

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 10363 of 2019

S.M Zahid Hasan

...Convict-appellant

-Versus-

The State and another

...Respondents

Mr. Md. Abdul Alim Miah (Jewel), Advocate with

Ms. Momtaj Parvin, Advocate

...For the convict-appellant

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan (Manna), A.A.G

...For the State

Mr. Shaheen Ahmed, Advocate

...For the respondent No. 2

Heard on 29.10.2023, 01.11.2023, 02.11.2023 and
09.11.2023**Judgment delivered on 13.11.2023**

This appeal under Section 10 of the Criminal Law Amendment Act, 1950 is directed challenging the legality and propriety of the impugned judgment and order dated 24.07.2019 passed by Special Judge, Court No. 6, Dhaka in Special Case No. 19 of 2018 arising out of Ramna Model Police Station Case No. 12 dated 07.11.2016 corresponding Anti-Corruption Commission G.R. No. 388 of 2016 convicting the appellant under Section 27(1) of the Anti-Corruption Commission Act, 2004 and sentencing him thereunder to suffer rigorous imprisonment for 4(four) years and fine of Tk. 2,00,000(two lakh), in default, to suffer imprisonment for 6(six) months and confiscating Tk. 12,56,597(twelve lakh fifty-six thousand five hundred and ninety-seven) in favour of the state.

The prosecution case in a nutshell is that after preliminary inquiry the Anti-Corruption Commission found that accused S.M Zahid Hasan acquired assets beyond his known source of income and the Anti-Corruption Commission by memo dated 27.05.2014 issued a notice upon the accused under Section 26 of the Anti-Corruption Commission Act, 2004 to furnish statement of his assets and liability and other information specified in the said notice. After that, on 15.06.2014 the accused

submitted the statement of his assets to the Anti-Corruption Commission and vide memo dated 26.06.2014 the Anti-Corruption Commission instructed the informant to submit a report on the statement of assets submitted by the accused. In the statement of assets, the accused asserted that he acquired immovable property valued at Tk. 22,40,000 and movable property valued at Tk. 20,37,512, total Tk. 42,77,512. The accused also asserted that there is a debt of Tk. 41,36,510. He obtained a house building loan of Tk. 22,40,000, customer credit loan amounting to Tk. 1,76,000 from BASIC Bank, personal loan amounting to Tk. 6,57,212 from Standard Chartered Bank and Provident Fund loan amounting to Tk. 4,00,000 from the BASIC Bank, salary loan amounting to Tk. 88,000 from the BASIC Bank, a total loan amounting to Tk. 35,61,212. The Inquiry Officer did not find any basis of loan amounting to Tk. 5,75,295. After inquiry, the Inquiry Officer opined that the accused acquired total assets of Tk. 7,16,300 beyond his known source of income. After that, the informant obtained permission on 03.11.2016 to lodge the FIR against the accused.

P.W. 5 Muhammad Mahbubul Alam, Deputy Director, Anti-Corruption Commission, Combined District Office, Chattogram took up the investigation of the case. During the investigation, the Investigating Officer seized documents, prepared the seizure list, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and after completing the investigation submitted a charge sheet against the accused under Section 27(1) of the Anti-Corruption Commission Act, 2004 for acquiring assets amounting to Tk. 12,56,597 beyond the known source of income of accused S.M. Zahid Hasan.

After submitting the charge sheet, the case record was transmitted to the Metropolitan Senior Special Judge, Dhaka and by order dated 25.04.2018 the Metropolitan Senior Special Judge, Dhaka took cognizance of the offence under Section 27(1) of the said Act against the accused and by order dated 21.10.2018 transferred the case to the Special Judge, Court No. 6, Dhaka for trial. The trial Court by order dated 11.11.2018 framed charge against the accused under Section 27(1) of the Anti-Corruption

Commission Act, 2004. The accused was absconding. The prosecution examined 5(five) witnesses to prove the charge against the accused. After concluding the trial, the trial Court by impugned judgment and order convicted the accused and sentenced him as stated above against which he filed the instant appeal.

P.W. 1 Muhammad Mahbubul Alam is the Deputy Director, Anti-Corruption Commission, Combined District Office, Chattogram. He stated that on 7.11.2016, he was posted at Head Office, Dhaka as Deputy Director and following the office order of the Anti-Corruption Commission, Head Office, Dhaka, he enquired about the movable and immovable property of accused S.M Zahid Hasan. After enquiry, he submitted the report on 31.08.2016 making a recommendation to lodge the FIR against the accused Zahid Hassan for acquiring assets of Tk. 7,16,300 beyond his known source of income and the Anti-Corruption Commission by memo dated 03.11.2016 decided to lodge the FIR against the accused. He proved the said order as exhibit 1. Subsequently, he lodged the FIR against the accused Zahid Hassan on 7.11.2016. On 27.05.2014, a notice was served by the Anti-Corruption Commission upon the accused for submitting the statement of his assets and he submitted statement of his assets on 15.06.2014. He proved the statement assets of accused S.M Zahid Hasan as exhibit 2. He proved the notice as exhibit 3. He was instructed by memo dated 26.04.2014 to enquire about the statement of assets of the accused. In the statement of assets, the accused mentioned that he acquired total immovable property amounting to Tk. 22,40,000 and movable property of Tk. 20,37,512, total assets of Tk.42,77,512. The accused claimed that he had a loan of Tk. 41,36,510. There was a staff house building loan of Tk. 22,40,000, customer credit loan of Tk. 1,76,000 from BASIC Bank Limited, personal loan of Tk. 6,57,212 of Standard Chartered Bank, PF loan of Tk. 4,00,000, salary loan of Tk. 88,000, total loan of Tk. 35,61,212 was found correct. There was no document of the loan amounting to Tk. 5,75,298 which was dishonestly shown to legalize the assets acquired illegally. He did not find any known or lawful source

of income of Tk. 7,16,300. He proved the FIR as exhibit 5 and his signature as exhibit 5/1.

P.W. 2 Md. Rabiul Hossain Chowdhury is the Assistant General Manager, BASIC Bank Limited, Head Office, Dhaka. He stated that Bank Officer Harunur Rashid was discharging his duty as Deputy General Manager on 30,10,2017, Muhammad Mahabubul Alam, Deputy Director of Anti-Corruption Commission, Head Office visited the bank. At that time, Harunur Rashid presented the loan documents of S.M Zahid Hasan mentioned in Serial No. 5 of the seizure list to Harunur Rashid. The said Harunur Rashid is not available now for which he came to depose in Court. The documents were handed over to the custody of Harunur Rashid. Since Mr. Harun retired, he brought those documents and produced before the court. He proved the seizure list and the signature of Harunur Rashid on the seizure list as exhibit 6 and 6/1 respectively. He also proved the jimmanama and signatures of Harunur Rashid on the jimmanama as exhibit 7 and 7/1 respectively. He claimed that Harunur Rashid is his official colleague for which he is known to him. He proved the alamat mentioned in serial No. 5(ka)-5(cha). He proved six documents as exhibit 8 series.

P.W. 3 Niranjana Chandra Debnath is the General Manager, BASIC Bank Limited, Head Office, Dhaka. He stated that on 30.10.2017 Deputy Director Md. Mahbubul Alam seized documents from the Deputy General Manager Harunur Rashid mentioned in column Ka-Cha of the seizure list. He signed the seizure list. He proved his signature on the seizure list as exhibit 6/2. The seized documents were handed over to the custody of DGM Harun. He is also the witness of the jimmanama. He proved the jimmanama as exhibit 7 and his signature on the jimmanama as exhibit 7/2.

P.W. 4 Mohammad Al Amin is the Deputy General Manager, BASIC Bank Limited, Dhaka Cantonment Branch, Dhaka. He stated that on 30.10.2017 at 3.00 pm, Deputy Director Md. Mahbubul Alam of the Anti-Corruption Commission visited the Head Office of BASIC Bank Limited. DGM Harunur Rashid of the said bank presented the loan

documents of accused S.M Zahid Hossain. He proved the seizure list as exhibit 6 and his signature as exhibit 6/3. He proved his signature on the Jimmanama as exhibit 7/3.

P.W. 5 Muhammad Mahbubul Alam is the Deputy Director, Anti-Corruption Commission, Combined District Office, Chattogram-2. He stated that he was appointed as Investigating Officer by memo No. 19416 dated 26.06.2014 issued from the Anti-Corruption Commission, Dhaka. During the investigation, he recorded the statement of witnesses and seized documents on 30.10.2017 at 3.00 pm from the DGM Harunur Rashid of BASIC Bank Limited, Head Office, Dhaka. He proved his signature as exhibit 6/4. He handed over the seized documents to the custody of the DGM of the bank. He proved his signature as exhibit 7/4. From the oral evidence and documents, it is found that the accused S.M Zahid Hasan acquired total assets of Tk. 55,33,652 but in the statement of his assets submitted to the Anti-Corruption Commission, he stated that he acquired total assets of Tk. 41,36,510. During the investigation, he did not find any documents of loan amounting to Tk. 5,75,298 and the investment of Tk. 6,81,299 mentioned in serial No. 10 of the statement of his assets. During the investigation, he did not find the truth of the known and lawful source of a total of 12,56,597 for which he submitted memo of evidence on 07.01.2018. Subsequently, the Anti-Corruption Commission by memo No. 5083 dated 13.02.2018 had approved to submit charge sheet. He proved the approval as exhibit 9. He submitted charge sheet against the accused under Sections 26(2) and 27(1) of the Anti-Corruption Commission Act, 2004.

Learned Advocate Mr. Md. Abdul Alim Miah (Jewel) appearing along with learned Advocate Ms. Momtaj Parvin on behalf of the accused S.M Zahid Hasan submits that the trial Court without any material declared the accused absconding and violating the provision made in Section 6(1A) of the Criminal Law Amendment Act, 1958 framed the charge in absentia. He further submits that in incompliance with the notice served under Section 26(1) of the Anti-Corruption Commission Act, 2004, the accused submitted statement of his assets and also annexed the

documents including the income tax returns and the photocopy of the credit cards but the investigating officer malafide with an ulterior motive did not exhibit those documents filed along with the statement of the assets of the accused. He also submits that the accused in his statement had given a detailed description of his assets and liability and there was no income beyond his known source of income but the trial Court without any evidence illegally convicted the accused under Section 27(1) of the said Act. Having drawn the attention to the impugned judgment and order passed by the trial Court, the learned Advocate submits that the trial Court without framing the issue on the point for determination and without assigning any reason mechanically passed the impugned judgment. Therefore, the impugned judgment is not a legal judgment under Section 367 of the Code of Criminal Procedure, 1898. He prayed for setting aside the impugned judgment and order passed by the trial Court.

Learned Advocate Mr. Shaheen Ahmed appearing on behalf of respondent No. 2 submits that the trial Court after recording the reason in its order dated 23.07.2018 passed an order for publication of the notice in the official gazette in compliance with the provision made in Section 6(1A) of the Criminal Law Amendment Act, 1958. Despite the notice published in the official gazette under Section 6(1A) of the Criminal Law Amendment Act, 1958 the accused did not surrender before the trial Court and consequently, the trial was held in absentia. He further submits that the defence did not cross-examine the prosecution witnesses. Therefore, the evidence of the prosecution witnesses remains uncontroverted by the defence. The trial Court after proper assessment of the evidence of the prosecution witnesses rightly convicted the accused. He prayed for the dismissal of the appeal.

I have considered the submissions of the learned Advocate Mr. Md. Abdul Alim Miah (Jewel) who appeared on behalf of the accused and the learned Advocate Mr. Shaheen Ahmed who appeared on behalf of respondent No. 2, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the records, it appears that the Metropolitan Senior Special Judge, Dhaka by order dated 25.04.2018 took cognizance of the offence against the accused under Section 27(1) of the Anti-Corruption Commission Act, 2004 and issued a warrant of arrest and fixed the next date on 04.06.2018 for execution report. On 04.06.2018, the Metropolitan Senior Special Judge, Dhaka passed an order fixing the next date on 23.07.2018 for execution report. In the order dated 23.07.2018, the Metropolitan Senior Special Judge, Dhaka mentioned that neither the accused was arrested by DB Police nor any report was submitted to that effect and there is sufficient reason to believe that to avoid the trial, the accused absconded and there is no early prospect of arrest of the accused. Consequently, he passed an order for publication of notice in the official gazette.

At this stage, it is relevant here to quote Section 6 of the Criminal Law Amendment Act, 1958 as under;

“6. ¹[(1) The provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), shall, in so far as they are not inconsistent with this Act, apply to the proceedings of the Court of a Special Judge and for the purposes of the said provisions, the Court of a Special Judge shall be deemed to be-

(a) a Court of Sessions, if the Special Judge is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge.

²[* * *]

³(1A) If a Special Judge has reason to believe that an accused person has absconded or is concealing himself so that he cannot be arrested and produced before him for trial, he may, by order notified in the official Gazette, direct such person to appear before him within such period as may be specified in the order, and if such person fails to comply with such direction, he may be tried in his absence.”

A bare reading of Section 6(1A) of the Criminal Law Amendment Act, 1958, reveals that if the Special Judge has reason to believe that an accused person has absconded or is concealing himself so that he cannot be arrested and produced before him for trial, he may, by order notified in the official Gazette, direct such person to appear before him within specified period and if the accused fails to comply with such direction, the Special Judge may proceed with the trial in the absence of the accused.

On perusal of the order dated 23.07.2018, it reveals that before publication of the Gazette, the execution report regarding the warrant of arrest of the accused was not sent by the concerned Officer-in-Charge of the Police Station and before sending any execution report, the Metropolitan Senior Special Judge, Dhaka without any materials opined that there is reason to believe that accused absconded to avoid the trial and there is no early prospect of arrest of the accused. Therefore, I am of the view that at the time of the passing order dated 23.07.2018, there were no materials before the Metropolitan Senior Special Judge, Dhaka to arrive at a conclusion that the accused absconded to avoid trial and there is no early prospect of arrest of the accused.

P.W. 5 stated that the accused acquired total assets of Tk. 55,33,652. In the statement of assets (exhibit 2), the accused stated that he had debt of Tk. 41,36,510. P.W. 5 opined that he did not find any document regarding debt amounting to Tk. 5,75,298 and the investment of Tk. 6,81,299 is not supported by any document. The accused acquired total assets of Tk. 12,56,597 beyond his known source of income.

On perusal of the records, it appears that in compliance with the notice served upon the accused under Section 26(1) of the Anti-Corruption Commission Act, 2004, the accused S.M. Zahid Hasan submitted his statement of assets on 15.06.2014 (exhibit 2) to the Secretary, Anti-Corruption Commission by filing separate application on the same date. On perusal of the application dated 15.06.2014, it reveals that the accused furnished annexures (total 76 pages) along with the statement of his assets but those documents were not proved by the prosecution although those documents are part of the statement of assets (exhibit 2) submitted by the

accused and are required to be considered by this Court to arrive at a correct conclusion as regards the total assets and liability of the accused.

On perusal of the statement of assets (exhibit 2) dated 15.06.2014, it reveals that the accused submitted the photocopy of the credit cards (1) MX Tk. 1,80,000, (2) Bank Asia Tk. 1,25,000, (3) SIBL Tk. 85,000 and (4) DBL Tk. 1,00,000 total Tk. 4,90,000. No statement was collected from the said banks regarding the debt of total Tk. 4,90,000. P.W. 5 calculated the additional amount of Tk. 85,298 in respect of credit card loans. In serial No. 10 of the statement of assets, it has been mentioned that the accused purchased a prize bond amounting to Tk. 14,78,280, savings certificate (সঞ্চয়পত্র), share and provident fund contribution. The accused also annexed the documents in support of his investment amounting to Tk. 14,78,280. During the trial, P.W. 5 reframed from exhibiting those documents regarding investment of Tk. 14,78,280. P.W. 5 stated that he did not find any basis of the investment amounting to Tk. 6,81,299. No report as regards said investment from the concerned authority was collected by the Investigating Officer.

To determine the total assets of the accused beyond his known source of income, no objective criteria was followed by the investigating officer. Before concluding as regards the total assets of the accused allegedly acquired beyond known source of his income, it is indispensable on the part of the investigating officer to determine the total income, expenditure and debt of the accused. In the instant case, the investigating officer P.W. 5 without determining the total income, expenditure and debt of the accused abruptly arrived at a finding that the accused acquired total assets of Tk. 55,33,652 out of which he acquired total assets of Tk. 12,56,597 beyond his known source of income. Therefore, I am of the view that the investigating officer P.W. 5 without following any objective criteria determined that the accused acquired total assets of Tk. 12,56,597 beyond his known source of income and the trial Court without proper assessment of the evidence passed a stereotype judgment finding the accused guilty of the offence under Section 27(1) of the Anti-Corruption Commission Act, 2004.

The accused was indeed absconding during trial and the defence did not cross-examine the prosecution witnesses. The evidence of the prosecution witnesses is not sacrosanct. Furthermore, the gazette under Section 6(1A) was not published following law. Only on proper assessment of the evidence if the Court finds that the evidence of the prosecution witnesses is trustworthy, credible and reliable and the accused committed offence punishable under law the trial Court is legally empowered to convict the accused. The prosecution withheld the documents submitted along with the statement of assets of the accused (exhibit 2) regarding the debt amounting to Tk. 4,90,000 and investment amounting to Tk. 14,78,280. The trial Court without proper assessment of evidence mechanically held that the accused S.M. Zahid Hasan acquired total assets of Tk. 12,56,597 beyond his known source of income and illegally passed the impugned judgment and order of conviction and sentence.

In view of the above facts and circumstances of the case, evidence, findings, observation and proposition, I am of the view that the prosecution failed to prove the charge against the accused beyond all reasonable doubt.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order of conviction and sentence passed by the trial Court are hereby set aside.

The accused S.M Zahid Hasan is acquitted from the charge framed against him and he is discharged from the bail bond.

Send down the lower Court's records at once.