

**11 SCOB [2019] HCD 79****HIGH COURT DIVISION**

Criminal Appeal No. 3862 of 1991

**Md. Abdul Kader @ Abdul Kader and another**

..... Appellants.

**Vs.****The State**

..... Respondent.

For the Appellants Mr. Cumar Debul Dey, Advocate

For the State Mr. Titus Hillol Rema, A.A.G with  
Ms. Mahmuda Perveen, A.A.G

Date of Judgment 21.03.2018

**Present:****Mr. Justice Quazi Reza-Ul Hoque, J.**

**It appears that none of the three local witnesses were eye witnesses rather they were asked to sign as witness, which is absolutely derogatory to the norms of law and the BDR and the local police for inflicting penalty upon the accused petitioners resorted to such activity which is seriously deplorable.** ... (Para-15)

**Every citizen has a right to free movement within Bangladesh and to do any business or profession subject to restriction imposed by law.** ... (Para-19)

**JUDGMENT****Mr. Quazi Reza-Ul Hoque, J:**

1. The instant appeal was admitted for hearing on 22.04.1987 and by the same order the realization of fine was stayed.

2. The instant appeal was preferred by the convicted-appellants against the judgment and order dated 30.03.1987 passed by the Special Tribunal, Jessore in Special Tribunal Case No. 78 of 1986 convicting and sentencing the accused appellants to suffer rigorous imprisonment for 05(five) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer rigorous imprisonment for 01(one) year more under section 25B(b) of the Special Powers Act, 1974.

3. The facts necessary for disposal of the appeal, in short, is that on 27.08.86 B.D.R. Lance Nayek Amir Ali lodged an FIR with the Sarsha Police Station with the allegation that he along with Sepoy Abdus Salam and Sepoy Ansar Ali went on patrol duty from the Rudrapur B.O.P. on 26.08.86 at about 8.15 A.M. and during the period received a secret information of smuggling of some heads of cow from India into Bangladesh. Having received this information the B.D.R. patrol party ambushed near Setai and at about 10 A.M. they

found the accuseds to bring six heads of cows from India to Bangladesh and the informant and his companions challenged the accused. The accused on being challenged tried to flee away leaving the cows but the B.D.R. personnel arrested them when the accuseds confessed that they brought the cows from India. The cows were seized and seizure list was prepared accordingly and those cows were deposited to the customs office. Hence, this case.

4. The accuseds filed no written statement, however, examined two D.Ws. and the accused was examined under section 342 of the Code of Criminal Procedure. It appears from the trend of the cross-examination and also from the D.Ws. and the certificates submitted by the accuseds at the time of their examination under section 342 of the Code of Criminal Procedure that the accuseds tried to say that they were taking their own cows to the Satmile Bazar to sell them but the BDR (now BGB) personnel identified them as smugglers of their own property.

5. Mr. Cumar Debul Dey, the learned Advocate appearing for the appellant as having been engaged by the Legal Aid Committee of the Supreme Court of Bangladesh submits that there were 06 prosecution witnesses- P.W.- 1 being Lance Nayek Amir Ali the informant; P.W.-2, Ansar Ali Sepoy of the B.D.R. those who were deposed against the accused while P.W.- 3 Sepoy Abdus Salam was tendered. P.W.- 4 Shamsur Rahman stated that his house is at village- Rudrapur and on 26.08.86 he was called to the Rudrapur B.O.P. and the B.D.R. personnel told him that six cows and the accuseds were arrested by them and he put his signature in the seizure list. In cross he stated that Setai is at a distance of 3/4 miles from Rudrapur and he put his signature at about 3 P.M.

6. P.W.-5 Nurul Islam stated that his house is at Rudrapur and on 26.08.86 at about 8/10 A.M. he was going by the side of Rudrapur B.D.R. camp when B.D.R. man called him and told him that two accuseds and six cows were arrested by them and he put his signature in the seizure list. In his cross he stated that he put his signature after words as par prayer. However cannot say whether the seized cows were of Indian origin.

7. P.W.- 6, S.I. Soharab Hossain investigated the case and stated that he visited the P.O. and recorded the statement of the P.Ws. and submitted charge-sheet. In cross he stated that he found the cows in custom office and there is no identity mark of Indian cows and Bangladeshi cows. He also stated that he examined the accused but he did not record their statement.

8. Two defence witnesses were examined one being Daud Ali Mondal who was a member of the local Union Parishad and the other defence witness was Md. Moznu Ali Molla, Chairman, Goga Union Parishad.

9. Apart from partisan witness Nos. 1 and 2 whose who were Bangladesh Rifles (now Border Guards of Bangladesh) the three prosecution witnesses being 4, 5 and 6 none were eye witnesses and the defence witnesses also deposed in favour of the accused.

10. He further submitted that the instant Rule was issued on 22.04.1987 wherein the conviction and sentenced was for 05(five) years and since there is no bail order, as such, the instant convict-appellant served out their sentences long long ago. It is the realization of fine that has been stayed by this Court, as such, that may kindly be exonerated and the petitioner though by this time already have served out. If the convict are acquitted from the charges

levelled against them, they will be free from the stigma that has been put upon their status as a citizen of the country.

11. Section 25(B) embraces only goods, as such, a living creature cannot be treated as goods and therefore putting cattle under the provision of section 25(b) (2) do not attract the inflicted punishment which thus is liable to be set aside.

12. Ms. Mahmuda Perveen, the learned Assistant Attorney General could not assist the Court since she has no instruction, however, she opposes the appeal.

13. On perusal of the submission of the learned Advocates of both the sides, the memo of appeal, the impugned judgment of conviction and sentence and the Lower Court Records, it appears the convict-appellants were apprehended with six cows out of which two were calves and four bullocks by the patrolling BDR personnel led by the informant-witness No.1- Lance Nayek Amir Ali. The accused when they were challenged tried to escape and they were caught and arrested. The occurrence took place about four miles inside from the border and the BDR personnel by arresting them under the provision of section 25B of the Special Powers Act, 1974 through filing an FIR handed them over to the Sharsha Police Station.

14. The prosecution for making the case credible and to make it complained as per law under section 103(2) of the Code of Criminal Procedure called on three persons of the locality as prosecution witnesses Nos. 4, 5 and 6. Section 103 of the Code of Criminal Procedure, read as follows:

Section 103. (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

(4) When any person is searched under section 102, sub section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(5) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Penal Code.

15. It appears that none of the three local witnesses were eye witnesses rather they were asked to sign as witness, which is absolutely derogatory to the norms of law and the BDR and the local police for inflicting penalty upon the accused petitioners resorted to such activity which is seriously deplorable as can be discerned from the facts as stated above.

16. It is very apparent to note that the learned Judge passed two very serious comments about the local public representative who were D.W. No. 1 and 2. The D.W. No.1 was a local Union Parishad Ward Member and D.W. No. 2 was a local Union Parishad Chairman of Goga Union Parishad. They were drummed as persons of questionable character. Learned Judge ought never to pass such comment, unless he has enough evidence to do so. It is nowhere in the whole judgment is mentioned whether certificate from the local Union Parshad was necessary to treat cattle, either of his own, or as a business, unless it is done in a Khattal.

17. The 4 bullocks and 2 calves had no marking or identification that those were from across India as having being smuggled into Bangladesh and that calls for punishment. The prosecution has measurably failed to prove that the cows were of Indian origin and those were brought from cross India as smuggled goods. It is also notable that the learned Advocate for the appellant has pointed out that whether a cattle can be termed as goods that has also not been addressed. The learned Judge only upon assumption that since the accused were trying to scape, so they are the offenders sentenced to suffer rigorous imprisonment for 05(five) years and also to pay penalty Taka 5,000/- each.

18. None of the independent witnesses deposed to be eye witnesses and their deposition very expressly portrayed that they were called by the BDR to sign as witness against the accused sometimes after the accuseds were arrested and the cattles were already in possession of the BDR. None except the P.W. 1 and 2 in reality deposed against the accused and they could not in any manner prove that the cattles were of Indian origin or brought in from India.

19. Every citizen has a right to free movement within Bangladesh and to do any business or profession subject to restriction imposed by law. Neither the prosecution, nor the learned Judge have specified that treading of cattle during that period (1986-87) within certain limits of Bangladesh bordering India were either banned, or require any certification. Since the whole spectrum was devised by the BDR personnel out of assumption and that has been followed up in the impugned judgment calls for interference by this Court. A citizens right as has been guaranteed to do free movement (Article 36) right to trade and profession (Article 40) in respect of trial and punishment (Article 35) and to enjoy protection of law (Article 31) and safeguard as to arrest and detention (Article 36) are seriously jeopardized with regard to the instant convict-appellants and therefore I am of the view that the accused appellants be acquitted of the charges levelled against them by the impugned judgment of conviction and sentence.

20. In the result, the appeal is allowed.

21. The appellants are hereby acquitted from the charges. The fine imposed upon them is also exonerated.

22. Send down the L.C. R. with the copy of this judgment to the concerned Court below immediately.