IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Criminal Appellate Jurisdiction)
Present
Madam Justice Kashefa Hussain

Criminal Appeal No. 495 of 2021

Md. Faruk Hossain
.....Appellant
-Versus-
The State and another
------- Respondents.

Mr. Md. Golam Nabi, Advocate with
Mr. Mirza Salah Uddin Ahmed,
Advocate
------ For the appellant

Mr. Md. Mohiuddin Dewan, D.A.G with
Ms. Sayeda Sabina Ahmed Molly, A.A.G
.... for the respondent No. 1.

Mr. Md. Nawsher Ali Mollah, Advocate
----- For the respondent No. 2.

Heard on:22.11.2023,
06.12.2023, 07.012.2023and
Judgment on:13.12.2023.

This appeal is directed against the judgment and order of conviction and sentence dated 12.01.2021 passed by the learned Divisional Special Judge, Barishal in Special Case No. 17 of 2018 arising out of Uzirpur Police Station Case No.19 dated 15.01.2018 corresponding to G.R Case No. 19 of 2018 (Uzirpur) under sections 420 and 161 of the Penal Code and convicting the accused appellant under sections 420 and 161 of the Penal Code and sentencing him to suffer rigorous imprisonment for 3

years and to pay a fine of Tk. 20,000/- in default to suffer rigorous imprisonment for 6(six) months more.

The prosecution case, in short, is that one Md. SifathUdin, assistant director, Durnity Daman Commission, the district co-ordiante office, Barishal as the informant lodged the first information report against the accused appellant with the Uzirpur Model Police Station on 15.01.2018 at 18.05 hours alleging inter alia that in between 14.12.2017 at 12.00 hours to 15.01.2018 at 17.00 hours the accused Md. Faruk Hossain in his capacity as surveyor of Upazilla settlement office, Uzirpur, Barishal took taka 10,000/- from one Md. Nazim Ali Howlader as bribe in order to correct the record of right of S.A khatian number- 406, 442, 455, 572, 745, 895, 909, 910 of MouzaBaherhat under UzirpurUpazilla and he was caught red-handed by the informant party in a trap case. After receiving the said information the officer in charge recorded the Uzirpur Police Station case No. 19 dated 15.01.2018 under section 161 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 and sent the case to the Durnity Daman Commission for investigation. Hence the case.

The court below upon hearing the parties allowed the Special Case No. 17 of 2018 arising out of Uzirpur Police Station Case No.19 dated 15.01.2018 corresponding to G.R Case No. 19 of 2018 (Uzirpur) under sections 420 and 161 of the Penal Code and convicting the accused appellant under sections 420, 161 of the Penal Code and sentencing him to suffer rigorous imprisonment for 3 years and to pay a fine of Tk. 20,000/- in default to suffer rigorous imprisonment for 6(six) months more.

Being aggrieved by the judgment and order of conviction and sentence dated 12.01.2021 the accused convict as appellant preferred a criminal appeal which is presently before this court for disposal.The accused convict appellant also obtained bail from by an order of this division pursuant to appeal be admitted.

Pursuant to exhausting the relevant procedures including the ACC laws enacted for the purpose trial was held and both parties produced evidences and witnesses were examined.

Learned Advocate Mr. Md. Golam Nabi with learned Advocate Mr. Mirza Salah Uddin Ahmed

appeared for the convict-appellant while learned Deputy Attorney General Mr. Md. Mohiuddin Dewan with Ms. Sayeda Sabina Ahmed Molly, A.A.G appeared for the respondent No. 1 and the learned Advocate Mr. Md. Nawsher Ali Mollah, Advocate appeared for the respondent No. 2.

Learned Advocate Mr. Md. Golam Nabi for the convict-appellant submits that the court below upon total misreading and misconception of evidences arrived upon a wrong conclusion and therefore the judgment of the court below is not sustainable and ought to be set aside. He argues that there is nothing from the materials to show that there is any direct evidence by way of eye witness which may indicate that the accused convict appellant is guilty of the offence alleged against him. He argues that none of the witnesses in the court below except for one eye witness were present during the alleged occurrence. He asserts that all the other witnesses gave their evidences only upon hearsay and are not eye witness. He points out that only one eye witness was present with him who is P.W-8. He contends that from the deposition of P.W-8 it is crystal clear that the alleged amount of Taka 10,000(ten thousand)

as bribery was not recovered directly from the accused. He draws this benchs' attention to the oral evidences of p.w-8 and points out that the p.w-8 is the office assistant of the Uzirpur Settlement Office. He argues that upon an examination of the oral evidences of p.w-8 it clearly manifest that the allegation against the accused appellant is untrue and unfounded.

He pursuades that moreover there are marked discrepancy and inconsistency between the conduct of the trap team also. He asserts that the only eye witness P.w-8 Md. Sirajul Haque in his deposition states that the trap team came to the dormitory room No. 9 twice upon their first entry and left and again came with the informant. He next points out that significantly enough the only eye witness states that the amount of 10,000/-(ten thousand) was recovered from the bed side of the room and not from any drawer contrarily to the other witnesses claims. He submits that although the other p.ws stated that the money was recovered from the drawer however there is no reason to ignore the oral evidences of the only eye witness in the absence of any adverse indication against him. He argues that the court below upon total misapplication of mind and

reason best known to it did not even discuss the oral evidences of the witnesses separately and also did not discuss and evaluate the oral evidences of the p.w-8 and thereby deviated from its legal duty. He submits that in any case in a proceeding under criminal procedure the oral evidences of the eye witnesses must prevail over any hearsay evidence. He reasserts that moreover there is nothing from the materials or from the judgment which may indicate that the p.w-8 Md. Sirajul Haque is not an independent witnesses nor could it be shown or proved anywhere that his depositions are not credible. He submits that in the absence of any proof to the effect and in the absence of any indication to the effect that the oral evidences of the P.W-8 is not reliable it is only clear that the P.W-8 the only eye witness's statements are true. Placing reliance on his arguments he contends that since the money was not recovered from the accused convict appellant directly and was recovered only from the bed side from room No. 9 therefore it is clear that the convict-appellant is not guilty of the offence.

He next argues on the issue of the appellant being present in the dormitory room No. 9 and not in the office.

He points out to the materials and assails that as per their version the trap team first went to the settlement office and claimed that upon not finding the convict-appellant in the settlement office they went to the dormitory which is near the settlement office. He contends that however there is nothing from the materials which may manifest that the trap team had prior permission from the authorities to conduct their operation in the dormitory. He argues that it is part of the procedural criminal law under the Code of Criminal Procedure wherein an operation in a particular place is to be conducted prior permission must be taken by the authorities for entry and conducting operation in that particular place. He submits that the procedure of the Anti Corruption Commission laws essentially come within the ambits of the criminal procedural laws. He continues that therefore the trap team whatsover representing the respondent No. 2 is not lawfully authorised to conduct any operation without prior recommendation and permission and authorization of the authorities. He argues that therefore such operation and arrest of the appellant from the dormitory without prior permission is inherently unlawful and such arrest cannot stand in the eye of law.

He next points out to the oral evidences of the p.ws and points out that it is proved by the oral evidences from some of the witness's statement in deposition that room No. 9 was not even allotted in the name of the accused convict appellant. He particularly draws upon the evidences of the P.W- 7 and P.W 11 from the bail application. He submits that from the oral evidences of P.W-7 it appears that the appellant had requested the P.W-7 for room keys of room No. 9 for taking his shower. He submits that it is also clear that upon his request the P.W-7 admittedly handed him the keys of room No.9. He next points out to the P.W-7's cross examination where in it is admitted that the P.W-7 himself and P.W-11 are residents in room No. 9 and not the accused convict. He next points out to the oral evidences of the P.W-11 who in his cross examination admits that the room was not allotted in the name of convict-appellant Md. Faruk Hossain. He argues that taking all these circumstantial factors into consideration it is absurd to presume that the convict appellant Md. Faruk Hossain or any other person would upon receiving bribe money run the risk of keeping such money by a bed side of a room which does not even

belong to him and wherein he is virtually a guest. He submits that the circumstantial evidences are adequate enough to prove that the accused is a victim of circumstances due to hostility and collusion of some and it is also clear that some other person kept the money in the bedside with the purpose of falsely implicating the appellant.

He next argues that although the informant claims that Md. Faruk Hossain was designated to do the work related to mutation and preparation/correction of record of rights but however nowhere in the evidences could it be proved that Md. Faruk Hossain was actually in charge to further or facilitate the mutation case or do correction of record of rights. He contends that although the informant's allegation is that the accused is surveyor of land, and also allege that the accused was designated to survey the land of the informant regarding mutation etc. and do correction of record of rights, but however there is nothing in the evidences to prove that the convict appellant ever conducted any survey in the complainant's land.

He next argues that from the oral evidences of the other P.Ws even if those are hearsay evidences however

none of the P.Ws oral evidences could state that the money was recovered directly from him and/or from his body. He contends that moreover most of the other P.Ws who are hearsay witnesses and not direct eye witnesses stated that money was recovered from the drawer. He assails that since the only eye witness unambiguously stated that the money was recovered from the bed side therefore the oral evidences of the only eye witness must be relied upon. He next draws upon the oral evidences of the P.W-5 who is a settlement officer of Uzirpur settlement office. He particularly points out to the cross examination of p.w-5 and asserts that from the cross-examination of the p.w-5 it is clear that the appellant Md. Faruk Hossain was not designated to survey the land of the informant. He continues that rather one Binod Bihari who is an assistant settlement officer was engaged for the task. He submits that therefore this case is a case of no evidence since there is nothing on record to show that there is any direct evidence of the occurrence of the offence of receiving bribery as alleged against the appellant. He asserts that however the lower court below upon total misapplication of mind upon wrong finding came upon an incorrect

conclusion and therefore the judgment of the court below ought to be set aside and the appeal ought to be allowed for ends of justice.

On the other hand learned Advocate Mr. Md. Nawsher Ali Mollah appeared for the respondent No. 2 and opposes the appeal. Upon a query from this bench the learned Advocate for the respondent No. 2 however concedes that there are several lacunas in the judgment of the court below. He concedes that the court did not properly discuss the oral evidences separately and deviated from its legal duty to do. He next submits that since the court below did not evaluate the evidences properly therefore the matter be sent back on remand.

Regarding the learned Advocate for the appellant's contention as to no prior permission of the concerned authorities taken to conduct operation in the dormitory, the learned Advocate for the respondent No. 2 controverts such submission and draws upon section 537 of the Code of Criminal Procedure. Drawing upon section 537 of the Code of Criminal Procedure he argues that section 537 of the Code of Criminal Procedure contemplate that subject to the other provisions no finding, sentence or order

passed by a court of competent jurisdiction shall be reversed or altered under Chapter XXVII or an appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code.

He however concedes that since there are some lacunas in the findings of the court below particularly on the issue of the court not discussing the evidences elaborately and properly, therefore the matter be sent back on remand for fresh trial and the appeal be disposed of accordingly.

Learned D.A.G Mr. Md. Mohiuddin Dewan along with Ms. Sayeda Sabina Ahmed Molly, learned A.A.G appeared on behalf of the respondent No. 1 and substantively support the submissions of the learned Advocate for the respondent No. 1.

I have heard the learned counsels, perused the memorandum of appeal and bail application and also the materials on record. It is a general principle of law

particularly in criminal proceedings including under the provision of laws of Anti Corruption Commission whatsoever, that whatever be the number of witnesses nevertheless the evidence of eye witnesses in a case shall prevail over any other hearsay evidence unless and until such eye witness is proved to be hostile or otherwise proved not to be an independent witness. Bearing this in mind I have examined the oral evidences of all the eye witnesses minutely. It is clear that except for P.W-8 Md. Sirajul Haque none of the other p.ws are eye witnesses of the occurrence in the case. I am inclined to opine that the oral evidences of the P.W-8 must be examined thoroughly. The relevant portion of the oral evidences in the instant case is reproduced below:

> *"Examination in chief: আমার কাজ করতে থাকাবস্থায় হঠাৎ করেই দুদকের লোক ঐ রুমে এসে ফারুক সাহেবকে জিজ্ঞাসাবাদ শুরু করে।তারা ফারুকের দেহসহ সব কিছু সার্চ করে। কিছু না পেয়ে তারা রুম থেকে বের হয়ে যায়।এরপর তারা কিছু পরে আবার ঐ রুমে আসে।ফারুককে সার্চ করে কিছু না পেয়ে দ্বিতীয়বার তারা রুমে এসে বেডের কোনো থেকে ১০,০০০/- (দশহাজার) টাকা উদ্ধারকরে। এরপর তারা ফারুক সাহেবকে গ্রেফতার করে থানায় নিয়ে যায়।"*

From the oral evidences of the only eye witness P.W-8 it is manifest that there is marked inconsistency in the conduct of the trap team. The first time they came into the room and went out again and again came back to the room and recovered money only from the bed side of the room and not from any other place of the room and that also as shown by the informant who was accompanying them.

It is clear from the oral evidences of the p.w-7 and p.w-11 that the room No. 9 of the dormitory was never at all allotted in the name of the convict appellant Md. Faruk Hossain.

It would be most unreasonable to hold that Md. Faruk Hossain or any other person in his right senses and right mind would consciously keep money upon receiving bribe in a bed side of a room which room is not his. Rather admittedly the room is in the occupancy of two other persons. In all reasonableness it is absurd to hold that the appellant Md. Faruk Hossain would run the risk of keeping any briber money of Tk. 10,000/- or whatever amount in the drawer or bed side or in any place whatsoever of a room where he is practically a guest only.

Moreover it is also clear that the money was actually recovered from the bed side since the only eyewitness clearly stated that the money was recovered from the bed side. Most of the other witnesses (and none of them are eye witnesses) in particular the members of the trap team stated in their oral evidences that the money was recovered from a drawer. But however in the absence of any indication that the P.W-8 is a hostile witness or that he is not an independent witness there is no reason to disbelieve the oral evidences of the P.W-8 the only eye witness. From the cross examination of P.W-8 also nothing inconsistent could be revealed. He also state in his cross-examination which is reproduced below:

> *"ফারুক সাহেবকে ঐ রুমে বসে যখন সার্চ করে তখন আমি সেখানে উপস্থিত ছিলাম।তারা ফারুক্রে কাছে কিচু না পেয়ে তারা সবাই চলে যায়। ঐ রুমে সে সময় ৩০ ধারা বা ৩১ ধারা সংক্রান্ত কোনো নথি দাখিলা, পরচা, সার্ভে রিপোর্ট বা অন্য কিছু ছিলো না।দুদকের লোকজন দ্বিতীয়বার যখন আসে তখন সে সময়তারা নাজেম আলী নামের এক লোককে ডেকে আনে। এরপর নাজেম আলীর দেখানো মতে দুদকের লোক ঐ রুমের দুই বেডের এক বেডের কোনা থেকে ১০,০০০/- (দশহাজার) টাকা উদ্ধারকরে।"*

Significantly enough Najem Ali is the informant of the case and P.W-8 in his cross examination stated that when the trap team came back a second time Najem Ali. directly pointed out to the bed side of the room and the money was recovered from one of the corners of the bed side.

It may be reiterated that in the absence of any evidences to the contrary, the oral evidences of the PW-8 may be considered as genuine evidences. Since I am inclined to hold that the oral evidences of the P.W-8 the only eye witness is genuine evidence therefore I am also inclined to come to the conclusion that the informant Najem Ali kept the money in the bed side collusively whatsoever/ for reasons best known to him. My opinion comes from the logical conclusion that unless the informant Najem Ali knew where the money was hidden or kept in the room he would not or could not readily point out to a particular place.

In my considered view in the instant case the cross examination of the p.w-8 is one of the significant factors to prove the appellant’s innocence and also indicate that he may be only a victim of circumstances.

The settled principle of direct oral evidence of witnesses prevailing over any indirect evidences echoes the statutory provisions of section 60 of the Evidence Act 1872.

The relevant portion of the provisions of section 60 for our purpose is reproduced below:

60. Oral evidence must be direct- Oral evidence must, in all cases whatever, be direct; that is to say-

if refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

Such being the position of the law, the direct oral evidence of PW-8 is satisfactory enough to prove the innocence of the accused-convict-appellant in this case.

While addressing the issue of the place of alleged occurrence, it must be borne in mind that the dormitory room was not allotted in the name of Md. Faruk Hossain. Rather it was allotted in the name of two other persons P.W-7 and P.W-11.

I have also taken into consideration the appellant's argument that although there was no recommendation to

conduct operation by the trap team in the dormitory by the concerned authority, however the trap team without such recommendation conducted the operation and which is not allowed by law. The learned Advocate for the respondent No. 2 attempted to controvert the submissions of the learned Advocate for the appellant on the issue of not having permission to conduct the operation and therefore such operation being unlawful. While controverting, relying on his contention the learned counsel for the Respondent No.2 Anti Corruption Commission points out to section 537 of Code of Criminal Procedure which is reproduced below:

> *"537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered under Chapter XXVII or an appeal or revision on account*
>
> *(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order judgment or other proceedings before or during trial or in*

any inquiry or other proceedings under this Code, or."

However, upon perusal of section 537 of the Code of Criminal Procedure, I do not agree with the reliance placed by the learned Advocate for the respondent No.2. I am of the view that section 537 of the Code of Criminal Procedure is not applicable in this case since the language of Section 537 does not cover within its ambit or range an operation conducted by a trap team designated by the Anti Corruption Commission.

Moreover it is necessary to be reminded that the provisions of Anti Corruption Commission laws are enacted under a special statutory enactment. Therefore unless any provision is specified in the provision of laws relating to Anti Corruption Commission, it cannot be presumed that a trap team may conduct an operation in a particular case without any formal permission. Upon query form this Bench, the learned counsel for the Respondent No.2 could not refer to any particular provision of Rules which may allow conducting an operation without recommendation. Therefore the provision of Anti Corruption Commission laws being a special statutory

enactment there is no scope for presumption since all the provisions must be strictly construed.

The informant's specific allegation against the appellant is that the appellant took bribe from him in lieu of doing work related to mutation and correction of record of rights as a surveyor. The informant claims that previously the convict appellant took taka 30,000/- as bribe money but however there is nothing on record which may indicate any previous receiving of bribery by the appellant nor is there any evidence that the accused is habitually a corrupt person.

Morever from the oral evidences of the P.w-5 it clearly shows that the appellant was not in charge of surveying land of the informant. The cross examination of p.w-5 is reproduced below:

''আজ যে কাগজগুলো দাখিল করলাম সে গুলোরমতামত দেবার অধিকার বিনোদ বিহারী। তিনি সহকারী সেটেলমেন্ট অফিসার।''

From the oral evidences of the p.w-5 also it is clear that the appellant was not even engaged to conduct any survey of the informant's land.

I have examined the judgment of the court below thoroughly. Regrettably enough the court deviated from its judicial duty given that it did not even discuss nor evaluate the oral evidences of the 21 P.Ws separately. Rather it gave a sweeping remark on the evidences inter alia other findings. Such conduct by the court below in arriving on its finding without evaluating the material evidence amounts to a travesty of justice.

Under the facts and circumstances of the case, evidence on record and in the light of the above discussions and decisions, I find merit in this appeal.

In the result, the appeal is allowed. The judgment and order of conviction and sentence dated 12.01.2021 passed by the learned Divisional Special Judge, Barishal in Special Case No. 17 of 2018 arising out of Uzirpur Police Station Case No.19 dated 15.01.2018 corresponding to G.R Case No. 19 of 2018 (Uzirpur) under sections 420 and 161 of the Penal Code and convicting the accused appellant under sections 420, 161 of the Penal Code and sentencing him to suffer rigorous imprisonment for 3 years and to pay a fine of Tk. 20,000/- in default to suffer

rigorous imprisonment for 6(six) months more, is hereby set aside.

Let the sub-ordinate Court Records along with a copy of this judgment be sent to the Court below at-once.

Communicate this judgment at once.

Arif(B.O)