

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 3855 of 2018

Md. Shahjahan Mia and others

-Vs-

The State and another

Mr. Md. Ahsan Ullah, Advocate with
Mr. S.M. Sanour Hossain, Advocate

.... For the appellants

Mr. Md. Omar Farook, Advocate

.....for the respondent No. 2 (ACC)

Mr. Md. Monirul Islam, DAG with

M/s.Anjuman Ara Begum, AAG with

M/s. Kazi Shamsun Nahar, AAG with

Mr. Md. Shamim Khan, AAG

....for the State

**Heard on 22.01.2023, 30.01.2023, 12.02.2023,
14.02.2023, 15.02.2023 and 19.02.2023.**

Judgment on 26.02.2023

This appeal is directed under Section 10 of the Criminal Law Amendment Act, 1958(Act No. XL of 1958) challenging the legality of the judgment and order of conviction and sentence dated 28.03.2018 passed by the Special Judge, Court No.6, Dhaka in Special Case No. 06 of 2011 arising out of Kafrul Police Station Case No. 40 dated 21.05.2008 corresponding A.C.C.G.R. No. 109 of 2008 convicting the appellants under Sections 409/109 of the Penal Code, 1860 and sentencing them to suffer simple imprisonment for 05 (five) years and also to pay a fine of Tk. 19,64,459 (nineteen lac sixty-four thousand four hundred fifty-nine) against appellant Md. Shahjahan, to pay a fine of Tk. 32,75,870.50 (thirty-two lac seventy-five thousand eight hundred seventy point fifty) against appellant Md. Abdus Satter and to pay a fine of Tk. 1,65,152 (one lac sixty-five thousand one hundred fifty-two) against appellant Md. Humayun Kabir and also convicting the appellants under Section 5(2) of the Prevention of Corruption Act, 1947 and sentencing them to suffer simple imprisonment for 05 (five) years and also to pay a fine of Tk. 19,64,459 (nineteen lac sixty-four thousand four hundred fifty-nine) against appellant Md. Shahjahan, to pay a fine of Tk. 32,75,870.50 (thirty-two lac seventy-five thousand eight hundred seventy point fifty) against appellant Md. Abdus Satter and to pay a fine of Tk. 1,65,152 (one lac sixty-five thousand one hundred fifty-two) against appellant Md. Humayun Kabir, which shall run concurrently.

The prosecution case, in short, is that the accused persons received total Tk. 1,23,39,958 from the owners of 2659 motor vehicles and fraudulently forged the seal, tax tokens and the deposit slips (ACG-67) and without depositing the said amount to the BRTA misappropriated the same. Md. Showkat Ali, former Deputy Postmaster General, at the time of inspection, found that 06(six) accused persons misappropriated the said amount between 27.03.2005 to 29.06.2005. Accused Md. Abul Kalam former Sub-Post Master, Sub-Post Office, Mirpur was discharging his duty from 20.07.2003 to 20.07.2004 and he misappropriated Tk. 68,09,868. Accused Md. Mohiuddin Ahmed, Sub-Post Master was discharging his duty from 21.07.2004 to 02.07.2007 in the Sub-Post Office, Mirpur, Dhaka and he misappropriated Tk. 18, 324. Accused Md. Shahjahan Mia was discharging his duty as Postal Operator of said office from 27.12.2003 to 27.06.2004 and he misappropriated Tk. 19,64,459. Accused Md. A. Sattar was discharging his duty as Postal Operator in the said office from 29.01.2004 to 30.07.2004 and he misappropriated Tk. 32,75,870.50. Accused Md. Humayun Kabir was discharging his duty as Postal Operator in the said office from 09.02.2004 to 11.08.2004 and he misappropriated Tk. 1,65,152. Accused Kazi Md. Arif was discharging his duty as Postal Operator in the said office from 23.12.2003 to 09.06.2004 and he misappropriated Tk. 1,06,284.50.

P.W. 13 Md. Talebur Rahman, the Assistant Director of Anti Corruption Commission was appointed as the investigating officer and during the investigation, he found the prima facie truth of the allegation against the accused persons and others. The Anti Corruption Commission vide Memo No. 13567 dated 06.09.2009 has given approval for submission of charge sheet against the accused persons under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 and the investigating officer submitted charge sheet on 30.09.2009 against the accused persons. Thereafter, the case record was transmitted to the Court of Metropolitan Senior Special Judge, Dhaka for trial and disposal who took cognizance of the offence against the accused persons under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947.

After that, the case was transferred to the Special Judge, Court No. 6, Dhaka for trial. The trial court by order dated 2.6.2011 framed charge against the accused persons under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947. During the trial, the prosecution examined 14 witnesses and thereafter the accused persons were examined under section 342 of the Code of Criminal Procedure, 1898 and they declined to examine any DW.

P.W. 1 Md. Moshir Rahman is the Inspector, Post Office, North Division, Dhaka. He stated that at the time of inspection in July 2005 Deputy Post Master General, North Division, Dhaka found that Sub-Post

Master Abul Kalam, Sub-Post Master (1) Mohiuddin Ahmed (2) Postal Operators Md. Shahjahan Mia, (3) A. Sattar (4) Md. Humayun Kabir and (5) Haji Md. Arif in connivance with each other fraudulently forged the seal, receipt of tax token ACG-67 and realised tax amounting to Tk. 1,23,39,958 from the 2659 owners of the motor vehicles between 20.07.2003 to 02.07.2007 and misappropriated the same amount. In the inspection report it has been mentioned that at the time of payment of the tax in the said post office, owners of the motor vehicles submitted tax tokens of the previous year which is kept along with the Bangladesh Form No. 403N. At the time of inspection, the motor tax tokens, the daily schedule MT-17 tax register and the MP-22 ledger have been verified. At the time of renewal, the serial number of the tax token, account number, date of payment of tax, date of issue, etc. are required to be written. After scrutiny of the daily payment of tax schedule of that date, account number of the vehicle, vehicle number and period of payment of tax if not found in the schedule it is to be presumed that tax of the previous year has been misappropriated. As per paragraph No. 2 of Special Circular No. 26 dated 8.6.1991, the ledger was not maintained. The Sub-Post Masters and the Postal Operators who discharged their duty at the relevant time misappropriated the amount. The Sub-Post Masters Md. Abul Kalam and Mohiuddin Ahmed misappropriated the tax deposited by the owners of the motor vehicles. Accused Md. Abul Kalam, former Sub-Post Master, BRTA Post Office during his tenure between 20.07.2003 to 20.07.2004 issued 274 forged tax tokens and misappropriated Tk. 6,89,868. Accused Md. Mohiuddin Ahmed, former Sub-Post Master, during his tenure between 21.07.2004 to 02.07.2007 issued 03 forged tax tokens and misappropriated Tk. 18,324. Accused Md. Shahjahan Mia former Postal Operator during his tenure between 27.12.2003 to 27.06.2004 issued 864 forged tax tokens and misappropriated Tk. 19,64,459. Accused Md. A. Sattar, former Postal Operator during his tenure between 19.01.2004 to 30.07.2004 issued 1404 forged tax tokens and misappropriated Tk. 32,75,870.50. Accused Md. Humayun Kabir, a former Postal Operator, during his tenure between 23.12.2003 to 09.06.2004 issued 70 forged tax tokens and misappropriated Tk. 1,65,152. Accused Kazi Md. Arif, a former Postal Operator, during his tenure between 23.12.2003 to 09.06.2004 issued 44 forged tax tokens and misappropriated Tk. 1,06,284.50. As per instruction of DPMG, North Division, Dhaka contained in Nothi No. তদন্/এমভি ট্যাক্স/বি.আর.টিএ ডাকঘর/২০০৭ তারিখঃ ২১.০৫.২০০৮, the informant lodged the FIR. He proved the FIR as exhibit-1 and his signature as exhibit-1/1.

He stated that on 14.09.2008 between 11:00 to 13:30 hours he took custody of the goods mentioned in the seizure list. He proved the Zimmanama as exhibit-2 and his signature as exhibit-2/1. He proved the MT-17 register, total 03 (three) bundles of records (schedule of April, May and June of 2004) as material exhibit-II series. He proved the tax token Bangladesh Form No. 403N dated 15.09.2008. He proved the zimmanama

as exhibit-3 and his signature as exhibit-3/1. During cross-examination, he stated that following the inquiry report made by Deputy Post Master General(PW.9), he lodged the FIR. He did not make any inquiry regarding the misappropriation as mentioned in the FIR. On 21.05.2008, the Deputy Post Master General has given approval to lodge the FIR. The occurrence took place between 20.07.2003 to 02.07.2007 and at the relevant time, he was posted at Mohammadpur, Newmarket, Jigatla, Inspection Division. The documents were seized from the concerned Post Masters of the G.P.O. A receipt is issued by the post office when a tax token is given. The money receipt is called ACG-67. The Deputy Post Master General instructed him to lodge the FIR and during the investigation, the investigating officer collected ACG-67 form from the GPO. During cross-examination, he stated that he is not aware as to whether between 02.07.2003 to 02.07.2004, the BRTA has given any objection as regards the adjustment of the tax tokens and during investigation he did not examine the MT-17 register and MT-12 ledger.

P.W. 2 Md. Jalal Uddin is the Superintendent of Post Office, North Division, Dhaka. He stated that while he was discharging his duty at Post Office, North Division, Dhaka on 26.06.2008, Inspector Md. Moshir Rahman lodged the FIR with Kafrul Thana and the investigating officer seized total 153 pages of documents on 19.09.2008 from his office and circular No. 26 dated 06.01.1991. He proved the zimmanama as material exhibit-III and his signature as exhibit-2/2. During cross-examination, he stated that between 26.06.2008 to 03.05.2011, he was discharging his duty as Superintendent. He was not aware as regards the date of occurrence and at the relevant time he was not working in the Post Office, North Division, Dhaka. Mahbulul Haque was in charge of the Superintendent at the time of occurrence or before the occurrence.

P.W. 3 Md. Jahirul Islam stated that he signed the seizure list on 14.09.2008 sitting in Room No. 228(Kha), North Division, Dhaka. He signed the seizure list (exhibit-2) and his signature as exhibit- 2/3. On 14.09.2008, Deputy Post Master General Jalal Uddin seized documents contained in Nothi No. তদন/ M.Btax/BRTA, Mirpur and the Special Circular dated 08.06.1991 issued by Director General.

P.W. 4 Mozammel Haque Bhuiyan is the S.P.M., G.P.O, Dhaka. He joined as S.P.M. on 03.07.2007 in the office of BRTA Post Office, Mirpur. On 16.09.2008, Assistant Director Md. Talebur Rahman, Anti-Corruption Commission, seized 22 ledgers (MT22) which have been produced in Court and prepared a seizure list on 16.09.2008. He proved the seizure list as exhibit-4 and his signature as exhibit-4/1. He proved the zimmanama as exhibit-5 and his signature in the zimmanama as exhibit-5/1. He proved 22 ledgers (MT22) as material exhibit-IX.

P.W. 5 Md. Jane Alam is the Postal Operator, Tejgaon, Post Office, Dhaka. He stated that on 16.09.2008 while he was posted as Postal Operator at BRTA Post Office, Mirpur, Mozammel Haque Bhuiyan was the Sub-Post Master in that office. The investigating officer Talebur Rahman seized the MT-22 ledger in his presence and prepared a seizure list. He proved his signatures as exhibit-4/2 and 4/3. He stated that the material exhibit-IX has been seized in his presence.

P.W. 6 Sheikh Nazmul Islam is the Postal Operator at Mirpur Sub-Post Office. He stated that while he was discharging his duty in the mid of 2008 at BRTA Post Office. Investigating Officer Talebur Rahman, seized MT- 22 ledgers from Postmaster Mozammel Haque Bhuiyan in his presence. He proved his signature in the seizure list dated 16.09.2008 (exhibit-4) as exhibit-4/4.

P.W. 7 Khan Hasan Mohammad Iqbal Masud is the Deputy Post Master, Dhaka Division. He stated that between 22.10.2007 to 22.12.2010, he was posted in the Post Office, North Division, Dhaka and at that time former D.P.M.G Mr Shaukat Ali (P.W.9) found that the tax of motor vehicles have been misappropriated and submitted a report as regards the misappropriation of Tk. 1,23,38,958 against the former Sub-Post Master Abul Kalam, former Sub-Post Master Md. Mohiuddin, Postal Operator Md. Shahjahan, Postal Operator A. Sattar, Postal Operator Humayan Kabir, and Postal Operator Kazi Arif. The investigating officer took specimen signatures of the employees in his presence.

P.W. 8 Syed Morshedur Rahman is the owner of the car No. Dhaka Metro 13-Ga-7989. He stated that he paid the tax on his vehicle on 07.07.2004 at Mirpur BRTA Post Office. Thereafter, a receipt was issued and the same was submitted to the BRTA.

P.W. 9 Md. Shawkat Ali is the Deputy Secretary, Ministry of Education, Dhaka. He stated that between 29.4.2004 to 14.01.2007, he was discharging his duty as D.P.M.G, North Division, Dhaka and in July 2005 he visited BRTA Sub-Post Office, Mirpur between 27.3.2005 to 29.6.2005. During his inspection, he examined the records to ascertain whether the tax receipts for the previous years and the present year have been deposited in the government exchequer. During the inspection, he found that out of 74000 motor vehicles, the tax of 2659 motor vehicles, total Tk. 1,23,39,958 have been misappropriated. Accused Md. Abul Kalam Azad misappropriated Tk. 68,09,868 between 20.07.2003 to 20.07.2004. Accused Mohiuddin Ahmed misappropriated Tk. 18,314 between 21.07.2004 to 02.07.2007. Accused Md. Shahjahan Mia misappropriated Tk. 19,64,459 between 27.12.2003 to 27.06.2004. Accused Md. A. Satter misappropriated Tk. 32,25,870/50 between 29.01.2004 to 30.07.2004. Accused Md. Humayun Kabir misappropriated Tk. 1,65,152 between 09.02.2004 to 11.08.2004. Accused Kazi Arif misappropriated Tk. 1,06,184/50 between

23.12.2003 to 09.06.2004. He proved the inquiry report as exhibit-6 and his signature as exhibit-6/1. He stated that based on his inquiry report Md. Moshiur Rahman lodged the FIR. During cross-examination, he affirmed that the tax of total 2658 motor vehicles have been misappropriated.

P.W. 10 Md. Najmul Hossain is the owner of the private car No. Dhaka Metro Kha-11-9909. He stated that on 11.04.2004 he paid the tax on his car in the BRTA Sub-Post Office and after the deposit, the tax token was issued.

P.W. 11 Md. Jahangir Alam is the Senior ASP, CID, Dhaka. He stated that on 29.1.2008, he was discharging his duty in the Office of the CID, Handwriting Branch, Dhaka. At that time, he received the documents in connection with Kafrul P.S. Case No. 40 dated 21.05.2008 from Md. Talebur Rahman, Assistant Director, Anti-Corruption Commission, Dhaka for the opinion which has been mentioned in Serial Nos. 1 to 18 of his opinion. He proved his report dated 12.11.2008 as exhibit-7. He proved his signature on 6(six) pages. He proved the 42 tax tokens (39 pages) as exhibit-8, signatures on 48 pages as exhibit-9 series and the extended 42 pictures have been proved as exhibit-10 series.

P.W. 12 Jesmin Mannan is the Lecturer of Independent University and owner of car No. Dhaka Metro Ga-15-6869. She stated that she paid the tax regularly and on 18.4.2004 she paid all the taxes in favour of the government in the office of the BRTA Post Office.

P.W. 13 Md. Talebur Rahman, Assistant Director, Anti Corruption Commission, Dhaka is the investigating officer. He stated that he received the report from Abul Hossain, Deputy Assistant Director of ACC and thereafter started the investigation of the case and prepared 4 seizure lists. He handed over the alamat to Inspector Moshiur Rahman. He proved his signature as exhibit- 5/2. He proved his signature in the seizure list dated 14.09.2008 as exhibit-11/1. He proved the Zimmanama as exhibit-12 and his signature as exhibit-12/1. He proved the seizure list dated 15.09.2008 as exhibit- 13 and his signature as exhibit- 13/1. He proved the Zimmanama as exhibit-14 and his signature as exhibit-14/1. He proved his signature in the seizure list as exhibit-4/5 and he proved his signature in the Zimmanama as exhibit-5/2. He recorded the statement of the witnesses under section 161 of the Code of Criminal Procedure, 1898 and sent tax tokens to the handwriting expert vide memo dated 12.11.2008 and after obtaining an expert opinion from the CID it is found that the accused persons (1) Md. Abul Kalam, (2) Mohiuddin Ahmed, (3) Md. Shajahan Mia, (4) Md. A. Sattar and (5) Md. Humayun Kabir signed the tax tokens and without depositing the recovered tax misappropriated the same.

Accused Abul Kalam fraudulently issued 274 tax tokens and misappropriated Tk. 12,98,102 without depositing the money to the

government exchequer. Accused Md. Mohiuddin Ahmed fraudulently issued 2 tax tokens and misappropriated Tk. 12,091 without depositing the money to the government exchequer. Accused Shajahan Mia fraudulently issued 864 tax tokens along with Md. Abul Kalam and they in connivance with each other misappropriated Tk. 39,28,918 without depositing the money to the government exchequer. Accused Abdus Sattar fraudulently issued 1414 tax tokens along with Md. Abul Kalam and in connivance with each other they misappropriated Tk. 65,91,741 without depositing the money to the government exchequer. Accused Md. Humayun Kabir fraudulently issued 70 tax tokens along with Md. Abul Kalam and in connivance with each other they misappropriated Tk. 3,30,304 without depositing the money to the government exchequer. Thereafter, the Anti Corruption Commission vide memo No. দুদক/অনুঃ তদস-৩/সি-৪৫/২০০৯(ঢাকা মেট্রো)/১৩৫৬৭ তারিখঃ ০৬.০৯.২০০৯ has given sanction for submission of charge sheet against the accused persons. He proved the sanction letter dated 06.09.2009 and memo dated 30.09.2009 as exhibit-15. During cross-examination, P.W. 13 stated that no report has been submitted by the BRTA stating that the tax of 2614 motor vehicles was not adjusted. He seized the office copy of the tax tokens from the office. He could not ascertain which office used to receive the tax tokens, money receipts, deposit slips and recovered money. He denied the suggestion that the accused persons deposited the money to the office of BRTA.

Learned Advocate Mr. Md. Ahasan Ullah appearing along with learned Advocate Mr. S.M. Sanuour Hossain on behalf of the appellants submits that they were discharging their duty under P.W. 9 who submitted the inquiry report dated 21.06.2007 (exhibit-6) against the accused persons due to trade union activities and no audit objection has been submitted by the audit department as regards the misappropriation of tax recovered from the owners of the motor vehicles. He further submits that the tax recovered from the owners of the motor vehicles has been deposited to the BRTA and no complaint or allegation has been made by the BRTA to effect that after receiving the tax from the owners of the motor vehicles the accused persons did not deposit the money to the BRTA and in the absence of any report from the audit department or BRTA the offence of misappropriation cannot be proved and only to harass and humiliate the accused persons, P.W. 9 falsely implicated them in this case and the prosecution failed to prove the charge against the accused persons beyond all reasonable doubt. He also relied on the decision made in the case of Shakir Hossain vs. The State reported in 9 DLR(SC)(1957) 14.

The learned Advocate Mr. Md. Omar Farook appearing on behalf of respondent No. 2 submits that the appellants are the Postal Operators and they received the tax from the owners of motor vehicles and issued false/forged tax tokens to the owners of the motor vehicles without maintaining the MT-17 register and MT-22 ledger and misappropriated the

tax without depositing the same to the BRTA violating the Special Circular No. 26 dated 08.06.1991. In the expert opinion exhibit-7, P.W. 11 opined that the accused persons in connivance with principal accused Md Abul Kalam and A. Sattar issued the forged tax token (MT 17) and without making any entry in MT 22 ledger misappropriated the tax without depositing the same to the BRTA. P.W. 9 in his report (exhibit-6) opined that the accused persons violating Circular No. 26 dated 08.06.1991 misappropriated the tax amounting to Tk. 1,23,39,958 recovered from 2659 motor vehicles. Therefore, they committed offence under sections 409/109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947 and the prosecution witnesses proved the charge to the hilt against the accused persons beyond all reasonable doubt. He also relied on the decision made in the case of Shakir Hossain vs. The State(Supra).

The issue involves in the instant appeal as to whether in the absence of any audit objection or any complaint from the BRTA, the prosecution proved the charge against the accused persons relying on the report dated 21.06.2007 (exhibit-6) submitted by P. W. 9 prepared based on tax token register (MT-17) material exhibits-II series and MT-22 ledger material exhibit-IX.

At the very outset, it is noted that the DG of the Postal Department of Bangladesh issued Special Circular No. 26 dated 08.06.1991 as regards the acceptance of the tax of the motor vehicles and deposit of the tax of motor vehicles to the BRTA. Under the Special Circular No. 26 dated 08.06.1991 issued by the DG of the Postal Department of Bangladesh tax on motor vehicles is required to be paid in cash in the designated post office and BRTA shall supply a cash book of 3 foils against each motor vehicle at the time of receiving cash from each motor vehicles and the Postal Operator shall verify in details the purpose of depositing the cash in each foil. After receiving the cash, the Postal Operator shall deliver one foil to the owner of the vehicle and shall send another copy of the foil to the BRTA and a copy of the counterfoil shall preserve in the concerned post office. After examination of each foil supplied by the BRTA, the Postal Operator shall make an entry in the concern register MT 17, 18, 19, 20 and 21 and thereafter, shall sign in 3 foils. The Post Operator shall file up the ACG-67 form used for the motor vehicles and shall submit the same along with the foil book to the APM/ Supervisor. After receiving the foil book and ACG-67, the APM/Supervisor shall examine the same and put a seal and sign on the fixed place. After signing the foil book and ACG 67, the APM/Supervisor shall preserve the third foil and hand over a foil to the owner of the motor vehicle. No. 2 foil shall send to the BRTA along with the daily statement. The post office shall maintain separate registers of MT 17 and MT22 ledger permanently as proof of payment of tax of motor vehicles and deposit the recovered tax to BRTA.

The Sub-Post Master and the Counter Operator are jointly liable for making entry of tax of motor vehicles in the MT 17 register and MT22 ledger. In the inquiry report dated 21.06.2007 submitted by DPMG to the Additional Post Master General (exhibit-6) it is stated that from 27.03.2003 to 29.06.2005, total Tk. 1,23,39,958 have been recovered by the accused persons but did not maintain the MT 17 register and MT 22 ledger and without depositing the said amount to the BRTA the accused persons in connivance with each other misappropriated the same. During cross-examination, the defence suggested to P.W. 9 that the accused persons received the said amount and deposited the same to BRTA.

In the inquiry report dated 21.06.2007 submitted by P.W. 9 DPMG Md. Shawkat Ali to the Additional Post Master General, it has been opined that;

“পরিদর্শনকালে সমর্পিত ট্যাক্স টোকেনে প্রদত্ত তারিখের ভিত্তিতে ঐ তারিখের দৈনিক সিডিউল (এমটি-১৭) এবং গাড়ীর মালিক কর্তৃক দাখিলকৃত করের টাকা জমা ফয়েলের সংগে পোস্ট অফিস কপি পরীক্ষা করে দেখা হয়। পরিদর্শন মেয়াদে যে সকল গাড়ীর কর নবায়ন করা হয়েছে সেগুলোর পূর্ববর্তী মেয়াদের ট্যাক্স টোকেনে(সমপর্নকৃত) নোটকৃত ক্রমিক নম্বর, গাড়ীর হিসাব নম্বর, কর পরিশোধের মেয়াদ ইত্যাদি পরীক্ষা করে সংশ্লিষ্ট তারিখের দৈনিক সিডিউলে(এমটি-১৭) অনর্ভুক্ত পাওয়া না গেলে ঐ গাড়ুগুলির পূর্ববর্তী মেয়াদের করের টাকা সরকারী খাতে জমা না করে আত্মসাৎ করা হয়েছে বলে গন্য করা হয়েছে।”

On perusal of the Special Circular No. 26 dated 08.06.1991, it appears that Sub-Post Master and Postal Operator shall jointly maintain the third foil of tax recovered from the owners of motor vehicles in the daily schedule (MT 17) and also maintained a permanent register as regards recovered tax against each motor vehicle after making entries in the MT 22 ledger. The defence did not cross-examine P.Ws. 1 and 9 as regards the maintenance of the MT 17 register and MT 22 ledger. MT 17 register and MT 22 ledger proved that after recovery of the tax on motor vehicles the concerned Postal Operators and the Sub-Post Masters deposited the realized tax to the BRTA. By giving suggestions to P.W. 9 defence admitted that they have received the tax from the owners of the motor vehicles, but the accused persons did not maintain the MT 17 register and MT 22 ledger. Therefore, I am of the view that no complaint or report is necessary from the audit department or from the BRTA to the effect that the Postal Operators and the Sub-Post Masters recovered the tax on motor vehicles and misappropriated the same without depositing to the BRTA. MT 17 register and MT 22 ledger are the only materials to prove that the tax on motor vehicles have been realized from the owners of the motor vehicles and the Sub-Post Master and the Postal Operator deposited the realized tax to the BRTA following the Special Circular No. 26 dated 08.06.1991.

The accused persons by giving suggestions to P.W. 9 admitted that they have received the tax from the owners of the motor vehicles. Therefore, the accused persons have to prove that they have deposited the

recovered tax amount to the BRTA. The prosecution is always bound to prove the charge to the hilt against the accused persons beyond all reasonable doubt. Section 106 of the Evidence Act, of 1872 states that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. The Sub-Post Masters and the Postal Operators are entrusted with the tax recovered from the owners of the motor vehicles. Under Section 106 of the said Act, the Sub-Post Masters and the Postal Operators are legally obliged to explain that following the Special Circular dated 08.06.1991 they have deposited the tax to the BRTA. The accused persons have failed to discharge their duty to prove that the tax recovered by them from the owners of the motor vehicles have been deposited to the BRTA and thereby violated the Special Circular dated 08.06.1991 without maintaining the MT 17 register and MT 22 ledger and the trial court rightly convicted the accused persons under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947.

In the case of Shakir Hossain vs. The State reported in 9 DLR (SC)(1957) 14 it has been held as under:

“We have found on the evidence that the accused has given an explanation of what he did with the money which may well be true and that it is not proved that he misappropriated it. It is true that under the departmental rules, the money could not have been collected by the appellant or by the Patwari but we must not lose sight of the fact that the appellant was working under the Patwari as his Assistant and if the Patwari required him to collect the money on the representation that the Tehsildar had directed such collections to be made, the irregularity committed by the appellant, even if he had knowledge of such irregularity, would not make him criminally liable unless it is proved that he knew that the amount thus collected was to be misappropriated by Ali Akbar Shah or somebody else. Of such knowledge, there is not the slightest indication on the record”.

Now another issue is required to be examined by this court as to whether the trial court was legally justified in awarding sentence passed against the appellants considering the gravity of the offence.

Criminal breach of trust committed by public servant is also a criminal misconduct punishable under section 5(2) of the Prevention of Corruption Act, 1947. Section 26 of the General Clauses Act, 1897 prohibits double punishment under two different enactments but the said provision does not prohibit trial or conviction under different enactments. Section 26 of the General Clauses Act, 1897 states that where an act or

omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. In the instant case, the accused persons were convicted and sentenced twice under section 409/109 of the Penal Code, 1860 and also under section 5(2) of the Prevention of Corruption Act, 1947. Section 5(4) of the said Act is more explicit. Section 5(4) of the said Act states that the provision of this section shall be in addition to, and not in derogation of any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this section, be instituted against him.

From the proposition discussed herein above it is crystal clear that trial and conviction under Sections 409/109 of the Penal Code, 1860 and under Section 5(2) of the Prevention of Corruption Act, 1947 are permissible under the law but accused persons cannot be punished twice under the said enactments. In the above backdrop of the matter, the trial court is not legally justified in awarding the sentence under different provision of the two enactments. The trial court is at liberty to award sentence under either of the provision of the said enactments.

The above view of this Court lends support from the decision made in the case of Muhammad Sadiq Javeed vs. the state reported in 21 DLR (WP) 62 and ATM Nazimullah Chowdhury vs. the state reported in 65 DLR 500 para 81.

Accused Abul Kalam is the Sub-Post Master General and the principal accused. The trial court found that he misappropriated Tk. 6703583.50 and sentenced him to suffer rigorous imprisonment for 05 years. Accused Md. Shahjahan Mia is the Postal Operator and he misappropriated Tk. 1964459. Accused Md. Abdus Satter is the Postal Operator and he misappropriates Tk. 3275870.50 and accused Humayun Kabir is the Postal Operator and he misappropriated Tk. 1,65,152.

Considering the facts and circumstances of the case and the gravity of the offence, I am of the view that ends of justice would be best served if the sentence passed against the appellants are modified as under;

The appellant Md. Abdus Satter is found guilty of the offence under section 409/109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947 and he is sentenced to suffer rigorous imprisonment for 03 (three) years under sections 409/109 of the Penal Code, 1860 and to pay a fine of Tk. 32,75,870.50.

The appellant Md. Sajahan Mia is found guilty of the offence under sections 409/109 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 and he is sentenced to suffer rigorous

imprisonment for 02(two) years under sections 409/109 of the Penal Code,1860 and to pay a fine of Tk.19,64,456.

Appellant Md. Humayun Kabir is found guilty of the offence under sections 409/109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947 and he is sentenced to suffer rigorous imprisonment for 01 (one) year under sections 409/109 of the Penal Code and to pay a fine of Tk. 1,65,152.

In view of the above observation, findings and proposition, the appeal is disposed of with a modification of the sentence.

The trial Court is directed to do the needful.

Send down the lower Court's record at once with a copy of this judgment.

The register of this Division is directed to send a copy of the judgment to all the Senior Divisional Special Judges and Special Judges for compliance of the above view of this court made as regards the provision made in section 26 of the General Clauses Act, 1897.

In the case of ATM Nazimullah Chowdhury vs State reported in 65 DLR(2013) 500 para-66

....So it is seen that the limitation of one year as contained in the proviso to sub-section (2) of section 222 is not applicable for trial of a person accused of more offences than one under the Criminal Law Amendment Act. In this respect, it seems that the learned Advocate for the Anti-Corruption Commission-respondent Mr. Harunur Rashid has rightly relied on the decision in the case of *Habibur Rahman Molla vs The State reported in 61 DLR 1*. In that decision, it has been held that the period of one year is available in section 234 of the Code of Criminal Procedure; but it is absent in section 6(1B) of the Criminal Law Amendment Act and thereby section 6(1B) excludes the applicability of section 234 which relates to the period of commission of offences. So it is crystal clear that in respect of trial of offences punishable under section 409 of the Penal Code and section 5(2) of the Prevention of Corruption Act under the Criminal Law Amendment Act, the accused-Ambassador may be tried for all such offences irrespective of dates of commission of the same.