IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Criminal Appeal No. 3086 of 2022

Md. Nabab Ali
.....Convict-appellant.
-VERSUS-
The State
……. Respondent.

With
Criminal Appeal No. 2621 of 2022

Md. Anik @ Md. Polash
.....Convict-appellant.
-VERSUS-
The State
……. Respondent.

Present:
Mr. Justice Mamnoon Rahman

Mr. Md. Humayun Kabir, Adv. with
Mr. Mustafa Hamid Siddique, Adv.
…… For the appellant
(In Crl. Appeal No. 3086 of 2022)
Mr. Obayed Ahmed, Adv.
…For the appellant
(In Crl. Appeal No. 2621 of 2021)
Mr. Md. Taifoor Kabir, DAG with
Mr. Md. Lokman Hossain, AAG
Mr. Md. Hatem Ali, AAG
…… For the State.
Heard on: 14.11.2023
And
Judgment on: 29.11. 2023

Both the appeals were heard together and now disposed of by a common judgment as they do involve in similar question of facts and law though the convict-appellants are different.

In Criminal Appeal No. 3086 of 2022

This appeal is directed against the judgment and order of conviction and sentence dated 03.03.2022 passed by the learned Judge

of Metropolitan Special Tribunal No.16, Dhaka in Metropolitan Special Tribunal Case No. 186 of 2018 arising out of Biman Bandar Police Station Case No. 17 dated 08.11.2017, convicting the Appellant under Section 25B1(b) of the Special Powers Act, 1974 and sentencing him to suffer rigorous imprisonment for a period of 4(four) years and to pay a fine of Tk. 10,000/- (ten thousand) in default of which to suffer simple imprisonment for a period of 3(three) months more.

In Criminal Appeal No. 2621 of 2022

This appeal is directed against the judgment and order of conviction and sentence dated 03.03.2022 passed by the learned Metropolitan Special Tribunal No.16, Dhaka in Metro. Special Tribunal Case No. 186 of 2018 arising out of Biman Bondar Police Station Case No. 17 dated 08.11.2017 corresponding to G.R. No. 439 of 2017 convicting the appellant under section 25-B1(b)/25-D of the Special Powers Act, 1974, and sentencing him to suffer simple imprisonment for a period of 4(four) years and to pay fine of Tk. 10,000/- and in default to suffer simple imprisonment for 3(three) months more.

The prosecution case in short, are that, one Md. Niamul Haque, Sub-Inspector of APBN, Uttara, Dhaka lodged a First Information Report on 08.11.2017 in the morning against four accused persons including the appellant alleging *inter-alia* that while on duty with his team on 7.11.2017 detected a person in front of the Canopi Area who was moving with skating shoe. He was noticed that the said person handing over the same to three other persons. At one stage they

apprehended the accused persons including the appellant and they searched them and recovered certain gold ornaments and also recovered six pieces of gold weighing to 399 grams. Thereafter, as they failed to show any legal papers the informant lodged the First Information Report by preparing a seizure list. Subsequently, the police started investigation and after investigation submitted charge sheet being No. 11 dated 17.1.2018 against the accused persons. Eventually, the case record was transmitted to the court of Metropolitan Special Tribunal No. 16, Dhaka being Metropolitan Special Tribunal Case No. 186 of 2018 wherein the court below framed charge and proceeded with the case. During trial the prosecution examined as many as five witnesses and the defence examined none. Thereafter, the court below after examining the accused persons under section 342 of the Code of Criminal Procedure convicted and sentenced the accused persons including the appellants and ultimately sentenced them to suffer rigorous imprisonment for four years and to pay a fine of Tk. 10,000/- and also seized the incriminating articles in favour of the respondent-state and also confiscated the passport of the appellant, namely Nabab Ali. Being aggrieved by and dissatisfied with the aforesaid judgment and order of conviction and sentence the appellant Md. Nabab Ali and Md. Anik @ Md. Polash moved before this court by way of instant appeals.

Mr. Md. Humayun Kabir, the learned counsel appearing along with the learned counsel Mr. Mustafa Hamid Siddique on behalf of the

appellant in Criminal Appeal No. 3086 of 2022 submits that the both the courts below without applying their judicial mind and without considering the facts and circumstances, evidence both oral and documentary, most illegally and in an arbitrary manner passed the impugned judgment and order of conviction and sentence which requires interference by this court. He submits that in the present case in hand the appellant was falsely implicated by the police personnel with the offence as alleged as much as there is no credible evidence either oral or documentary to show the involvement of constructive possession of the appellant over the incriminating articles and the trial court ought to have considered the same and acquitted the appellant from the charge leveled against them. He further submits that admittedly the prosecution obtained confessional statement from the appellant Md. Nabab Ali but the same is not true and voluntarily as because the appellant does not know about the content of the skating shoe and he is a *bonafide* worker working in abroad and as such a serious doubt available in the prosecution case in hand and as such he is liable to get the benefit of doubt. The learned counsel also referred the provision of section 103 of the Code of Criminal Procedure and submits that in the present case in hand the seizure list was not prepared following the mandatory provisions as laid down in section 103 of the Code of Criminal Procedure as because the same was not done following the strict provisions and as such the foundation of the case itself is defective and the appellants are entitled to get the benefit of

doubt. In support of his contention the learned counsel referred the decisions as reported in 60DLR34. Also by referring another decisions reported in 12BLC 420 the learned counsel submits that in the said case while preparing the seizure list the informant's side failed to call the local inhabitants which creates serious doubt in the prosecution case in hand.

Mr. Mr. Obayed Ahmed, the learned counsel appearing on behalf of the appellant in Criminal Appeal No. 2621 of 2022 adopted the submissions as made by the learned counsel in Criminal Appeal No. 3086 of 2022.

Mr. Mohammad Taifoor Kabir, the learned Deputy Attorney General appearing on behalf of the respondent-state vehemently opposes the appeals. He submits that in the present case hand the court below on proper appreciation of the facts and circumstances, materials and record, evidence both oral and documentary the court below passed the impugned judgment and order of conviction and sentence which requires no interference by this court. He further submits that in the present case in hand the prosecution adduced sufficient evidence both oral and documentary to support the prosecution case and the charge against the appellants along with the other accused persons were proved beyond all reasonable doubt and as such the trial court committed no error in passing the judgment and order of conviction and sentence. He also submits that admittedly in the present case in hand there is a confession made by the appellant Md. Nabab Ali which is

true and voluntarily and as per the decision reported in 59 DLR 492 no independent witness or seizure list witness is required to warrant of conviction on the basis of the confessional statement. By referring the decision as reported in 15BLD 486 he submits that when the accused admits his involvement in the offence as alleged strict following of provisions of section 103 or 165 of the Code of Criminal Procedure is not necessary.

I have heard the learned Advocates for the appellants as well as the learned Deputy Attorney General for the state. I have perused the impugned judgment and order of conviction and sentence passed by the trial court as well as the lower appellate court, respective Memorandum of appeals, provisions of law, decisions as referred to as well as Lower Court Records.

On perusal of the same, it transpires that the appellants along with co-accused persons stood charge for an offence under section 25-B1(b)/25-D of the Special Powers Act, 1974 for bringing gold by not paying tax and duties imposable by Customs Authority before the Metropolitan Special Tribunal No. 16, Dhaka in Metropolitan Special Tribunal Case No. 186 of 2018. P.W. 1 as informant lodged the First Information Report with the Airport Police Station implicating the four accused persons including the appellants stating that on the day and time of occurrence while they were on patrol duty noticed that appellant Md. Nabab Ali was in the Canopi Area and ultimately they also noticed that he was handing over something with the other accused

persons and at that time they apprehended them and on search they recovered two gold chain and one ring weighing 28 grams and ultimately 6 pieces of gold weighing 399 grams from the skating shoes carrying by Nabab Ali. It also transpires that that the said informant prepared seizure list and lodged the case. The Investigating Officer after investigation submitted charge sheet against the accused persons including the appellants and on trial the trial court handed down the judgment and order of conviction and sentence.

P.W. 1 in his deposition supported the prosecution case as narrated in the First Information Report. In his cross-examination he stated that they apprehended the accused persons. P.W. 2 who was the member of the raiding team supported the testimony of P.W. 1. P.W. 3 also supported the testimony of P.W. 1. P.W. 4 is the Investigating Officer who proved the charge sheet. P.W. 5 is the Magistrate who proved the confession recorded by the appellant Md. Nabab Ali.

So, it transpires that during trial the prosecution adduced as many as five witnesses out of which three are the eye witnesses and admittedly the members of the raiding party. As per the statement of the said prosecution witnesses, it transpires that they supported the version of First Information Report as they conducted the raid, arrest and seizure. Admittedly, there was no independent witness examined or produced by the prosecution to support the case of the prosecution. However, in the case reported in 59 DLR 492 the High Court Division came to a conclusion that the evidence of the police can be taken into

consideration even if no independent or seizure list witnesses turned to support the prosecution case. While deciding the said case their lordships considered the other extenuating circumstances. Also in the case reported in 15 BLD 486 their lordships also came to a conclusion when the accused admits the guilt and there is no necessity to follow the other provisions of the law while proceeding. But the facts and circumstances of the case as stated in 15BLD 486 and the instant case is totally different. In the present case in hand, it transpires from the seizure list that admittedly the same was prepared by the informant who lodged the First Information Report and in the said seizure list two constables *i.e.* the member of the raiding party were made as witnesses. Section 103 of the Code of Criminal Procedure runs as follows;

> ***Section 103:*** *(1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.*
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> *(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under*

this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section signed by the said witnesses, shall be delivered to such occupant or person at his request.

(4) When any person is searched under section 102, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall he delivered to such person at his request.

(5) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Penal Code.

So, it transpires from the aforesaid provision of law it is mandatory on the part of the police or raiding party to make the seizure list in presence of two or more inhabitants locally to ensure the partially and neutrally which is a specific and clear provisions of law that has to be complied with in each and every circumstances. But in the present case in hand, it transpires from the seizure list that no such attempts were made rather two police constables were shown as seizure list witnesses. In the case reported in 12BLC 420 the High Court Division

categorically stated that failure of the Law Enforcing Agency in calling the local inhabitants seriously affect the prosecution case and also the case reported in 60 DLR 34 lend support to the above contention.

It further transpires from the confessional statement of Nabab Ali that he made the statement which runs as follows;

> *আমি সিঙ্গাপুরে থাকি। আমি ছুটিতে দেশে আসার জন্য (ছেড়া) /১১/১৭ইং িকাল অনুমান৫.৪০ মিনিটে। সিঙ্গাপুর চাঙ্গী িমান□ন্দরে যাই।িমান□ন্দরের ভিতরে একজন অপরিচিত □াংলাদেশী লোক আমাকে এসে □লে তার ছোট ভাইয়ের জন্মদিন তার জন্য একজোড়া চাকাওয়ালা জুতা নিয়ে যা□ার জন্য এরপর সে জানায় ছুি তোলে এ□ং □লে আমার ছি তার ভাইয়ের কাছে পাঠা□ে। িমান□ন্দরে রাজন নামে একজন লোক এসে আমাকে চিনে আমার কাছে থেকে জুতাটা নিয়ে যা□ে। আমি তার দেয়া জুতা নিয়ে িমানে করে □াংলাদেশ িমান□ন্দরে পৌছালে িমান থেকে □ের হওয়ার সময় (ছেড়া) ক্যানপীর □াহির গেটে অপেক্ষা কালে পুলিশ এসে আমাকে আটক করে। সেখানে িমান□ন্দরের ভিতরের অফিসে আমাকে নিয়ে তল্লাশী করে ০২ টি স্বর্নের চেইন ও ০১ টি আংটি পায়। এ□ং ই চাকাওয়ালা জুতার ভিতরে ০৬ পিস স্বর্নের চাকতি পায়। পরে আমাকে থানায় নিয়ে যায়। এই আমার □ক্তব্য।*

So, it transpires from the same that he is a worker in Singapore and when he is coming, a day labour who is the relation of the accused handed over the shoe with simple understanding. So, it is the simple confession about the carrying of the certain articles not knowing about the actual contents inside. Admittedly, such carrying cannot give any benefit to the person or ignorance of law is not an excuse, but the entirety of the case clearly shows that the person who carrying the same is a victim of circumstances as much as in the present case in hand the prosecution miserably failed to prepare the seizure list following the provision of section 103 of the Code of Criminal Procedure. As such the very foundation of the prosecution case is being shuttered and creates serious doubt in the prosecution case. Hence, I find substance in both the appeals.

Accordingly, both the appeals are allowed. The impugned judgments and orders of convictions and sentences passed by both the courts below are hereby set aside. The appellants are discharged from their bail bonds.

Send down the L.C. Records to the concerned court below with a copy of the judgment at once.

(Mamnoon Rahman, J:)

Emdad.B.O.