

11 SCOB [2019] HCD 90**HIGH COURT DIVISION
Criminal Appellate Jurisdiction**

Criminal Appeal No. 3615 of 2002

Md. Biddut alias Helal Khan

.....Appellant

Vs.**The State**

...Respondent

Mr. Khan Tipu Sultan with

Ms. Showkat Ara

...For the Appellant

Mr. Zahirul Hoque Zahir D.A.G. with

Mr. Nizamul Haque Nizam A.A.G. and

Mr. Atiqul Haque Salim A.A.G.

.....For the State.

Heard on 29.06.2015, 30.06.2015

And

Judgment on: 01.07.2015

Present:**Mr. Justice Shahidul Islam****And****Mr. Justice K. M. Kamrul Kader****Mere declaration of the seizure list witnesses as hostile in no way cured the defect of the prosecution case. ... (Para 36)****When the witnesses did not support the recovery of the arms from the possession of the convict appellant or on his showing and when the charge sheeted witnesses did not support the prosecution case and prosecution witnesses are withheld by the prosecution without any explanation, it raises adverse presumption against the genuineness of the prosecution case and the appellant entitled to get benefit of doubt under section 114 (g) of the Evidence Act. ... (Para 37)****Judgment****K. M. Kamrul Kader, J.**

1. This appeal has been preferred at the instance of Md. Biddut alias Helal Khan challenging the judgment and order dated 12.11.2002 passed by the learned Judge of the Special Tribunal No.4, Jessore in Special Tribunal Case No.433 of 2000, convicting the appellant under section 19 (a) of the Arms Act and sentencing him to suffer rigorous imprisonment for 10 (ten) years.

2. Short facts, relevant for disposal of the appeal are that one Sub-Inspector Md. Aynul Hoque of the Detective Branch of Police, Jessore as informant lodged a First Information Report on 14.04.2000 alleging, *inter alia* that on getting secret information that the appellant is a terrorist and he has illegal arms in his possession. Thereafter, on 14.04.2000, the informant alongwith his force went to Puraton Koshba, Bablatala to secure his arrest. They arrested the convict appellant, during interrogation he admitted that he had a revolver in his possession and as per his statement they went to the Christian graveyards suited at Puraton

Koshba Missionpara, Jessore and recovered a revolver, which is 7" in length, made in U.S.A and its contained six chamber for bullets in the wheeler. The informant in presence of the witnesses seized this incriminating article and prepared the seizure list. Thereafter, he lodged the instant Ejahar and the same was registered as Kotwali Police Station case No. 41 dated 14.04.2000, under section 19 (a) of the Arms Act.

3. Sub-Inspector Alamgir investigated the case and after conclusion of investigation, he submitted charge sheet being no. 209 dated 02.05.2000, under section 19 (a) of the Arms act.

4. Thereafter, the case was transmitted to the Court of Special Tribunal, Jessore for trial, who took cognizance of the offence and the same was registered as Special Tribunal Case No. 433 of 2000. The case was further transferred in the Court of Special Tribunal No.4, Jessore for trial and at the commencement of trial, charge was framed against this appellant under section 19 (a) of the Arms Act, which was read over and explained to him, to which he pleaded not guilty and claimed to be tried.

5. The prosecution in support of this case examined as many as 9 witnesses out of 14 charge sheeted witnesses and the defence examined none. The defence cross examined the prosecution witnesses. From the trend of cross-examination the defence as it transpires that the appellant is innocent, he has been falsely implicated in this case at the instance of a vested quarter. No incriminating item has been recovered from this convict appellant and he has no knowledge about the incriminating item. Further case of the defence is that the incriminating article i.e. the revolver was recovered from the exclusive possession and controls one Siddique but the police with intention to harass and press this appellant entangled him in this case instead of Siddique.

6. After completion of taking evidence, the accused appellant was examined under section 342 of the Code of Criminal Procedure, where he again pleaded not guilty and declined to adduce any evidence in support of his defence. The learned Judge of the Special Tribunal No.4, Jessore after conclusion of the trial convicted and sentenced the appellant as aforesaid.

7. Having aggrieved by and dissatisfied with the said judgment and order, the convict appellant preferred this instant Criminal Appeal under section 30 of the Special Powers Act 1974.

8. Learned Advocate Mr. Khan Tipu Sultan, appearing on behalf of the convict-appellant, after taking us through the entire evidence on record, submits that this is a case of no evidence; the convict-appellant is innocent and he has been falsely implicated in this case, at the instance of a vested quarter. He submits that the learned Judge of Special Tribunal No.4, Jessore committed illegality in holding the accused-appellant guilty for the offence charged in spite of the fact that the seizure list witness did not support the recovery of the incriminating article from control and possession of the accused-appellant. The police personnel also made contradictory statement and they contradict with each other on material point relating to the recovery of the revolver on showing or pointing out by the convict appellant. He next submits that the arms was recovery from a Christian Missionary Graveyard, which surrounded by wall and there is no public access to the grave yard and it was controlled and possessed by the missionary not in control of this appellant. The appellant's house is situated at 2 ½ kilometer away from the graveyard, from where this incriminating item was recovered. He next submits that the arms was not recovered from the exclusive possession and control of the convict appellant rather the same was recovered from one Siddique but the police did not entangle

him in this case, rather the police entangled the convict appellant with the intention to harass and press him, due to previous enmity and at the instigation of a vested quarter. None of the seizure list witness supported the prosecution case rather all private seizure list witnesses deposed in one voice that the alleged incriminating article was recovered from one Siddique not from this convict appellant and they also specifically asserted that from whom arms was recovered was not present on the dock and they did not identify the appellant on dock. He further submits that the prosecution failed to examine other charge sheeted witnesses and non-examination of material witnesses without satisfactory explanation raises an adverse presumption against the prosecution case. It is evident from the record that the arms was not recovered from the possession of the convict appellant. The prosecution failed to prove the case against this convict-appellant beyond all reasonable doubt and the learned Judge of the Special Tribunal No. 4, Jessore failed to consider the evidence on record and most illegally convicted and sentenced the appellant. He lastly submits that the prosecution witnesses did not corroborate with each other and there is no independent or disinterested witness by which the accused can be convicted and sentenced under section 19 (a) of the Arms act as such, the conviction and sentence is liable to be set aside. In support of his submission the learned advocate for the appellant placed reliance on the decisions in the cases of *Mohammad Ismail Hossain @ Kana Ismail vs. The State 19 BLT (AD) (2011) 187*, *Habibur Rahman @ Raju vs. State 7 BLC (2002) 162*, *Abdul Khaleque & others vs. The State 40 DLR (1988) 493*, *Zamil Mia vs. State 6 BLC (2001) 570* and *Arshadullah vs. The State 21 DLR (1969) 584*.

9. Mr. Zahirul Haque Zahir, the learned Deputy Attorney General with Mr. Atiqul Haque Salim the learned Assistant Attorney General and Mr. Nizamul Haque Nizam the learned Assistant Attorney General appearing for the State submits that since the said revolver was recovered by the police in presence of the witnesses on showing and pointing out by this convict appellant, which he himself handed over to the police and after recovery of the incriminating item police prepared the seizure list and lodged this instant case against this accused appellant, the prosecution has proved their case by adducing reliable oral and documentary evidence including the incriminating item. He further submits that though there are some discrepancies in the evidence of the Seizure list witnesses but their admission to the effect that the presence of their signatures on the seizure list as well as seeing of the incriminating article at the time of occurrence clearly justify the recovery of the incriminating article from control and possession of the accused-appellant. He further submits that the police personal who accompanied the informant during the recovery have proved the recovery of the incriminating article from control and possession of the accused-appellant and the defence found to have failed to discredit them in any way or to show any enmity with the accused-appellant and their interest with the result of the case. He next submits that even if the public seizure list witness does not support the prosecution case, in spite of that there is no legal bar in convicting the appellant on the unimpeachable evidence of police personnel. He lastly submits that the allegations under section 19 (a) of the Arms Act against this appellant has been well proved by the prosecution as the incriminating item recovered from him thereby the appellant has committed an offence under section 19 (a) of the Arms Act and the tribunal rightly convicted the appellant and as such, this appeal should be dismissed. To substantiate his submission the learned Deputy Attorney General placed reliance in the cases of *Joyanal Abedin and others vs. State 9 BLC (2004) 310* and *Abdul Razzak Talukder vs. State 51 DLR (1999) 83*.

10. Before entering into the merits of this appeal let us now discuss the evidence of the prosecution witnesses one after another.

11. P.W. No.1 Sub-Inspector Aynal Huq, the informant of this case found to have corroborated the F.I.R. in toto. He deposed that on getting information that the accused has illegal arms, thereafter, he along with his force went to Bablatala and at about 10.00 a.m. he arrested accused Biddut. During interrogation the accused admitted that he had illegal arms in his possession, which he kept at the Christian graveyards suited at Puraton Koshba Missionpara, thereafter, he alongwith his force and the accused went there and on his showing, they recovery one pistol from underneath the bushes, at south-eastern corner of the said graveyard in presence of the witnesses. He also deposed that he prepared seizure list, which marked as exhibit-1 and his signature on it marked as exhibit-1/1. He identified the U.S.A made pistol, which marked as material exhibit- Ka. He identified the Ejahar, which marked as exhibit-2 and his signature on it marked as exhibit-2/1. This witness also deposed that Sub-Inspector Nazrul Islam filled up the F.I.R form, which marked as exhibit-3 and he identified signature of S.I. Nazrul Islam, which marked as exhibit-3/1. He identified the accused on dock.

12. During cross examination this witness deposed that he got that information at about 10.00 a.m. while he was at D.B. Office. He admitted that he does not know the accused Biddut but the informer had identified the accused Biddut. He did not go to the residence of Biddut. This witness also deposed that he arrested the accused Biddut at about 10.30 in the morning at Bablatala however; he admitted that he did not disclose this in the ejahar. Thereafter, he took him to the Bablatala Police box for interrogation. He admitted that the graveyard is situated 2 kilometer away from Bablatala and the house of the accused is situated 2-2 ½ kilometer away from the graveyard. This witness also deposed that he searched the place in presence of the witnesses and prepared the seizure list at the graveyard. He has write-down the F.I.R. at the police station. He denied the suggestion that he did not write-down the F.I.R. and seizure list. He denied the suggestion that he did not take the accused to the graveyard. He denied the suggestion that he arrested a kidnapper with arms. He also denied the suggestion that he inconnivance with one Siddique entangled this accused in this case on false and fabricated allegation due to previous enmity. He denied the suggestion that the arms was not U.S.A. made.

13. P.W. No. 2 Habilder Abdul Latif of D.B. Jessore found to have corroborated the prosecution case regarding recovery of incriminating article from the graveyard on showing of the accused appellant. Daroga (police office) prepared the seizure list in presence of the witnesses and took their signatures. He identified the revolver and the accused on dock.

14. During cross examination this witness admitted that he did not know the accused Biddut however, he could not disclose who identify him. He admitted that they arrested the accused from the Microbus stand and interrogates him on the road. Thereafter, they took him to the south-eastern corner of the graveyard. This witness also admitted that the graveyard was surrounded by wall. He admitted that while they went to the graveyard, at the time, they found the gate was locked. He denied the suggestion that arms was not recovered according to the admission of accused.

15. P.W. No. 3 constable Hasmot Ali of D.B. Jessore, a member of raiding party found to have corroborated the prosecution case regarding recovery of incriminating article from the graveyard on showing of the accused appellant. He identified the revolver and the accused on dock.

16. During cross examination this witness admitted that they arrested the accused from Microbus stand at Bablatata and they interrogate the accused on their car. This witness also admitted that the Police Station is situated far away from Bablatata. He also admitted that the informer did not go with them to Bablatata. This witness also deposed that the Christian graveyard always kept on lock. He denied the suggestion that there is no bush in the Christian graveyard. He denied the suggestion no arms was recovered on his admission or on his showing. This witness admitted that seizure list was prepared at the graveyard in presence of the witnesses. He denied the suggestion that they did not take the accused to the graveyard. He denied the suggestion that “ সিদ্ধিকের উদ্ধারকৃত অস্ত্র দিয়ে আসামীর বিরুদ্ধে মিথ্যা মামলা হয়েছে।”

17. P.W. No. 4 Habilder Abdus Salam, a member of raiding party found to have corroborated the prosecution case regarding recovery of incriminating article from the graveyard on showing of the accused appellant. He identified the revolver and the accused on dock.

18. During cross examination this witness admitted that he did not enter the graveyard. This witness also admitted that they arrested the accused Biddut from his shop beside the road, while he was sitting in that shop. They interrogate him in the said shop. He denied the suggestion nothing has happened as alleged. He denied the suggestion that he deposed falsely in this case at the instigation of the informant.

19. P.W. No. 5, Habibur Rahman, a resident of Puraton Koshba Missionpara and a seizure list witness did not support the prosecution case however, he deposed that the police personnel told him that they recovered an arms. He saw the arms and they took his signature on a blank paper however, he identified his signature on the seizure, which marked as exhibit 2. This witness also deposed that “ শুনেছি সিদ্ধিক নামের একটি ছেলের কাছ থেকে অস্ত্র উদ্ধার হয়েছে। সিদ্ধিককে পুলিশ আমাকে দেখিয়েছে, সে এ ছেলে নয়। ডকে দাঁড়ানো আসামীকে সেখানে দেখি নাই”, whereupon he was declared hostile and cross-examined by the prosecution.

20. During cross examination by the prosecution this witness denied the suggestion that the accused-appellant handed over the revolver at the Christian graveyard in his presence. He denied the suggestion that the police officer prepared the seizure list thereafter; he took his signature on it. He denied the prosecution suggestion that he deposed falsely on being gained over by the defence. He could not identify the accused on dock.

21. During cross examination by the accused he admitted that Rabi Babu and Bitu Babu are caretakers of the Christian graveyard and they reside beside the graveyard. There are 7/8 Christian houses in the neighbourhood. He also admitted that there are no bushes at the south-eastern corner of the Christian graveyard.

22. P.W. No. 6, Jahangir Alam another seizure list witness deposed that he resides beside the Christian graveyard. Police told him that they found an arms. They also showed him revolver and took his signature on a paper and he identified his signature on it, which marked as exhibit 1/2. This witness also deposed that “পুলিশ বলেছে সিদ্ধিকের কাছ থেকে অস্ত্র উদ্ধার হয়েছে। সেই সিদ্ধিক কাঠগড়ায় নাই।” At this stage, he was declared hostile and cross examined by the prosecution.

23. During cross examination by the prosecution this witness denied the suggestion that Siddique did not handover the said arms and the arms was recovered from accused Biddut.

He denied the prosecution suggestion that he deposed falsely on being gained over by the accused.

24. During cross examination by the defence this witness admitted that he put his signature on a blank paper. This witness also admitted that “পুলিশ বলে সিদ্দিকের কাছ থেকে অস্ত্র পেয়েছি। তাই জন্ম তালিকা করতে হবে বিধায় আমার সই নেয়। পুলিশ সিদ্দিককে গাড়িতে করে নিয়ে যায়।”.

25. P.W. No. 7 Saiful Islam another public seizure list witness did not support the prosecution case. This witness deposed that “পুলিশ বলে কবরস্থানের ভিতর থেকে সিদ্দিক অস্ত্র বের করে দিয়েছে। পুলিশ বলে জন্ম তালিকা করতে হবে। তাই সাদা কাগজে সাক্ষীদের সই নেয়। সিদ্দিক ডকে নাই।”. At this stage, he was declared hostile and cross examined by the prosecution.

26. During cross examination by the prosecution this witness denied the suggestion that the arms was not recovered from Siddique and it was recovered from Biddut. He denied the suggestion that the police after preparing seizure list, they took his signature on it. He denied suggestion that he deposed falsely on being gained over by the defence. The defence declined to cross-examine him.

27. P.W. No. 8 Constable Golam Kibria of D.B. Jessore a member of raiding party found to have corroborated the prosecution case regarding recovery of incriminating article from the graveyard on showing of the accused appellant. He identified the revolver and the accused on dock.

28. During cross examination by the accused this witness admitted that he did not make any statement to the investigating officer. He denied the suggestion that nothing was recovered according to admission of the accused or on his showing. He denied the suggestion that he deposed falsely in this case.

29. P.W. No. 9 Sub-Inspector Alamgir is the Investigating Officer of this case. During investigation he visited the place of occurrence, prepared the sketch map with separate index. Sketch map marked as exhibit-4 and his signature on it marked as exhibit-4/1. He recorded the statement of the witnesses under section 161 of the Code of Criminal Procedure and after finding prima facie case against the accused he submitted charge sheet.

30. During cross examination this witness deposed that he knows that the F.I.R and seizure list were prepared by Sub-Inspector Aminul Huq. However he deposed that “এজাহার ও জন্মতালিকা একই হাতের লেখা বলিয়া মনে হয় না। কেইসটি কার হাতের লেখা তাহা আমি নির্ণয় করি নাই।” This witness also admitted that the place of occurrence was surrounded by wall and there is a gate at the entrance however, he did not mention it in his sketch map or index. This witness denied the suggestion that arms was recovered from one Siddique. He denied the suggestion that he submitted the charge sheet on being gained over by the informant and his investigation was perfunctory.

31. These are the evidence of the prosecution witnesses.

32. We have carefully considered the submissions of the learned Advocates appeared on both the sides, scrutinized the impugned judgment and order of conviction and sentence and evidence on record. We have categorically considered the depositions of the prosecution witnesses. In the instant case, we find that the learned Judge of the Special Tribunal convicted and sentenced the appellant on the basis of the evidence of police personnel. The

prosecution witness Nos.1, 2, 3, 4, 8 and 9 are members of the police force. P.W. No.1 Sub-Inspector Md. Aynul Hoque is the informant of this case and his statement was partly corroborated by the P.W. No.2 Habilder Abdul Latif, P.W. No. 3 constable Hasmot Ali, P.W. No. 4 Habilder Abdus Salam and P.W. No. 8 Constable Golam Kibria. They have corroborated with each other that on the alleged date and time of occurrence, they as a member of the raiding party arrested the accused and during interrogation he admitted that he had an arms and the same was kept at the Puraton Kasba Christian graveyard. Thereafter, they went to the place of occurrence and on his showing they recovered a U.S. made revolver underneath the bushes at the south-eastern corner of the said graveyard in presence of the witnesses. P.W. 1 seized the incriminating item and prepared seizure list and took signatures of the witnesses. Thereafter, P.W.1 lodged the instant case against this appellant. On perusal of the record we find that the P.W. Nos. 4, 5 and 6 are all public seizure list witnesses, they did not support the prosecution case. Even though they did not support the prosecution case, but when P.W. No.1 the informant as police personnel proved the prosecution case corroborated by the other police personnel, who were members of the raiding party there is no legal bar to convict the appellant on such unimpeachable and corroborative evidence of police.

33. Now the question is whether the evidence of police personnel are unimpeachable and corroborative relating to the time, place and manner of occurrence and whether or not the defence case is more probable than the prosecution case.

34. In the instant case, we find that there are some serious discrepancies and contradictions in the evidence of prosecution witnesses relating to the manner of arrest, interrogation, admission of the accused and on his showing they recovered the incriminating article from the exclusive control and possession of the accused. The prosecution witness Nos. 1, 2, 3, 4 and 8 are member of the raiding party and they did not corroborate with each other on these materials points. P.W. No.1 in his cross examination deposed that “বিদ্যুতকে পূর্ব থেকে চিনতাম না। সংবাদদাতা বিদ্যুতকে চিনিয়ে দিয়েছে।” however, P.W. No.3 in his cross examination admitted that “সংবাদদাতা আমাদের সঙ্গে বাদলাতলায় যায় নি।” which contradict with P.W. No.1. as to how they identified the accused appellant when he was arrested. Further P.W. No.1 during cross examination admitted that they interrogate the accused appellant at Bablatala police box, he categorically stated that “বাদলাতলায় পুলিশ ফাঁড়িতে নিয়ে জিজ্ঞাসাবাদ করি।” P.W. No.2 in his cross examination stated that “তাকে রাস্তায় দাঁড়িয়ে জিজ্ঞাসাবাদ করা হয়েছে। ” P.W. No.3 during cross examination deposed that “আসামীকে গাড়িতে এনে জিজ্ঞাসাবাদ করা হয়েছে। বাদলাতলা থেকে বেশ দূরে পুলিশ ফাঁড়ি আছে। ”

35. We are of the view that these are not mere discrepancies but these are serious contradictions as they are claim to be witnessed the occurrence and members of the raiding party. The police personnel made contradictory statement relating to the how, when and what manner they arrested and interrogated the convict appellant. So, their evidence cannot be considered as unimpeachable and corroborative to each other on these material points.

36. The learned Advocate appeared for the appellant argued that the seizure list witnesses did not support the recovery of the incriminating article from control and possession of the accused-appellant. It appears from the record that none of the seizure list witnesses supported the prosecution case; rather they supported the defence case and they in one voice deposed that the alleged incriminating article i.e. the revolver was recovered from one Siddique not from this appellant. It appears from the aforesaid evidence that none of the public witnesses supported the prosecution case. The seizure list witnesses were declared hostile and cross-

examined by the prosecution. The fact remains that the public seizure list witnesses did not support the prosecution case regarding recovery of the incriminating article from the control and possession of the accused appellant. The prosecution though declared the seizures list witnesses as hostile, but could not show any cause of such hostile animus against the prosecution by way of cross-examination. So the fact remains that the prosecution case got no corroboration from the public seizure-list witnesses. It also apparent from the record that they categorically stated that the arms was recovered from one Siddique and they saw him at the place of occurrence. They did not identify the accused on dock. The prosecution declared the public seizure list witnesses as hostile, it is in no way can be said that the defect of the prosecution case has been cured, since they failed to show any hostile animus with the prosecution. We are of the view that mere declaration of the seizure list witnesses as hostile in no way cured the defect of the prosecution case.

37. It is also apparent from the record that the place of recovery is a restricted area, which was controlled and possessed by the local Christian community, the prosecution seriously failed to cite any witness from that community, though they are present at the time and place of recovery. Further, the house of the appellant is situated 2 to 2 ½ kilometer away from the place of recovery, which creates doubt about the recovery of the alleged arms from the exclusive control and possession of the accused-appellant. On perusal of the record, it is clear that the prosecution failed to prove its case by adducing reliable oral and documentary evidence or any witness that the incriminating items i. e. the revolver was recovered on showing of the accused appellant or from the control and possession of this appellant. The prosecution witnesses also contradict with each other in their testimony to prove recovery of the incriminating items from exclusive possession of the appellant. It casts serious doubt about the credibility of the whole prosecution case. When the witnesses did not support the recovery of the arms from the possession of the convict appellant or on his showing and when the charge sheeted witnesses did not support the prosecution case and prosecution witnesses are withheld by the prosecution without any explanation, it raises adverse presumption against the genuineness of the prosecution case and the appellant entitled to get benefit of doubt under section 114 (g) of the Evidence Act.

38. We find that the prosecution has failed to prove their case beyond reasonable doubt in the facts and circumstances of the instant case, evidence on record and the law endorsed under section 19 (a) of the Arms Act. We are of the considered view that the prosecution has not been able to connect the appellant in commission of the offence punishable under the said Act. Accordingly, we find merit in this Appeal.

39. In the result, the appeal is allowed.

In the light of our findings stated above, the impugned the judgment and order of conviction and sentence dated 12.11.2002 passed by the learned Judge of the Special Tribunal No. 4 Jessore in Special Tribunal case No. 433 of 2000, is hereby set-aside. The appellant is acquitted from the charge leveled against him and he may be released from his bail bond.

40. Send down the LCR along with the copy of the judgment and order at once.