

Present:
Mr. Justice Md. Nazrul Islam Talukder
And
Mr. Justice Md. Mostafizur Rahman

Criminal Revision No.2072 of 2021

Durnity Daman Commission

..... **Petitioner.**

-Versus-

Dr. S.M. Nazmul Huq and another

..... **Opposite-parties.**

Mr. Md. Khurshid Alam Khan, Senior Advocate

..... **For the Petitioner.**

Mr. A.K.M. Amin Uddin, D.A.G with

Ms. Anna Khanom Koli, A.A.G and

Mr. Md. Shaifour Rahman Siddique, A.A.G

..... **For the State-opposite party.**

Mr. Mahbub Shafique, Advocate with

Mr. Md. Shahria Kabir Biplob and

Mr. Md. Motiur Rahaman, Advocate

.....**For the Accused-opposite-party No.1.**

Heard on 03.02.2022 and Judgment
on: 07.02.2022

Md. Nazrul Islam Talukder, J:

On an application under Section 10(1A) of the Criminal Law Amendment Act, 1958, this Rule, at the instance of the petitioner, was issued calling upon the accused-opposite-party No.1 and another to show cause as to why Order No.33

dated 29.09.2021 passed by the learned Special Judge, Court No.06 Dhaka in Special Case No.04 of 2019 arising out of DUDOK G.R. No.27 of 2018 corresponding to Shahabagh Thana Case No.26 dated 12.04.2018 under Section 5(2) of the Prevention of Corruption Act, 1947 read with Section 161 of the Penal Code, now pending in the Court of learned Special Judge, Court No.06, Dhaka, rejecting the application for considering the examination-in-Chief of P.W.2 as recorded through court and/or at the initiative of the court, should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

The prosecution case, in brief, is that on 12.04.2018, one Md. Abdul Wadud, Assistant Director of the Durnity Daman, Integrated District

Office, Dhaka being informant lodged a First Information Report before the Officer-in-Charge of Shahbagh Police Station, Dhaka against the accused-opposite party No.1 under Section 5(2) of the Prevention of Corruption Act,1947 read with Section 161 of the Penal Code alleging, inter-alia, that the accused-opposite party No.1, by misusing his power and authority, took Tk.5,00,000/ as bribe from one Imam Hasan, Junior Executive Officer of M/S Syed Shipping Lines at 6/1/A, Segun Restaurant, second floor, Segunbagicha, Dhaka for the purpose of approving the name and design together with no objection certificates in respect of M.V. Prince of Sohag (M-60094), M.V. Rafsan and M.V Nabila, the passenger ships owned by M/S Syed Shipping Lines. It is mentioned in the FIR that the accused-opposite

party No.1 demanded Tk.15,00,000/- from the owner of M/s Syed Shipping lines and thereafter, the owner of the passenger ships being compelled agreed to give the said amount of Tk.15,00,000/- by two installments. In spite of receiving Tk.5 lac as bribe, the accused-opposite party No.1 did not approve the name and design together with no objection certificates in respect of the passenger ships. Subsequently, the owner of the passenger ships through his representative communicated the accused-opposite party No.1 who told the owner that if payment of the remaining Tk.10,00,000/- is not given, approval of name and design along with no objection certificates in respect of proposed passenger ships will not be given. Initially, the owner of the passenger ships did not ethically agree to give the bribe money to the accused.

Subsequently, Imam Hasan, the representative of the owner agreed to pay the said bribe money and informed the informant of this matter. On 12.04.2018, when the accused-opposite party No.1 received Tk.5,00,000/- as bribe out of remaining demanded Tk.10,00,000/- from Imam Hasan, a representative of the owner, at that time, the informant reached the place of occurrence and caught him red handed with the bribe money. It is stated in the F.I.R that the informant obtained permission from the Commission being Memo No. 04. 01. 2600. 701. 01. 036. 18785 dated 12.04.2018 for conducting the trap case. Accordingly, the accused-opposite party No.1 committed offence under Sections 161 of the Penal Code read with Section 5(2) of the

Prevention of Corruption Act, 1947. Hence, the FIR.

It is stated in the application that the offences being schedule offences under the Durnity Daman Commission Ain, 2004, the Commission investigated the case; during investigation, the Investigating Officer visited the place of occurrence, prepared the sketch map with index, recorded the statements of witnesses under section 161 of the Code of Criminal Procedure and after investigation submitted memo of evidence before the Durnity Daman Commission and thereafter obtaining sanction under section 32 of the Durnity Daman Commission Ain, 2004, the Durnity Daman Commission submitted Charge-sheet being No.435 dated 18.10.2018 under sections 161 of the Penal Code read with section 5(2) of

the Prevention of Corruption Act, 1947 against the accused-opposite party No.1.

It is further stated in the application that after submission of charge-sheet, the case was transferred to the Court of learned Special Judge, Court No.6, Dhaka and the same was registered as Special Case No.4 of 2019.

It is stated in the application that on 19.02.2019, the accused-opposite party No.1 filed an application for discharging him from the case under section 241A of the Code of Criminal Procedure before the Special Judge, Court No.6, Dhaka who after hearing the parties rejected the said application by order No.6 dated 19.02.2019.

On 19.02.2019, charge was framed by the learned Special Judge, Court No.6, Dhaka against the accused-opposite party No.1 under section 161

of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1949 and the said charge was read over to the accused in which he pleaded not guilty and claimed to be tried.

Meanwhile, the prosecution examined as many as 3(three) P.Ws. The examination-in-chief adduced by PW-2 was recorded by the court on 12.09.2021 but he did not support the prosecution case. As a result, on that date, the learned public prosecutor submitted an application before the court for cross-examining P.W-2 declaring him hostile witness. The court allowed the application, declared P.W-2 as hostile witness and allowed the learned P.P to cross-examine him. The learned P.P duly cross-examined P.W-2 and the evidence given by P.W-2 was duly recorded by the learned trial Judge. On 21.09.2021, the learned P.P was

supposed to produce witnesses before the court but he did not produce any witness on that date. It may be noted that on 12.09.2021 and 21.09.2021, the learned P.P did not raise any objection against the examination-in-chief of P.W-2 and did not submit any application for considering the examination-in-chief of P.W-2 as recorded through court and/or at the initiative of the court.

On 29.09.2021, the Durnity Daman Commission filed 2(two) separate applications- one is for recalling P.W-2 for cross-examination and the other is for considering the examination-in-chief given by PW-2 as recorded through court and/or at the initiative of the court since he was declared hostile witness by the court following an application filed by the prosecution.

On 29.09.2021, the learned Special Judge, Court No.6, Dhaka upon hearing the parties, by order No.33 dated 29.09.2021, allowed the application for recalling P.W-2 for cross-examination and rejected the application for considering the examination-in-chief of P.W-2 as recorded through court and/or at the initiative of the court.

Being aggrieved by the impugned Order No.33 dated 29.09.2021 passed by the learned Special Judge, Court No.6, Dhaka, the Durnity Daman Commission filed this criminal revision before this court under section 10(1A) of the Criminal Law Amendment Act, 1958 and obtained this Rule along with an order of stay of the proceeding.

At the very outset, Mr. Md. Khurshid Alam Khan, the learned Senior Advocate appearing for the Durnity Daman Commission, submits that the learned Special Judge, Court No.6, Dhaka without considering the facts and circumstances of the case and the contents of the application filed by the Durnity Daman Commission wrongly rejected the said application and as such, the impugned order passed by the learned Special Judge, Court No.6, Dhaka is liable to be set aside.

He next submits that when the accused-opposite-party No.01 took Tk.5,00,000/- as bribe, the informant caught him red handed and seized the said monies which show that the accused-opposite-party No.1 committed offence punishable under Section 161 of the Penal Code read with Section 5(2) of the Prevention of

Corruption Act, 1947 and as such, the Rule should be made absolute setting aside the impugned order.

He categorically submits that since the court declared the P.W-2 as hostile witness following an application filed by the prosecution, there is no bar to treating the examination-in-chief adduced by P.W-2 as recorded through court and/or at the initiative of the court and that being the reason, the impugned order may be set aside for ends of justice.

He lastly submits that P.W-2 Md. Imam Hasan is a charge-sheeted witness but he did not disclose the actual fact before the Court, hence, the Durnity Daman Commission filed an application for considering the examination-in-chief given by PW-2 Md. Imam Hasan as

recorded through court and/or at the initiative of the court since the court declared him hostile pursuant to application filed by the prosecution but the learned Special Judge without considering the same rejected the said application on 29.09.2021 and as such, the impugned order should be set aside for ends of Justice.

On the other hand, Mr. Mahbub Shafique, the learned Advocate along with Mr. Shahria Kabir Biplob and Mr. Md. Motiur Rahaman, the learned Advocate appearing for accused-opposite party No.1, submits that the learned P.P of ACC Mr. Mahmud Hosain Jahangir in keeping the P.W.2 namely Md. Hasan Iman under his control before some dates produced him on 12.09.2021 and after recording his examination-in-chief, the learned P.P filed an application before the court

for declaring him hostile and accordingly P.W.-2 was declared hostile by the court and then he was cross-examined by the learned P.P in accordance with law; on 12.09.2021, the learned P.P did not submit any application before the court for considering the examination-in-chief adduced by P.W-2 as recorded through court and/or at the initiative of the court; moreover, in the next date i.e on 21.09.2021, the learned P.P was supposed to produce witnesses for recording their evidence but he did not produce any witness before the court on that day; nonetheless, he did not file any objection or application in respect of the examination-in-chief of P.W-2 and the learned Special Judge, Court No.6, Dhaka upon hearing the parties correctly and rightly rejected the application for considering the examination-in-cheif of P.W-2 as

recorded through court and/or at the initiative of the court and as such, the Rule is liable to be discharged in the interest of justice.

He next submits that P.W.-2 Md. Hasan Imam adduced examination-in-chief before the court on 12.09.2021 but he did not support the prosecution case; the learned P.P. did not submit any application for considering the examination-in-chief of P.W-2 as recorded through court and/or at the initiative of the court on 12.09.2021 and 21.09.2021; anyway, the learned P.P. filed two separate applications- one is for re-calling the P.W.-2 and the other is for considering the statement of P.W-2 as recorded through court and/or at the initiative of the court as he was declared hostile by the court at the instance of the prosecution and the learned Special Judge, Court

No.6, Dhaka correctly and properly rejected the application for considering the examination in-chief of P.W-2 as recorded through court and/or at the initiative of the court although the learned Special Judge, Court No.6, Dhaka allowed the application for re-calling the P.W-2 for cross-examination for the ends of justice despite assigning no reasons for the same and as such, the Rule is liable to be discharged for the ends of justice.

He then submits that the First Information Report was lodged on 12.04.2018 and the prosecution (ACC) prayed times one after another for producing their witnesses and as such the proceeding is being lingered without any fault of the accused-opposite party No.1; furthermore, if the order of stay dated 01.11.2021 passed by this

court subsists, the prolongation of the proceeding before the trial Court will be continued for an uncertain period of time and as such, the Rule is liable to be discharged.

He candidly submits that the examination-in-chief or the evidence of a hostile witness cannot be treated as taken down through court and/or at the initiative of the court and that there is no provision of law within the four corners of the Code of Criminal Procedure to the effect that the examination-in-chief or evidence of a hostile witness may be treated as taken down through court and/or at the initiative of the court and that the submission made by the learned Advocate for the Durnity Daman Commission is a misconceived one and the same is not acceptable and sustainable in the eye of law.

He lastly submits that from the orders dated 21.09.2021, 29.09.2021 and 26.10.2021, it appears that after recording evidence of PW-3, the prosecution could not produce P.Ws.4-8 despite issuing Non Bailable Witness Warrant (NBWW) and Witness Warrant (W/W) upon them, as such the ACC intentionally and deliberately is trying to delay the proceeding as because their witnesses do not support the prosecution case and as such, the Rule is liable to be discharged.

Mr. Mahbub Shafique, the learned Advocate for the accused-opposite party No.1 in support of his submissions has referred to a number of decisions taken in the cases of Siddique Munshi Vs the State, reported in 44 DLR(AD) (1992)169, Amir Hossain Dhali and others Vs the State, reported in 49 DLR(1997) (HC)163, Fazlul Haque

Vs the State, reported in 11 DLR(HC)316, Abdur Rab alias Nedon Miah Vs the State, reported in 1 BLC(1996) (HC)270, Alauddin alias Md Alauddin and others Vs the State, reported in 12 BLC(2007) (HC)137.

Mr. A.K.M. Amin Uddin, the learned D.A.G along with Ms. Anna Khanom Koli, the learned A.A.G and Mr. Md. Shaifour Rahman Siddique, the learned A.A.G appearing for the State, has adopted the submissions advanced by the learned Advocate for the Durnity Daman Commission and submits that the Rule may be made absolute.

We have gone through the revisional application along with the prosecution materials annexed therewith and perused the same. We have also seen and gone through order Nos.31 dated 12.09.2021, 32 dated 21.09.2021, 33 dated

29.09.2021 and 38 dated 24.11.2021. We have also heard the learned Advocate for the petitioner and the learned Advocates for the accused-opposite party No.1 and the learned Deputy Attorney-General for the State at length.

For convenience of discussion and in order to come to a decision in this matter, we want to quote the pertinent portion of the impugned order which runs as follows :

“নথি ও পি ডব্লিউ-২ মোঃ হাসান ইমাম এর জবানবন্দি পর্যালোচনায় দেখা যায়, এই সাক্ষীকে রাষ্ট্র পক্ষের বিজ্ঞ পি পি জনাব মাহমুদ হোসেন জাহাঙ্গীর মামলার কয়েকটি তারিখ পূর্ব হইতেই নিজ নিয়ন্ত্রণে রাখিয়া আদালত হইতে কয়েকবার সময় নিয়া তাহাকে সাক্ষী হিসাবে গত ১২.০৯.২০২১ আদালতে উপস্থাপন করেন। জবানবন্দি প্রদান সমাপ্ত হইলে বিজ্ঞ পি পি এই সাক্ষীকে বৈরী ঘোষণা করার আবেদন করেন। তখন এই সাক্ষীকে আদালত বৈরী ঘোষণা করে এবং বিজ্ঞ পি পি তাহাকে জেরা করেন। বিজ্ঞ পি পি উক্ত তারিখে অত্র

দরখাস্তে বর্ণিত বিষয়ে কোন বক্তব্য দেন নাই। এরপর গত ২১.০৯.২০২১ তারিখেও বিজ্ঞ পি পি এই মামলায় হাজির অপর দুই সাক্ষীকে আদালতে উপস্থাপন করেন নাই এবং বর্ণিত বিষয়ে কোন আপত্তি বা দরখাস্ত দেন নাই। অদ্য ২৯.০৯.২০২১ ধার্য তারিখে বিজ্ঞ পি পি সাক্ষী হাজির না করিয়া যে দরখাস্ত দাখিল করিয়াছেন তাহার বিষয়বস্তু আইনানুগ নহে এবং গ্রহণযোগ্য নহে। এমতাবস্থায়, অত্র দরখাস্তটি সরাসরি নামঞ্জুর করা হইল”

It appears from the record that P.W.-2 Md. Hasan Imam adduced examination-in-chief before the court on 12.09.2021, but he did not support the prosecution case and following the same, the learned P.P for the Durnity Daman Commission submitted an application for declaring P.W-2 as hostile witness along with a prayer for cross-examining him. The learned Special Judge upon hearing the parties allowed the application filed by the learned P.P. The P.W-2 was declared hostile

by the court and then he was cross-examined by the learned P.P. On that day no objection was raised against the examination-in-chief of P.W-2 by submitting any application by the Durnity Daman Commission. The next date for recording evidence of other witnesses was fixed on 21.09.2021 but no witnesses were produced on that date. Furthermore, on that date, the learned P.P. neither submitted any application nor any objection against the examination-in-chief given by P.W-2 rather the learned P.P. filed two separate applications on 29.09.2021- one is for re-calling the P.W.-2 for cross-examination and the other is for considering the examination-in-chief of P.W-2 as recorded through court and/or at the initiative of the court since he was declared hostile by the court pursuant to the application filed by the

prosecution but the learned Special Judge, Court No.6, Dhaka upon hearing the parties rejected the application for considering the examination-in-chief of P.W-2 as recorded through court and/or at the initiative of the court although the learned Special Judge, Court No.6, Dhaka allowed the application for re-calling P.W-2 for cross-examination for the ends of justice despite assigning no reasons for the same. As per submission of the learned Advocate for the Durnity Daman Commission, there is no bar to treating the examination-in-chief given by P.W-2 as taken down through court and/or at the initiative of the court. Per contra, the submission of the learned Advocate for the accused-opposite party No.1 in this regard is that the submission of the learned Advocate for the Durnity Daman

Commission is a misconceived one and the same is beyond the scope of law since there is no such law and/or provision in the Code of Criminal Procedure for treating the examination-in-chief of P.W-2 as taken down through court and/or at the initiative of the court. The learned Advocate for the Durnity Daman Commission has failed to show us any provision of law in this regard. Rather the point of law as raised in the instant case at hand has been settled by a series of legal decisions of this court.

It is an established principle of law that the evidence of a hostile witness cannot be rejected in whole or in part but the whole of the evidence so far as it affects both parties must be taken into consideration. If the evidence of the hostile witness fits in with the attending circumstances,

then it may be accepted and considered along with other evidence.

The aforesaid view finds support in the decision taken in the case of Siddique Munshi Vs the State, reported in 44 DLR(AD) (1992)169 wherein in paragraph No.9, it was held as under :

“A witness is not necessarily hostile if he reveals the truth. Established practice, now forming a rule of law, regarding the evidence of a hostile witness is that the whole of his evidence so far as it affects both the parties, favourably or unfavourably, must be considered and the court which gets the opportunity to observe his demeanour is at liberty to make assessment of the evidence. If corroboration from other sources is available to the evidence of a hostile witness, there is no reason why his evidence should be

rejected outright. If the evidence of the hostile witness fits in with the attending circumstances, then it may be accepted and considered along with other evidence.”

Similar views have been expressed in the decisions taken in the cases of Amir Hossain Dhali and others Vs the State, reported in 49 DLR(1997) (HC)163, Fazlul Haque Vs the State, reported in 11 DLR(HC)316, Abdur Rab alias Nedon Miah Vs the State, reported in 1 BLC(1996) (HC)270, Alauddin alias Md Alauddin and others Vs the State, reported in 12 BLC(2007) (HC)137.

Having considered all the facts and circumstances of the case, the submissions of the respective parties and the propositions of law cited and discussed above, we do not find any illegality

or impropriety in the impugned order passed by the learned judge of the trial court in rejecting the application filed by the Durnity Daman Commission for considering the examination-in-chief of P.W-2 as recorded through court and/or at the initiative of the court and accordingly, we do not find any merit in this Rule.

In consequence thereof, the Rule is discharged.

Consequently, the order of stay granted at the time of issuance of the Rule stands vacated.

The learned Judge of the trial Court is directed to conclude the trial as early as possible preferably within 01 (one) year from the date of receipt of this judgment and order in accordance with law.

Communicate this judgment and order to the learned judge of the concerned court below at once.

Md. Mostafizur Rahman, J:

I agree.