

5 SCOB [2015] HCD 91**HIGH COURT DIVISION**

(CRIMINAL APPELLATE JURISDICTION)

No one appears for the Appellants

Criminal Appeal No. 603 of 1998

Mr. Md. Matiur Rahman, A.A.G.

... For the respondent

Motiur Rahman @ Moitta and others

... Convict-Appellants

Judgment on: 11.08.2015

Versus

The State

... Respondent

Present:**Mr. Justice Md. Abu Tariq****And****Mr. Justice Amir Hossain****Section 19A and 19(f) of the Arms Act, 1878:****The person from whose exclusive control and possession arms and ammunition are found is the only person to be liable. ... (Para 21)****Judgment****Amir Hossain, J.**

1. This appeal is directed against the judgment and order of conviction and sentence dated 23.03.1998 passed by the learned Special Tribunal No. 14 and Additional District and Sessions Judge, Court No. 6, Chittagong in Special Tribunal Case No. 245 of 1992 arising out of Patia Police Station Case No. 4, dated 11.4.1992 corresponding to G. R. case No. 28 of 1992 convicting the accused appellants Motiur Rahman @ Moitta, Abul Hossain @ Kalu under section 19 A and 19 (f) of the Arms Act, 1878 and sentencing them there under to suffer rigorous imprisonment for 10 (ten) years and 7(seven) years respectively and passed the order to run the sentence concurrently.

2. The prosecution case, in brief, is that on 10.4.1992 at 22.15 P.M. S.I Golam Mostafa along with Daroga Delwar Hossain, Constable Abdul Mannan, Belal Hossain, Ershad Hossain, Golam Mostafa, Md. Moslem and Shahjahan of Patia police station went for petrol duty. On 11.4.1992 at 1.15 A. M. when they were near the Dhal Ghat Union Parishad office, they received a secret information that, one Abul Hossain @ Kalu was loitering with illegal arms and ammunition near the bridge over the Hargazi Khal (Canel) of north Surma. There after the police force reached to the Hargazi bridge along with Dafadar Abedur Rahman and the witnesses namely Abdul Karim, Mojibur Rahman and arrested Abul Hossain @ Kalu, On interrogation Abul Hossain @ Kalu Admitted that he had a local made Banduk and a cartridge which he handed over to his friend Motiur Rahman alias Moitta on 10.04.1992 at night. The police force thereafter went to the home of Matiur Rahman @ Moitta along with Abul Hossain @ Kalu and detained Motiur Rahman @ Moitta. During interrogation, Matiur Rahman @ Moitta Produced a local made Bonduk and a cartridge from the poultry hut. The poultry hut was made of mud and was at the north corner inside the house. Accused Motiur

Rahman @ Moitta admitted that, he and accused Abul Hossain @ Kalu possessed this arms. Informant Golam Mostafa Seized the arms and ammunition and prepared a seizure list. Thereafter he went to the Patia Police Station and lodged the Ejhar (Exhibit- 2)

3. Police investigated the case and submitted charge sheet No. 24, dated 17.4.1992 against accused appellants Motiur Rahman @ Moitta and Abul Hossain @ Kalu under Sections 19A and 19 (f) of the Arms Act, 1878.

4. During trial, the learned Tribunal framed charge against both the accused-persons under Sections 19A and 19(f) of the Arms Act, 1878 and the same was read over to them, to which they pleaded not guilty and claimed to be tried as per law.

5. At the time of trial out of 12 witnesses, 5 witnesses were examined by the prosecution and on closure of the prosecution witnesses the accused persons were also examined under section 342 of the Code of the Criminal Procedure. In this stage the accused persons further pleaded not guilty and claimed to be tried. After that the defence examined as many as two witnesses.

6. Defence case as gathered from their cross examination and from the statement of D.Ws in short is that the accused persons were innocent and they have been implicated in this case falsely and out of enmity caused in connection with Union parishad Election campaign.

7. In considering the evidence on record, the learned Tribunal, Chittagong found the accused Motiur Rahman @ Moitta and Abul Hossain @ Kalu guilty of the charge under section 19 A and 19 (f) of the Arms Act, 1878 and convicted and sentenced both of them as mentioned above.

8. Against the said judgment and order of conviction, the convict-appellants filed the instant appeal.

9. No one appears on behalf of the convict appellants.

10. Mr. Md. Matiur Rahman, the learned Assistant Attorney General appearing on behalf of the state submits that the evidence on record and the other material facts and circumstances are sufficient to justify the conviction and sentence and as such, the appeal should be dismissed.

11. Let the relevant versions of the prosecution witnesses be discussed to assess how far the sentence of both the convicts were justified.

12. S.I. Golam Mostafa as PW-1, stated in his examination in Chief that, on 10.4.1992 he went to Dalghat where on 11.4.1992 at 01.15 A. M. he got the information that Abul Hossain @ kalu is possessing an arms. Thereafter he along with his force, arrested Abul Hossain @ kalu, after interrogation Abul Hossain @ kalu informed that, he had a country made L.G. and ammunition which he handed over to Matiur. Thereafter they along with Abul Hossain @ kalu went to the house of Motiur and arrested him. According to his confession a local made Banduk and one round cartridge was seized from the poultry hut of his kitchen in presence of witnesses and prepared seizure list. Thereafter, he went to the Police Station along with the accused persons and lodged the ejhar. He identified the seizure list and the ejhar marked as exhibit 1 and 2 accordingly. He also identified his signature in the seizure list and ejhar

marked as exhibit 1/1 and 2/1 respectively. He identified the sized Banduk and cartridge and they were marked as material exhibit I and II respectively.

13. This witness is also the investigating officer of this case, as investigating officer he deposed as a P.W.5, he stated in his examination in chief that, after getting the charge of investigation of the case, he visited the place of occurrence, drew the map of the place of occurrence along with the index thereof. He recorded the deposition of the witnesses. As the allegation against the accused persons has been proved primarily, so, he submitted the charge sheet No. 24, dated 17.4.1992 under section 19 Ka and 19 (cha) of the Arms Act. He identified the sketch Map and Index which was marked as exhibit -4 and 5 respectively. He also identified his signature in the sketch map and in the index which was marked as exhibit 4/1 and 5/1 respectively. This witness identified the accused persons in the dock.

14. This witness in his cross examination stated that he was in "Ranapahara" (petrol duty). First he went Dhalghat at 1.15 A. M. and arrested Abul Hossain @ kalu. He reached at the house of Matiur Rahman at 2.20 P. M. The poultry hut is a small house made of mud. He denied the suggestion that, arms has not been recovered from the poultry hut as shown by Matiur Rahman.

15. P.W.2 Ahdul Karim stated in his examination in chief that, on 11.4.1992 he and Ali Akbor, Mojibor Rahman and dafadar Abedur Rahman were voluntarily acting as guard. At 2.30 A. M. Police came from Patia police station and along with them went to the south of the bridge over the Hargazi Khal(Canel) of north surma and arrested accused Abul Hossain @ kalu. He further stated that, along with them and Abul Hossain @ kalu police went to the house of accused Motiur Rahman, produced a country made Banduk and a cartridge from his poultry hut. Then police prepared the seizure list and he put his signature thereon. He identified the seizure list and his signature thereon which was marked as ext.-1/2. He also identified the accused persons in the dock. This witness in his cross-examination has stated that the seizure list was prepared at the house of Matiur Rahman. He also stated that Ali Akbor was first who put his signature in the seizure list. Dafadar Abedur Rahman was also present at that time. He also stated that, the poultry hut was inside the house.

16. P.W.3 constable Abdul Mannan stated in his examination in chief that, on 10.4.1992 at 11.00 P.M. he started for that. They went to Dhalghat, North Surma area and took a man. There after along with that man they went to the house of Motiur Rahman and surrounded the house. Daroga entered into the house of Motiur Rahman. Dafadar was with him. Then daroga searched the home and told that, he had recovered an arms and cartridge then a seizure list was prepared. No one crossed this witness.

17. P.W. 4 constable Ershad Hossain stated in his examination in chief that, on 10.4.1992 at 1.30 A. M. when he was in patrol duty found a man loitering in the bank of the Surma Khal. He arrested the man, thereafter with that man they went to the house of Motiur Rahman. Daroga recovered an L. G. and a cartridge from the poultry Hut of the house of Matiur Rahman. A seizure list was prepared. Thereafter with the accused persons and arms they went to the Patia police station. This witness in his cross examination stated that, the way to the poultry hut is through the main door of the house.

18. We have heard the learned Assistant Attorney General. Perused the evidence of P.W. 1 to 5, D.W.1 and 2, perused the memo of appeal and other materials on record. The prosecution alleged that on 10.4.1992 while under the guidance of informant S.I. Golam

Mostafa (P.W.1) along with the police force were on petrol duty at night. On getting secret information, arrested Abul Hossain @ kalu and as per his information they surrounded the house of the accused Motiur Rahman @ Moitta. After searching the house they recovered country made L.G and a cartridge from the Poultry hut of said Motiur Rahman @ Moitta. The poultry hut was inside the house. A seizure list was prepared instantly in front of the witnesses. Thereafter along with the accused persons and the seized articles he went to Patia Police station and lodged the Ejhar. The said informant S. I. Golam Mostafa (P.W.1) in his deposition in dock supported the case of prosecution and identified the accused persons, seized arms and cartridge. He disclosed a chronological description of the arrest of accused Abul Hossain @ kalu and the recovery of arms and cartridge from the house of accused Motiur Rahman @ Moitta. The learned advocate for the accused could not become able to bring out anything contrary from him during cross examination. Constable Abdul Mannan (P.W.3) and Constable Ershad Hossain (P.W. 4) who were the members of the raiding party, supported the case of the prosecution in their evidence and corroborated with the evidence of the informant. P.W.2 who is a private witness, also described the fact of recovery of the arms and cartridge from the house of the accused Motiur Rahman@ Moitta. He in his evidence admitted his presence in the place of occurrence, identified the seizure list and his signature thereon. Learned advocate for the accused could not extract anything contrary from the witnesses. All the prosecution witnesses have corroborated the case of the prosecution in to to. They are not local people. It appears that though it is only the private witness (P.W.2) of seizure list, other than him all are police witnesses. Mere thereof, we found nothing to disbelieve the prosecution case. Nothing appeared as regard having any prior relationship or enmity of them with the accused.

19. In the case of Abdur Razzak Talukder Vs. State reported in 51 DLR at page- 83, the High Court Division has observed that, a police witness is reliable. Moreover P.W. 2, who is a public has also corroborated the evidence given by the police witnesses.

20. On the other hand, although the accused persons adduced 2 defence witnesses (D.W.1 & D.W.2) but they failed to shake the credibility of the prosecution case.

21. From above discussion, it appears that the Poultry hut has been inside the house of accused Matiur Rahman @ Moitta and the fire arms and one cartridge have been recovered from that hut. So, it becomes clear that the arms and ammunitions were found in exclusive possession and control of the accused Matiur Rahman@ Moitta and it is he, who alone has to be liable for such illegal possession. It appears from the evidence on record that the arms and ammunition have not been recovered from direct or exclusive possession of another accused Abul Hossain @ kalu. The person from whose exclusive control and possession arms and ammunition are found is the only person to be liable. Same principle of law has also been approved by our apex Court in Pannu Mollah and other Appellant Versus State Respondent Reported in 56 DLR- at page-142.

22. In such a situation, it is not understood, as to how and on the basis of which learned Trial Court recorded its decision finding the accused Abul Hossain @ kalu guilty of the charge under section 19A and 19(f) of the Arms Act.

23. Since the recovery of the arms and ammunition was not made from exclusive possession or control of accused Abul Hossain @ Kalu. So, we are inclined to acquit him from the charge.

24. We do not find any lacuna in the evidence of P.Ws or incriminating materials brought to prove the charge levelled against the convict appellant Matiur Rahman @ Moitta. Prosecution witnesses have reciprocally corroborated each other and thereby enhanced the credibility of the convict appellant Matiur Rahman @ Moitta's complicity in the offence of possessing the fire arms and ammunition, which come under the mischief of sections 19A and 19(f) of the Arms act, 1878.

25. We are of the opinion that the learned Tribunal has committed an error in convicting appellant Abul Hossain @ Kalu which is liable to be set aside. Since the conviction and sentence passed by the learned Tribunal have sufficient merit both on facts and legal aspect of the matter. We are thus inclined to maintain the sentence against the convict appellant Matiur Rahman @ Moitta. However the appellant Abul Hossain @ Kalu be acquitted from the charge brought under section 19A and 19(f) of the Arms Act and the order of conviction and sentence recorded against Matiur Rahman @ Moitta is hereby upheld.

26. In the result, the appeal is allowed in part. Consequently the impugned judgment and order of conviction and sentence dated 23.03.1998 passed by the learned Special Tribunal No.14 and Additional District and Sessions Judge, Court No.6, Chittagong in Special Tribunal Case No. 245 of 1992 is upheld in respect of convict appellant Matiur Rahman @ Moitta and set aside against the Abul Hossain @ Kalu.

27. The convict appellant Abul Hossain @ Kalu be therefore acquitted from the charge and he be set at liberty if not wanted in any other connection.

28. The convict appellant Motiur Rahman alias Moitta is directed to surrender before the trial Court within 30(thirty) days from the date of receipt of this Judgment, to serve out the remaining period of his sentence.

29. The period of custody of convict appellant Motiur Rahman @ Moitta which has already been spent shall be deducted in accordance with section 35A of Criminal Procedure Code.

30. Send down the lower Courts record along with a copy of the judgment at once.