

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 1755 of 1994

Md. Alefuddin

...Appellant

-Versus-

The State

...Respondent

No one appears.

...For the appellant

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan (Manna), A.A.G with

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

...For the State

Heard on 31.07.2023

Judgment delivered on 13.08.2023

This appeal under Section 30 of the Special Powers Act, 1974 is directed against the judgment and order dated 25.08.1994 passed by Assistant Sessions Judge, Court No. 2 and Special Tribunal, Lalmonirhat in Special Tribunal Case No. 18 of 1993 convicting the appellant under Section 25B(a) of the Special Powers Act, 1974 and sentencing him thereunder to suffer rigorous imprisonment for 2(two) years and fine of Tk. 500, in default, to suffer rigorous imprisonment for 1(one) month.

The prosecution case, in short, is that on 30.01.1993 at about 1.30 pm while the informant was on patrol duty along with his patrol party found that the accused Md. Alefuddin is going towards India from 500 yards away from the Sub-Pillar No. 14 of Main Pillar No. 924 and at that time, the raiding party challenged him but he tried to flee away. The informant caught him red-handed and subsequently, in the presence of the witnesses searched the body of accused Alefuddin and recovered 23 pieces of Japanese calculator kept on his waist in presence of witnesses. He prepared the seizure list and took his signature. Thereafter, the informant lodged the FIR on 31.01.1993.

The police took up investigation of the case. During the investigation, the Investigating Officer visited the place of occurrence, prepared the sketch map and index, recorded the statement of witnesses

under Section 161 of the Code of Criminal Procedure, 1898 and after investigation found prima facie truth of the allegation against the accused persons and submitted charge sheet. Subsequently, following the order dated 20.04.1993 passed by the Magistrate submitted supplementary charge sheet on 04.05.1993 and the case records was sent to the Senior Special Tribunal, Lalmonirhat. After that, the case records was transferred to the Assistant Sessions Judge, Court No. 2 and Special Tribunal, Lalmonirhat for trial. During the trial, the charge was framed on 19.09.1993 under Section 25B of the Special Powers Act, 1974 against the accused and the charge was read over and explained to the accused and he pleaded not guilty to the charge and claimed to be tried in accordance with law.

The prosecution examined 7 witnesses to prove the charge against the accused. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he declined to examine any D.W. After concluding the trial, the trial Court by impugned judgment and order convicted the accused and sentenced him as stated above against which he filed the instant appeal.

P.W. 1 Naik Abdur Rouf, 15 Rifle Battalion, Lalmonirhat stated that earlier he was posted at Durgapur Border Out Post and the Subedar Fazlur Rahman is the informant of the case. The occurrence took place on 30.01.1993. On that day under the leadership of Subedar Fazlur Rahman at 1.00-1.30 pm they along with the members of the patrol party went to Durgapur Union. When they ambushed at Sub-Pillar No. 14 of Main Pillar 924 saw that one man is going towards India and sensing the presence of the raiding party, he attempted to flee away. The members of the raiding party detained him and took him to respectable persons and in their presence searching his body recovered 23 Indian calculators, 2 notes of Tk. 500, 1 note of Tk. 20, 1 note of Tk. 10, a secondhand muffler and a shawl. Thereafter, he handed over the accused to the police. The informant Fazlur Rahman is known to him and his signature is also known to him. He proved the FIR as exhibit 1 and the handwriting of Fazlur Rahman as exhibit 1/1. During cross-examination, he affirmed that the informant

Fazlur Rahman retired from service. There are many houses beside the place of occurrence. While the raiding party searched the accused, 50-60 locals were present there. In the presence of the locals, the search was conducted. He affirmed that the seizure list was prepared in the presence of the witnesses.

P.W. 2 Sepoy Abdus Samad stated that at the time of occurrence, he was posted at Durgapur Camp and the occurrence took place on 30.01.1993. On that day at about 1.30 pm, he was on duty along with a patrol party and Abdur Rouf was the Commander of the patrol party and Subedar Fazlur Rahman was also along with them. They took an ambush near Main Pillar No. 924 areas. At that time, the members of the raiding party saw that one man was going towards India. When he came to the raiding party, he was detained and in the presence of the locals searching his body recovered 23 calculators, 2 notes of Tk. 500, one note of Tk. 20, 1 note of Tk. 10, one shawl and muffler. In the presence of witnesses, he prepared the seizure list and took the signatures of the witnesses. Subsequently, he handed over the accused to Police Station. He proved one calculator as material exhibit I and the remaining calculators were handed to the customs office. During cross-examination, he stated that all the recovered calculators were not produced in Court. The recovered shawl and muffler were not produced in Court. He affirmed that the recovered calculators are available in Bangladesh and he along with others used those calculators. There are many houses beside the place of the ambush.

P.W. 3 Md. Kudrat Ali stated that on 30.01.1993 two BDR personnel were going along with a person through in front of his house. At that time, the BDR personnel said that a man was detained and they requested him to sign. Accordingly, he signed on the paper. During cross-examination, he stated that he did not know which goods were recovered from him and he did not witness the recovery. He affirmed that he did not see the recovery of any goods from possession of the accused and the accused was forcibly taken.

P.W. 4 Kasiruddin stated that the occurrence took place on 30.01.1993 at 1.30 pm-2.00 pm. He heard that a man was detained and at that time, the BDR personnel requested him to sign but he did not sign. During cross-examination, he stated that he did not see any goods and that he did not know which goods were recovered by the BDR.

P.W. 5 Md. Sultan Hossain stated that on 30.01.1993 he was working on his land and at that time, he saw many locals. He also went to the place of occurrence but he did not see any goods. On the date of occurrence, he did not see the accused. He signed the seizure list. He proved his signature as exhibit 2/Ka. During cross-examination, he affirmed that on the day of occurrence, he did not see any goods and he could not say from where the goods were recovered and before preparing the seizure list his signature was taken. At the time of occurrence, he did not see the accused.

P.W. 6 Rasidul Islam stated that the occurrence took place on 30.01.1993 but he knows nothing about the occurrence. On the day of occurrence, he was working on his land and he did not sign the seizure list. During cross-examination, he stated that he did not see any goods on the day of occurrence. On the day of the occurrence, the accused was going to the house of his relation and he is not aware of the occurrence. He also did not see the occurrence.

P.W. 7 S.I Md. Abul Kasem stated that the occurrence took place on 30.01.1993. He was posted at Aditbari Police Station and the occurrence took place on 31.01.1993 at 12.30 pm. The informant J.C.O Subedar Fazlur Rahman, 15 D Company, Lalmonihat lodged the FIR which was recorded by the Officer-in-Charge Nejam Uddin Ahmed. During the investigation, he visited the place of occurrence, prepared the sketch map and index, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and after completing the investigation submitted charge sheet on 01.04.1993 under Section 156 of the Customs Act, 1969 and subsequently, the learned Magistrate directed to submit charge sheet including Section 25(B) of the Special Powers Act, 1974. Consequently, he again submitted charge sheet on 04.05.1993 under

Section 25(B) of the Special Powers Act, 1974 and Section 156 of the Customs Act, 1969. During cross-examination, he stated that initially, he decided to submit charge sheet under Section 156 of the Customs Act, 1969 and subsequently, as per instruction of the learned Magistrate, he submitted charge sheet under Section 25B of the Special Powers Act, 1974. He affirmed that all the alams were not produced before the Court and the place of occurrence is mentioned in the index. He affirmed that the place of occurrence is a big village and there are many houses adjacent to the place of occurrence. He denied the suggestion that no goods were recovered from the accused.

No one appears on behalf of the appellant.

Learned Deputy Attorney General Mr. S.M. Golam Mostofa Tara appearing on behalf of the State submits that the goods mentioned in the seizure list were recovered 500 yards away from the Sub-Pillar No. 14 of Main Pillar No. 924 while the accused tried to send those goods out of Bangladesh and the prosecution witnesses proved the charge against the accused beyond all reasonable doubt. Therefore, he prayed for the dismissal of the appeal.

I have considered the submissions of the learned Deputy Attorney General who appeared on behalf of the State, perused evidence, the impugned judgment and order passed by the trial Court and the records.

On perusal of the records, it appears that 23 pieces of calculator made in Japan along with one shawl and muffler were allegedly recovered from the possession of the accused. During cross-examination, P.W. 2 stated that the recovered calculators are available in Bangladesh and they also used a similar calculator. The recovered calculators are not prohibited goods and it is commonly used by the people at large and is available all over the country. The place of occurrence is 500 yards away from the Indian Border. P.Ws. 1 and 2 stated that 50-60 respectable persons were present at the place of occurrence. P.Ws. 3 to 6 stated that they were not present at the time of the alleged recovery of goods from the possession of the accused and they did not see anything.

It is found that informant Subedar Fazlur Rahman after lodging the FIR retired from service. He is a material witness but the prosecution did not examine him as a witness in the case. No explanation has been given by the prosecution as regards the non-examination of informant Subedar Fazlur Rahman. Due to non-examination of the informant and the local respectable persons who were present at the place of occurrence, the defence is seriously prejudiced. Furthermore, P.Ws. 3 to 6 stated that they were not present at the time of recovery of the alleged goods from the alleged possession of the accused. The prosecution failed to prove by adducing reliable, independent and credible witnesses that the accused send the recovered goods out of Bangladesh. Furthermore, the shawl and muffler by which the accused tied the recovered calculators along with his body were not produced before the Court.

In view of the above evidence, observation, findings and proposition, I am of the view that the prosecution failed to prove the charge against the accused beyond all reasonable doubt.

Therefore, I find merit in the appeal.

Consequently, the appeal is allowed.

The impugned judgment and order of conviction and sentence passed by the trial Court is hereby set aside.

The accused Md. Alefuddin is acquitted from the charge framed against him.

Send down the lower Court's records at once.