

**In the Supreme Court of Bangladesh
High Court Division
(Criminal Original Jurisdiction)**

Present:

Mr. Justice Ashish Ranjan Das

And

Mr. Justice Md. Riaz Uddin Khan

Criminal Appeal No. 8463 of 2020.

In the matter of:

Md. Shahed

.....accused-appellants.

Versus

The State

.....Respondent.

Mr. S.M. Sajahan, Senior Advocate with
Mr. Shah Monjurul Hoque, Senior Adv. with
Mr. Mohammad Masudul Hoque, Adv. with
Mr. Salim Ashraf Chowdhury, Adv. with
Mr. Md.Aaluddin (Al-Azad), Adv.with
Mr. Md.Shahariar Bhuiyan, Adv.

..... For the appellant.

Mr. M. Amin Uddin, Attorney General
Mr. Md. Sorowar Hossain(Bappi),D.A.G. with
Mr. S.M. Asraful Hoque, D.A.G. with
Mr. Sheikh Serajul Islam Seraj, D.A.G. with
Ms. Fatema Rashid, A.A.G. with
Mr. Md. Shafiquzzaman (Rana), A.A.G. with
Mr. Md. Akbar Hossain, A.A.G.

..... For the State.

**Heard on 08.11.2023, 12.12.2023,
14.12.2023, 17.12.2023 and Judgment
on: 11.01.2024.**

Ashish Ranjan Das, J.

Learned Judge of the Metro. Special Tribunal No-1,
Dhaka, by his judgment dated 28.09.2020 passed in
Metropolitan Special Tribunal Case No. 513 of 2020 found the

appellant guilty of the offence under Section 19A of the Arms Act, 1878 in addition under Section 19(f) of the same law and sentenced him to suffer rigorous imprisonment for life coupled with another additional imprisonment for 07 years under Section 19(f) of the Arms Act, 1878.

Being aggrieved the convict preferred this criminal appeal.

Succinct fact projected by the prosecution is that the appellant was taken to police remand in connection with another criminal case being Criminal Case No.05 dated 07.07.2020 attracting sections 406/417/465/468/471/269 of the Penal Code. While remaining in police custody on remand the appellant disclosed in respect of his possession of unauthorized fire arms. Accordingly police Inspector S.M. Gaffarul Alam of Uttara west Police Station, Dhaka Metropolitan Police (DMP) being accompanied by other responsible officers and forces of the police department took the appellant to Uttara area of Dhaka city. They stopped in front of House No. 38, Road No. 17, Sector-11, Uttara, Dhaka and they found a white X-Trail NISSAN Jeep however

without registration standing there. The appellant was allowed to get down however under arrest and from the open roof top of the Jeep he found the key of the vehicle, opened it and from behind the seat of the driver 05 bottles of foreign made whisky, 10 bottles of Indian prohibited drug phensedyl and a pistol could be seen there. On the body of the pistol "SUNMIC" Industrial etc. were engraved. In addition on the barrel both Japan and China were also found engraved. It was a 8 inch long pistol with a loaded bullet marking 7.65 KF. Those articles and the vehicle were seized there under a list in presence of witnesses gathered there. The police officers came back to the police station and it was by the time 19.07.2020. Stating above a case was registered upon which Uttara West police Station (DMP) Case No.14/157 dated 19.07.2020 was set on motion. After investigation the police pressed a quick charge sheet No.157 dated 30.07.2020 finding the allegation of illegal possession of the pistol and a bullet primarily proved. Cognizance was accordingly taken and charge attracting 19A and 19(f) of the Arms Act, 1878 was mounted to which the sole accused pleaded innocence and claimed to be tried.

In order to bring the charge home the prosecution produced and examined as many as 11 cited witnesses of those only P.W.8 and 9 were the local persons and witnesses to the recovery memo. While the remaining 9 were police officers. After conclusion of recording evidences the sole accused was examined under section 342 of the Code of Criminal Procedure (for short the Code). In the stage too the appellant once again pleaded not guilty. However he produced no D.W. nor spoke anything in defence.

The defence version as it could be gathered from the trend of cross examination of the P.Ws is that the articles so recovered branding it as a fire arms was not proved to have been a fire arm and it was not made clear from the prosecution as to inwhich country it was produced, whether it was Japan or China. Secondly the place from where the alleged alat was recovered was not within the exclusive control and possession of the appellant. It is said by the prosecution that the appellant picked up the key of the Jeep from its roof top and opened the vehicle. But in all fairness there was no scope for keeping the key on the open roof top for so many days.

We have heard the learned Advocates for the appellant and for the state including the learned Attorney General and perused the record meticulously.

Gist of the prosecution case is that a foreign made pistol loaded with a bullet alongwith some other articles was recovered from beneath the passenger's seat of the Jeep owned by the convict appellant and it could be so recovered as the appellant opened the Jeep with its key. Although he was during the period in the custody of police on remand.

Learned lawyer for the appellant empathically argued that admittedly since before arrest and date of recovery of alat the appellant used to be under police remand for 10 days. In that event the prosecution was under an obligation to prove beyond doubt that as the owner of the Jeep the key was in the pocket or in the possession of the appellant and he opened the Jeep and from below the passenger's seat those articles including the pistol were recovered in presence of witnesses. The learned lawyer for the appellant categorically pointed out that it was a Jeep admittedly without registration. The prosecution produced a certificate from the Bangladesh

Road Transport Authority (Exhibit-10) meaning that it was under ownership of Pubali Bank Ltd. Nazimuddin Road Branch, Dhaka on account of one Shahed Karim of Sector-6 of Uttara Model Town and not this Shahed of sector 11, Uttara.

The learned lawyer argued that since during the period the appellant was in police custody he can not be said to have been physically possessing the Jeep while the name Shahed Karim and the address shown in Sector-6, Uttara do not tally with the exact name and address of the appellant.

Secondly according to the seizure list (Exhibit-1) the Jeep was without a registration number in the number plate while the certificate of the BRTA suggested that definitely the Jeep had a registration being Dhaka Metro-Gha 17-4423. According to prosecution the pistol was recovered from below the passenger's seat behind the seat of the driver. It has been mentioned in the F.I.R. that the appellant got down from the police van and picked the key of the Jeep from its open roof top, opened the door of the Jeep and all those articles could be seen and recovered. It is the defence that it was not the appellant's Jeep nor the key was in his custody nor the key

could be kept or preserved for a long time on the open roof top of the Jeep. Another police officer and member of the recovery party P.W.3 admitted that there was no arrangement on the open roof top to keep such a huge key of the Jeep for so many days. As he said that “গাড়ীটির উপর নিচে আমি দেখেছি গাড়ীর roof top এ চাবি রাখার মত কোন provision নাই। Roof top টি গাড়ীর বাহিরে থেকে খোলা ছিল।” While according to (Exhibit-3) the informant officer produced the key on 19.07.2020 that is one day after the alleged recovery to the investigation officer when it was seized. There is no explanation from the prosecution as to how the key reached the pocket of the informant officer. The learned lawyer for the appellant vigorously argued that if the key of the Jeep is recovered from informant officer P.W.1 on the following day then it can not be said that the almat was at the relevant time within the control and possession of the appellant.

The learned lawyer for the appellant finally serged forward that in the end the story turned out to be enthusistic design of the prosecuting police that ended up in a mess and the prosecuting police was paid off by their own coin.

The learned lawyer for the appellant further submitted that it remained not proved that the alat that is the pistol article exhibit-1 was a fire arms within the meaning of the Arms Act. It is in the F.I.R. as well as in the seizure list that on both the sides of the barrel of the pistol two different countries of origin were engraved Japan and China which is naturally improbable. The pistol or the bullet was not examined by a ballistic expert. According to section 30A of the Arms Act such examination was not mandatory. But a condition was attached in the following terms section 30A. *“Opinion of arms and ammunition expert not necessary: In a trial of an offence punishable under this Act, no opinion or examination of any expert on arms or ammunition shall be necessary to prove whether or not any articles or things are arms or ammunition unless in the opinion of the court trying the offence such opinion or examination is necessary.”* So where the writing on the alleged pistol is showing that it was manufactured in both China and Japan where it was not described that the pistol had a metallic body or metallic barrel, where the trial judge also seems to have not kept a note meaning that he examined the alat physically and ex-facie became satisfied

that it was a fire arms and not a toy. The provision attached in section 30A of the Arms Act respecting expert examination of a fire arm does not appear as a provision of law without a purpose. Its examination by an authorized ballistic expert in the event was necessary which did not happen in the case.

The learned D.A.G. emphasised that both the two local witnesses P.Ws. 8 and 9 corroborated the story of recovery of alat in their presence.

Projected place of occurrence is a 70 fit broad road under Section 11 of the Uttara area. While P.W.9 is a resident of sector 6 of Uttara. P.W.8 stated that alongwith P.W.9 he reached the place of occurrence by bus. While both P.W.8 and 9 reached there by a rickshaw. P.W.8 in his cross-examination at one stage ejected that not the appellant but one officer of the recovery force opened the door of the jeep by himself. While admittedly the key of the jeep was seized (exhibit-3) from the informant officer.

The learned Attorney General submitted that the above discrepancies may be ignored as insignificant and minor. He chiefly relied on the case of Mrityunjay Biswas Vs. Pratab

reported in (2013)12 Supreme Court Cases page 796. Besides P.W.8 and 9 gave the same evidence on oath which they had made and recorded by the Magistrate under Section 164 of the Code of Criminal Procedure.

The learned lawyer for the appellant in its reply referred to a decision reported in the case of Abu Taher Chowdhury Vs. The State, 42 DLR(AD)1990 page 253 and argued that the statement so recorded should be viewed with caution. He continued here that since the statements of P.W.8 and P.W.9 were recorded by a Magistrate in presence of a police officer, any deviation or departure by those P.Ws while giving evidence should be critically examined. Particularly since they forgot as to how they reached there by a bus or rickshaw and who opened the jeep, whether the appellant or the informant police officer must raise doubt as regards bonafide of evidence of P.W. 8 and 9.

The learned lawyer particularly pointed out that the investigation was closed only within 11 days in a supersonic speed that smells the extra interest of the prosecution.

It appears from the record that of course investigation in the case was concluded within 11 days only. But we do not find any illegality in such smart performance of the police that of course tells about the zeal of the police in submitting report.

So from that point of view the evidence of the two seizure list witnesses (P.W.s 8 and 9) also should be assessed with caution.

While summing up we see that the disputed white jeep was found standing on the vacant road side for how many days could not be known as the prosecution too failed to give a clue in the respect. Since admittedly the appellant used to be in police custody on remand for 10 days, it can be presumed that the Jeep was lying there for 10 days or more.

Significant part of the prosecutions allegation is that as the appellant was taken there by another police van he got down and picked up the 3.5 inch long huge key of the Jeep from the open roof top. It is rarely believable that in these days one would leave a valuable Jeep carrying other valuable and suspicious articles abandoned on the road for so many days and also would leave the key on the open roof top.

Responsible police officer P.W.3 admitted in his cross examination that on the open roof top of the Jeep, there was no provision to keep the huge key of the Jeep in a concealed way. In our view this scenario of leaving the huge key of the jeep (Exhibit-3) renders the story less probable. Besides admittedly the Jeep was lying there abandoned for so many days. Articles left inside the Jeep could be seen by public at large through the glass window. There was apprehension of theft of those articles even the Jeep itself was quite probable and a man possessing such a criminal mind is not expected to have left all those things unattended where the key was on the open roof top and one could easily pickup the key to open the Jeep and steal all those things. So in our view the possession of the alat inside the Jeep by the appellant in custody appeared naturally not probable. A fact seeming naturally not believable or probable from the attending facts and circumstances it can not be made probable by adducing oral evidences.

While as regards the alat that is the pistol itself it remained undenied that its barrel was containing names of two different countries of manufacture which is intrinsically improbable. The alat was not ballistically examined either.

Although in the situation according to the provision of section 30A of the Arms Act, the trial court ought to have ordered an examination. Even the witnesses nor the court itself seems to have taken the alat in their hands and became satisfied that it was a metallic pistol otherwise workable as a fire arms.

Where the possession of alat by the appellant in the abandoned Jeep remains not probable it hardly matters whether the alat was otherwise a workable metallic pistol or not.

It appears that the learned trial court resolved those issues rather cursorily in favour of the prosecution without deeply assessing the evidence and circumstances.

As a result we are of the view that the possession of the pistol with a bullet by the appellant inside the abandoned Jeep where the appellant himself used to be in police custody remained not convincing rather the evidences appeared short of required legal standard.

As a result, the appeal is allowed. The judgment of conviction and sentence passed against the appellant in Special Tribunal Case No. 513 of 2020 dated 28.09.2020 by

the learned Senior Special Tribunal-1, Dhaka Metropolitan is set aside.

The appellant to be set at liberty if not wanted in connection with any other case or proceeding. The seized articles should be disposed of in accordance with law.

Communicate the judgment and order to the court below at once.

Send down the lower court record.

Md. Riaz Uddin Khan, J

I agree

Md. Atikur Rahman, A.B.O.