

7 SCOB [2016] HCD 161**High Court Division****(Criminal Appellate Jurisdiction)**

Jail Appeal No. 116 of 2011

Afangir @ Kalu.....Convict-Appellant

-Versus-

The State.....Respondent

Mr. Md. Sanower Hossain, Panel Advocate

...For the Appellant

Mr. Md. Harun-Ar-Rashid, D.A.G. with

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

Mr. M.A. Kamrul Hasan Khan Aslam, A.A.G

...For the State-Respondent

Heard on : 02.08.2016 & 04.08.2016

Judgment on : 09.08.2016

Present**Justice A.K.M. Abdul Hakim****And****Justice Md. Farid Ahmed Shibli****Explosive Substance Act, 1908****Section 4/6:**

Mere knowledge of an accused or his equivocal disclosure about existence of bomb-making powders during his police custody shall not expose him to any criminal liability of possessing or controlling that illegal substance. ... (Para 24)

Judgment**Md. Farid Ahmed Shibli, J.**

1. This Jail Appeal, at the instance of the Convict-Appellant Afangir @ Kalu, is directed against the Judgment and order of conviction dated 28.03.2011 passed by learned Judge of Special Tribunal No.4, who is also the Joint Session Judge, Jhenaidah, in Special Tribunal Case no. 47 of 2006 arising out of Jhenaidah Police Station Case no. 14 dated 14.05.2006 corresponding to G.R. Case no. 119 of 2006 sentencing the convict-appellant to suffer rigorous imprisonment for 7 years under section 4/6 of the Explosive Substance Act, 1908 (shortly “the Act”).

2. Case of the prosecution in a nutshell is as follows: On 14.05.2006 acting on a tip-off P.W.1 S.I. Sikder Matiar Rahman i.e. the informant flanked by his companion force arrested the convict-appellant Afangir @ Kalu (shortly “Afangir”) in front of Amtala Cadet College at Jhinukmala Abasan Project, Charkhajura under P.S. Jhenaidah in connection with P.S. Case no. 05 dated 04.03.2006. During interrogation in the police custody, Afangir expressed his identity as a member of “the Purba Bangla Communist Party” and disclosed existence of some packets of bomb-making powders, books, leaflets, etc. of the Communist Party (i.e. the *alamat*s of this case) at the house of co-accused Karim @ Bijoy situated at Charkhajura area. On the basis of such information the police squad headed by P.W.1 took Afangir with them and raided the house of Karim@Bijoy located at House no. 8, Barack no. 13 of the Charkhajura area. It is alleged that at the showing of accused Afangir the police recovered a huge quantity of bomb-making powders and other *alamat*s. In presence of some local

witnesses, P.W.1 recovered those incriminating materials and seized them preparing a seizure-list (Ext.2) to that effect. Subsequently, figuring himself as the informant P.W.1 lodged the Ejahar (Ext.1) with Jhenaidah Police Station, where it was registered as P.S Case no. 14 dated 14.05.2006.

3. Being entrusted with the responsibility P.W.16 S.I. Abul Kashem conducted investigation of the case visiting the place of occurrence, preparing sketch-map, index etc. and recording the statements of witnesses under section 161 of the Code of Criminal Procedure. P.W.16 i.e. the Investigating Officer (I.O.) obtained the opinion from an expert of the Bangladesh Army regarding the *alamats* seized and on analysis of all evidence procured finding prima-facie truth in the allegations submitted the charge-sheet having no. 125 dated 31.07.2006 against the accused Afangir and others under section 4/6 of the Act.

4. On receipt of the record learned Senior Special Tribunal of Jhenaidah took cognizance of the offence, framed charge under section 4/6 of the Act against Afangir and 8 others and finally transferred the record to Special Tribunal No. 4 for trial and disposal. Learned Judge of the Tribunal has recorded testimony of 19 (nineteen) witnesses and exhibited relevant documents with incriminating materials of the case. On conclusion of the trial, the Tribunal found the accused Afangir guilty of the charge under section 4/6 of the Act and sentenced him thereunder to suffer rigorous imprisonment for 7 (seven) years. It is noted that during trial 2 co-accused persons namely- A. Rashid @ Dada Tapan and Karim @ Bijoy died and for that reason the Tribunal could not award any sentence against them.

5. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction accused Afangir has preferred this Jail Appeal contending inter alia that he had no involvement with the alleged occurrence of possessing any bomb-making powders or *alamats* rather because of some village feud he has been implicated falsely. It is claimed in the petition of Jail Appeal that the convict-appellant Afangir is a poor Rickshaw-puller having no such financial ability to defend or represent him in this case and due to long absence his family members have been starving and passing their days in untold sufferings.

6. Out of the charge-sheet named 22 witnesses, the prosecution has produced only 19 witnesses. Let us now discuss identity and status of those witnesses. P.W.1 S.I. Sikder Matiar Rahman is the informant of the case, P.W.11 Constable Hironmoy Chanda Roy, P.W.12 Constable Md. Masudul Haque, P.W.14 S.I Md. Aatur Rahman, P.W.15 Constable Tariqul Islam, P.W.17 S.I Faruque Hossain are the members of raiding party. Other witnesses namely- P.W.2 Abul Kalam Biswas, P.W.4 Md. Monwar Hossain and P.W.13 Haran Ali are public seizure-list witnesses. Amongst others P.W.3 Abul Kashem Munshi, P.W.5 Moinuddin Biswas, P.W.6 Most. Saleha, P.W.7 Md. Rezaul Islam, P.W.8 Rahima Begum, P.W.9 Israil Hossain and P.W.10 Parimol chakraborti are the charge-sheet named local witnesses.

7. Remaining witnesses namely- P.W.18 P.S.I Molla Khalid Hossain is the F.I.R-recording officer and P.W.16 S.I. Abul Kashem is the Investigating Officer. P.W.19 S.I Abul Bashar verified the address and character of accused Afangir on the basis of an inquiry slip.

8. Out of the above named witnesses the following witnesses namely- P.W.6, P.W.8, P.W.10, P.W.14 and P.W.15 were tendered by the prosecution and the defence declined to cross-examine them.

9. Learned Panel Advocate Mr. Md. Sanower Hossain appearing for the Convict-Appellant and learned Deputy Attorney-General Mr. Harun-Ar-Rashid appearing for the State have participated in hearing of this Jail Appeal. We have heard the learned Advocates above and perused the record along with all evidence and incriminating materials.

10. In course of hearing Mr. Sanwer Hossain contends that although the alleged quantity of bomb-making powders and other *alamats* of the case were not recovered from possession or control of Afangir i.e. the convict-appellant, but the Tribunal has failed to appreciate the evidence on record in true perspective and ultimately pronounced the impugned judgment and order of conviction against accused Afangir which seriously suffers from grave errors on both questions of fact and law.

11. Mr. Hossain contends that since the prosecution has failed to prove the charge against the accused Afangir beyond all shadow of doubt, it was thus incumbent for the Tribunal to record its decision acquitting Afangir.

12. In reply, learned Deputy Attorney-General Mr. Harun-Ar-Rashid representing the State retorts and submits that in the Tribunal the prosecution took all out efforts to prove the case producing adequate number of witnesses and adducing available incriminating materials and being convinced the Tribunal rightly convicted Afangir awarding a sentence of 7 years imprisonment and in doing that no kind of error as alleged has been occasioned.

13. We have given our anxious consideration to the submission as advance by the learned Advocates above and perused the record along with the evidence enclosed therewith. Crux of the problem to be resolved here is- whether the alleged quantity of bomb-making powders and *alamats* of the case were found in exclusive possession and effective control of the convict-appellant Afangir or not. In order to examine those points, let us have a peep to the relevant portion of the ejahar (Ext.1) and the statement made by Afangir under section 164 of the Cr.P.C.

14. In the ejahar, it is stated:- “Kij yAvitv Rvbrq th, KtqKw`b cte`cujtki nvtZ wj b l tmvtnj aZ nI qvi cti weRq ZvntK etj th, Zvni evmva `tj i KZK_wj wj dtj U, eB, tevgv evbvtbvi mi Avqwi` A#Q| H_wj mivBqv Avmvgx cvtfj, gmbK l i Zbt`i Kv#Q tc\$QvBqv t`l qvi Rb` ewj qmQj | wKs`tm Zvni tc\$QvBqv t`q bvB| Avmvgx Kij jv t`l qv Z_gtZ `vbxq `vvt`i Dcw`wZtZ ivf` Abgvb 01.00 Uvi mgq Avmvgx weRq @ Kwig Gi emZ Nti i ivbnNi nBtZ Avmvgx Avch/xi l: Kij yGi t`lvbvi l ewni Kw qv t`l qv gtZ Dctiv³ AvjvgZ D#vi Kw qv Rã Zwj Kv `Zix ceR mvvt`i mwn j Bqv tndvRtZ j B|w

15. In his statement under section 164 of Cr.P.C, the convict-appellant Afangir states:- “Gi 2/3 ci weRq etj Avevmtb Avgi gviqi Kv#Q GK e`-v eB l wKQytevgvi gvjvgvj A#Q A_wj wbtq Avq| Avig Avnb bvB| Gici Avgvi Rji ntj Avig evoxZ wQjvg| H mgq wj b l tmvtnj aiv cto| Zvni Avgvi brg etj | cti AvgtK cuj k ati | ati AvgtK wRÁvni Kijtj Avig eB l tevgvi gmvttar ktha cuj k#K etj t`B|w

16. On juxtaposing the excerpted version of the ejahar and the 164 statement of the accused above it becomes evident that apart from giving some information regarding existence of *alamats* at the house of co-accused Karim@Bijoy, there was no manner of connection or control of Afangir over the bomb-making powders and other *alamats*. Being quizzed by the police Afangir narrated a story as to how he came to know about existence of the *alamats* at the house of Bijoy. It is noted that knowledge of Afangir about location of the *alamats* was not so complete or accurate and that was why the police after making intensive search recovered them from a kitchen of Bijoy’s mother, not exactly from the house of Bijoy.

17. P.W.1 i.e. the informant deposes that pursuant to the disclosure made by Afangir the police went to the house of Karim @ Bijoy and recovered the *alamats* including 3 or 4 types of bomb-making powders preparing a seizure-list to that effect, whereas the seizure-list provides that *alamats* were recovered from a kitchen located in northern side of the house. In this context, the seizure-list witness P.W.2 in cross states that some powders and books were recovered from the house of Karim's mother. P.W.2 deposes that being directed by the police he signed a paper without being conversant about its contents. P.W.4, who is also a seizure-list witness, in cross-examination states that the police took his signature in a paper and he (P.W.4) did not see recovery of any *alamat* from Kanchannagar or from house of the accused Afangir. Another seizure-list witness P.W.13 in his cross-examination claims that during search and recovery of the *alamats*, he (P.W.13) did not find any accused present there and the police also not told him the name of any accused. On analysis of the above testimony of P.W.2,4&13, it becomes evident that the police did not carry out search or recover of the *alamats* in presence of the above named witnesses and that is why apart from identifying signatures in the seizure-list, they (P.W.2,4&13) have not espoused the alleged complicity of Afangir possessing the bomb-making powders.

18. Other witnesses namely- P.W.3 deposes that he did not see the alleged recovery of the *alamats*. According to P.W.5, although the *alamats* were recovered from the kitchen of some Madina Begum, but he (P.W.5) did not know anything about Afangir @ Kalu. P.W.7 claims that he saw alleged recovery of the bomb-making powders, but at that time he (P.W.7) did not see Afangir present there. P.W.9 states that police accompanied by some other persons recovered the *alamats*, but at that time he (P.W.9) did not find Afangir there with the police.

19. On scrutiny of the evidence given by P.W.3,5,7&9, it becomes clear like anything that the alleged *alamats* were recovered not from the possession of Afangir, who at the very time of search and seizure allegedly conducted by the police was not even present at the place of occurrence.

20. Section-4(b) read with section-2 of the Arms Act provides that when any person keeps in his possession or under his control any material used for making any explosive substance shall be punished with imprisonment for a term which may extend to 20 years, shall not be less than 2 years to which fine may be added.

21. In order to constitute an offence under the above provision of the Explosive Substance Act, 1908, the facts of exclusive possession and effective control of the convict-appellant are to be proved beyond all reasonable doubt. In this case it is beyond our comprehension as to how and on the basis of which, the prosecution has attempted to prove any fact that the *alamats* were recovered from possession of the accused Afangir. It is evident that Afangir was nabbed beforehand of the alleged occurrence in connection with Jhenaidah P.S. Case no. 05 dated 04.03.2006 from the house of Sadeque Ali, who is the father-in-law of Afangir, situated at House no. 2, Barack no. 15 of Charkhajura area. Regarding the fact of recovery P.W.16 i.e. the Investigating Officer testifies- *উদ্যোগী আদালতী চক্রিক কয় য়ে মো উচ্চী রচয়ী বি য়কিবর*
Z_v wRqibMi _vbi DEi Kji v i v b Mgt Ges nij mrs Kiv AbbMi t l qv AvtQ Awf thv Mc t f | Avmigxi eZgib wKivb
Kiv AbbMi nBtZ tKib wctvvi K e D xvi nq biv / 00

22. On perusal of the evidence above, it reveals that the police did not recover any *alamat* from the present address of Afangir or from the house of his father-in-law Sadeque Ali. During the police custody, as claimed by P.W.1, Afangir gave an information that accused

Bijoy once asked him (i.e. Afangir) to fetch the *alamats* from his (Bijoy's) house. But accused Afangir, as gathered from the evidence, did not go to the house of Bijoy or comply with his direction. Nevertheless, on such disclosure of Afangir, the police raided the house of accused Karim@Bijoy situated at House no. 8, Barack no. 13 and allegedly recovered the *alamats*. So, it is transparent that all those *alamats* including bomb-making powders had been laying in exclusive possession and effective control of accused Bijoy, not in the possession of accused Afangir.

23. The prosecution, as noted, has maintained complete silence about the fact as to who carried and stored those bomb-making powders at the house of Bijoy or his mother's kitchen. No witness has found Afangir carrying or keeping the *alamats* at the house of the occurrence. On this point, all the prosecution witnesses are found in mute. So, we can safely hold that the convict-appellant Afangir had no manner of connection with the possession or control of the bomb-making powders and that is why he cannot be held liable for those.

24. It becomes abundantly clear that the bomb-making powders were recovered not from the possession of Afangir, who therefore cannot be liable for an offence under section 4/6 of the Act. We are of the view that mere knowledge of an accused or his equivocal disclosure about existence of bomb-making powders during his police custody shall not expose him to any criminal liability of possessing or controlling that illegal substance. The learned Judge of Tribunal, so far as we understand, has failed to assess the evidence on record in their real perspective and being misconceived passed the impugned judgment finding the accused Afangir guilty of the charge in an abrupt manner, which clearly warrants interference of this Court of appeal. Although it is proved in trial that accused Karim@Bijoy had exclusive possession and control over the bomb-making powders, but the Tribunal, as it appears, could not inflict any punishment upon Bijoy because of his death during the trial.

25. Be that as it may, we are inclined to hold that the prosecution has clearly failed to prove the charge against the convict-appellant Afangir beyond all reasonable doubt and the learned Judge of Tribunal No.4 has committed an error finding Afangir guilty of the charge under section 4/6 of the Act.

26. Consequently, this Jail Appeal is allowed setting aside the impugned judgment and order of conviction against the convict-appellant passed in Special Tribunal Case no. 47 of 2006. We find the convict-appellant Afangir not guilty of the charge under section 4/6 of the Code and acquit him accordingly. Let he be set at liberty if not wanted in any other connection.

27. Office is directed to transmit copy of this judgment to all concerned.

28. Send down the Lower Court's Records.