

Present

Madam Justice Kashefa Hussain

Criminal Appeal No. 11354 of 2019

Mir Mosharrof Hossain

..... Convict-Appellant-petitioner

-Versus-

The State and another

----- Respondent.

Mr. Md. Jafor Ali, Advocate

.... for the convict-Accused-appellant

Ms. Quamrun Nesa, Advocate

.... for the respondents

Mr. Md. Abdul Aziz Miah, D.A.G with

Ms. Syeda Sabina Ahmed Molly, A.A.G

----- For the State.

Heard on: 08.06.2023, 19.07.2023

and

Judgment on 20.07.2023

This appeal is directed against the judgment and order dated 30.01.2017 passed by the learned Special Judge, 6th court, Dhaka in Special Case No. 6 of 2016 arising out of Kafrul Police Station Case No. 48 dated 25.03.2014 corresponding to Anti Corruption Commission (ACC) G.R No. 119 of 2014 convicting the accused-appellant under Section 161 of the Penal Code along with Section 5(2) of the Prevention of Corruption Act, 1947 and Sentencing him to suffer rigorous imprisonment for a period of 3(three) years and also to pay fine of Tk. 2,00,000/- (Two Lac).

The prosecution's case, in short is that one Sub-Assistant Director of Durnity Daman Commission Principal office the Dhaka being the complainant lodged an ejahar on 25.03.2014 with Kafrul Police Station stating inter alia that one Abdur Rahman Chowdhury appeared in written examination for getting service for the post of Assistant Manager (General) in Titas Gas Transmission and Distribution Company Ltd. After succeeding he subsequently after appearing in viva test through his uncle was acquainted with the convict- appellant who was Public Relation Officer of Bangladesh P.S.C. and the convict accused appellant called him to his office room and demanded Tk. 14,00,000/- (fourteen lac) for the confirmation of the appointment in Titas Gas transmission and Distribution Company Ltd. the said Abdur Rahman Chowdhury agreed in good faith and gave him Cash Taka 8,00,000/- (eight lac) by several dates within 08.05.2012 to 17.07.2012 and on 08.07.2012 an amount of Taka 2,00,000/- (two lac) was sent through T.T to savings account No. 110734038832 of the convict appellant by the father-in-law said Abdur Rahman Chowdhury and also on 17.07.2012 a cheque amounting to Tk. 4,00,000/- (four lac) was also handed over to the convict appellant. But said Abdur Rahman Chowdhury found no name of his own in the final result sheet and having failed to get the

appointment he asked the convict appellant to repay his money, since the accused convict appellant was not agreeing to pay back money the complainant filed a written complaint before the chairman, Durnity Daman Commission pursuant to which after holding enquiry the instant F.I.R was lodged against the convict-appellant.

That after accomplishment of investigation one sub Assistant Director of Durnity Daman Commission submitted charge sheet being No. 597 dated 15.12.2015 under section 161 of the Penal Code read with section Prevention of the Corruption Act, 1947 against the sole convict appellant.

That after submission of charge sheet the case record having been ready for trial was sent before the Special Judge, 6th Court, Dhaka for trial and the case was registered as 6 of 2016 and the learned trial court started trial in absentia since the convict appellant was absconding.

That the trial court framed charge under section 161 of the Penal Code read with section 5(2) of Prevention of Corruption Act, 1947 vide order dated 06.09.2016 which could not be read out and explained to the convict appellant since he was absconding.

Learned Advocate Mr. Md. Jafor Ali appeared for the accused convict appellant, while learned advocate Ms. Quamrun Nesa represented the respondent-2 Anti Corruption Commission while learned Deputy Attorney General along with Ms. Syeda Sabina Ahmed Molly represented the respondent No. 1.

Learned Advocate Mr. Md. Jafor Ali for the accused-convict-appellant submits that it could not be proved by any reliable evidence that the convict accused appellant actually demanded and took gratification of the amount claimed by the respondents. He contends that however the court upon total misappraisal of facts and records came upon a wrong finding. He submits that the court unjustly convicted the petitioner of the offence under Section 161 of the Penal Code along with Section 5(2) Prevention of Corruption Act, 1947 and therefore the judgment ought to be set aside and the convict appellant be acquitted. He points out to the materials and contends that the allegation made by the complainant is primarily of accepting bribe at various stages upon assurance to the complainant to give him a job as manager of Titas Gas. He points out that from the materials it appears that the complainant alleges that the bribe was demanded and taken by the accused at different times

in different places. He submits that the total claim of taking bribe from the complainant is an amount of Tk. 14,00 000/- (fourteen lac) as claimed by the complainant respondent. He points out to the materials and shows that however the trial court itself could not prove the claim of taking of bribe of Tk. 8(eight) lacs and Tk. 4(four) lacs respectively. He submits that in the absence of any appeal by the respondents such finding of the trial court remains in force and cannot be challenged anymore. He submits that therefore it is evident that Tk. 8(eight) lacs and Tk. 4(four) lacs of bribe as claimed by the complainant has been proved to be wrong. He continues that therefore the adjudication at this stage is only on the allegation of demanding and taking of bribe Tk. 2(two) lacs. He argues that it could not be proved by any satisfactory evidences that the accused himself accepted the Tk. 2 (two) lacs as claimed by the complainant as bribe for assurance of job.

There was a query from this bench upon the respondents contention that a documentary evidence of Tk. 2(two) lacs as claimed to have been given by the father-in-law of the complainant through T.T to savings account No. 110734038832 which is the saving account number in the said Joypurhat branch of the accused. He replies that although the

complainants attempted to implicate the accused by way of some other documents etc but however the complainants could not any stage prove that the complainant himself directly gave bribe to the accused. He submits that an isolated T.T by the father-in-law of the complainant cannot be conclusive proof that the convict accused appellant himself took the bribe from the complainant. He submits that it is clear that the trial court in convicting the accused under Section 161 of the Penal Code along with Section 5(2) of the Prevention of Corruption Act, 1947 primarily relied only on one document which is the T.T. voucher exhibit-11 given by the father in law of the complainant. He submits that it is a settled principle of law that unless an offence is prove beyond reasonable doubt a person cannot be convicted of such offence. He submits that in this case there is no direct evidence that the accused directly took the money as bribe. He reiterates that an isolated T.T voucher given by the father-in-law of the complainant cannot establish the fact of the offence being committed by the complainant himself by way of receiving bribe. He submits that the intention behind giving the T.T. voucher to the accused by the complainant's father-in-law was never ascertained at any stage throughout the proceeding.

He points out that although some other witnesses were produced for examination but however the father-in-law of the complainant who was a necessary witness was not produced in court at any stage. He submits that non production of the father-in-law as a witness although a necessary witness is a serious error committed by the trial court. He contends that since admittedly exhibit-11 was given by the complainant's father-in-law to the accused therefore the trial court committed illegality in not taking steps to produce a necessary witness in court.

He continues that the oral evidences of the other Pws particularly the PW-6 the Ex-sub-registrar is not at all acceptable. In support of his argument he submits that PW-6 is an Ex-Sub-registrar of land. He submits that although it is not in the record but however the accused has been implicated in the case due to a previous conflict dispute inter alia involving transaction regarding land. He admits that however these evidences are not in the record. He argues that it would be absurd to presume that the accused convict being a well paid first class officer of the government in the Public Service Commission should take an amount of Tk. 2(two) lacs from the complainant.

Upon a query from this bench regarding the absconion of the accused during trial all through the proceeding learned advocate for the appellant submits that the accused had no knowledge about the case. He concludes his submissions upon assertion that the convict accused appellant did not commit the offence under Section 161 of the Penal Code read with Section 5 of the Prevention of Corruption Act, 1947 and the acceptance of Tk. 2(two) lacs could not be proved at all and therefore the judgment of the trial court be set aside and the appeal be allowed.

Learned advocate Ms. Quamrun Nesa for the respondent No. 2 submits that the trial court correctly gave the judgment and correctly convicted the convict accused appellant under Section 161 read with section 5 of the Prevention of Corruption Act, 1947. There was a query from this bench regarding the appellant's contention that the respondents could not prove any direct nexus between the complainant and the accused in giving bribe to the accused. To this query the learned advocate for the respondent No. 2 submits that the accused could not prove his case in trial since he was absconding and the trial was held in absentia. She submits that it was the duty of the accused to prove that he was innocent before the court. She submits that

deliberate absconsion from the law itself is an offence and he is guilty of such offence.

She next argues that however the prosecution could prove the case upon producing oral and documentary evidences. She points out to the oral and documentary evidences of PW-1, 2, 3, 4, 5, 6, 7 and 8. She contends that from these evidences there does not appear to be any marked inconsistency. She also points out to the documents by way of exhibit-11 which is the T.T voucher including some other supporting documents. She submits that it could not be established that the father-in-law of the complainant had any other independent relationship with the accused which might lead him to be involved in any monetary transaction with the accused. She submits that in the absence of proof of any other independent relationship between the father-in-law of the complainant and the accused it is adequate enough to show that the father-in-law of the complainant gave the T.T. voucher to the accused exhibit-11 as way of bribe for a job for his son-in-law. She concludes her submissions upon assertion that therefore it is clear that the appellant is guilty of the offence of accepting bribe of Tk. 2(two) lacs from the complainant through the T.T. voucher

given by the father-in-law and the appeal has no merits and ought to be dismissed.

I have heard the learned advocate from both sides and I have read the memo of appeal including the other materials before me. The complainant's case inter alia alleges demanding and taking of bribe of Tk. 14(fourteen) lacs at various stages. It is the complainant's claim that the accused took Tk. 8(eight) lacs, Tk. 4(four) lacs and Tk. 2(two) lacs at different times. It is however clear that the trial court found that the acceptance of bribe of Tk. 8 (eight) lacs, and Tk. 4(four) lacs could not be proved by satisfactory evidence. It is also evident that the respondents did not resort to the higher forum against such finding of the trial court. The trial court only convicted the accused regarding the allegation of bribe of Tk. 2(two) lacs. Therefore my duty here is to remain confined to the allegation of the acceptance of bribe of Tk. 2(two) lacs by the accused.

By way of documentary evidences the prosecution inter alia produced exhibit-11. Upon examination it shows that exhibit-11 is a T.T. voucher given by the father-in-law of the complainant to the accused. It is the claim of the prosecution that the father-in-law of the complainant gave the T.T. voucher to the accused by savings account No. 110734038832 as way of

bribe to the accused in lieu of job for his son-in-law. Admittedly the father-in-law of the complainant gave a T.T. voucher in the savings account of the accused which is exhibit-11. I have examined the other documents from the oral evidences. I do not find anything much about the relationship between the father-in-law and the accused. Regarding receiving T.T. voucher by way of bribe except for the oral evidences of the PW-3 who is the complainant himself, there is not adequate evidence. Moreover strangely enough the trial court did not examine the father-in-law as a witness although he was a necessary witness in the case. Since the main document on which the prosecution relies upon to prove their case was admittedly given by the father-in-law of the complainant and not the complainant himself, therefore there is a direct nexus between the alleged case and the production of the father-in-law as necessary witness. In my considered view unless the father-in-law is produced as a witness and examined in accordance with the relevant laws the case cannot be adjudicated properly and conclusively.

It is true that the appellant was absconding althrough the proceeding trial. The appellant's contention of not having knowledge of the proceeding against him is not acceptable. It is

evident that he was absconding. It is also true that absorsion itself is an offence. However for ends of justice I am of the considered view that there remains a lacuna in the whole proceeding unless the father-in-law of the complainant is examined as a witness. And such lacuna ought to be fulfilled for proper adjudication of the case.

Under the facts and circumstances I am inclined to send the matter in remand to the trial court.

In the result, the appeal is disposed of. The judgment and order dated 30.01.2017 passed by the Special Judge, 6th Court, Dhaka is Special Case No. 6 of 2016 is hereby set aside. The case is sent on remand to the trial court. The trial court is hereby directed to hear the matter afresh upon issuing necessary orders to produce the father-in-law of the accused and take fresh evidences necessary. The trial court is also directed to dispose of the matter as expeditiously as possible.

Send down the lower courts record.

Communicate the judgment at once.

Shokat (B.O.)