that they had seen the occurrence. The informant (P.W.1) admitted that the accused persons were not identified by any T.I. Parade, but the police identified them unofficially. P.W.8 admitted in cross-examination that on the date of occurrence he himself deposited Taka 7,000/= and deposition of Taka 52, 283/= was recorded by Assistant Manager Riaz Uddin in the register of account, but no entry against deposition of Taka 1,26,850/= was made therein. He also failed to show any document as to the payment of Taka 1,26,850/= in favour of the Mills by its clients. In such a position it is difficult to

believe that the informant was going to the bank with the money to deposit the same.

In the statement made under section 342 of the Code of the Criminal Procedure, respondent No.1 reiterated his innocence and asserted that because of land dispute between the Proprietor of the Flour Mills and his father, he was falsely implicated in the case. The police inhumanly tortured him in custody and he was compelled to make the statement under section 164 of the Code.

It appears from the impugned judgment that the learned Judge of the Tribunal discussed each and every piece of evidence and arrived at his findings that the prosecution failed to prove that the accused (respondent Nos.1-3) had snatched the money from the informant showing him pistol and knife on 23.10.2001 at about 11 hours.

An appeal against acquittal may be entertained when the impugned judgment is perverse, or so unreasonable that its maintenance would amount to miscarriage of justice, and it can be allowed only in exceptional circumstances, when the inference of guilt is irresistible. But in the present case, as discussed above, the depositions of the prosecution witnesses are contradictory, some of them were having enmity with the family members of the principal accused Titon Mia and some of them were not trustworthy. The Proprietor of the Flour Mills (P.W.10), who appears to be an influential and reach man, had an eye over the land of his (Titon Mia's) father.

The confessional statements was not recorded following the procedure strictly, and there was a strong possibility of extraction of confession by custodial torture. The arrest of accused Titon Mia by a private person without any resistance from him, does not suggest that he (Titon Mia) was an arms holder-mugger. The charge sheet shows their (respondent Nos.1-3's) previous record to be clean. The above facts and circumstances do not lead us to draw any inference of guilt against the accused. We have also noticed that the age of accused Titon Mia was not determined to ascertain whether the Tribunal had jurisdiction to try the case. Therefore, we are not inclined to interfere with the impugned judgment and order of acquittal. Since respondent Nos.1-3 are already acquitted and we are not inclined to interfere with the judgment, determination of his (Titon Mia's) age is not necessary at this stage.

In view of the above, we do not find any merit in the appeal. Accordingly, the appeal is dismissed. The judgment and order of acquittal dated 30.11.2003 passed by the Jana Nirapatta Bighnakari Aparadh Daman Tribunal, Sylhet in Jana Nirapatta Case No. 3 of 2002 is hereby upheld.

Send down the lower Court records.

Borhanuddin, J:

I agree.