

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 186 of 2000

Lal Chand and others

...Appellants

-Versus-

The State

...Respondent

Mr. Md. Israfil Hossain, Advocate

...For the appellants

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

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

...For the State

Heard on 24.08.2023, 28.08.2023, 31.08.2023 and
08.10.2023**Judgment delivered on 12.10.2023**

This appeal under Section 30 of the Special Powers Act, 1974 has been preferred against the impugned judgment and order of conviction and sentence dated 31.01.2000 passed by the Special Tribunal No. 2, Sirajganj in Special Tribunal Case No. 45 of 1996 arising out of Sirajganj Police Station Case No. 18 dated 21.02.1995 corresponding G.R. No. 116 of 1995 convicting the appellants under Section 25B of the Special Powers Act, 1974 and sentencing them to suffer rigorous imprisonment for 2(two) years and fine of Tk. 5,000, in default, to suffer rigorous imprisonment for 6(six) months.

The prosecution case, in a nutshell, is that Mirza Sarafat Ali Inspector of Police, C.I.D Camp, Sirajganj along with S.I. Saiful Islam, Constable No. 477 A. Majid, Constable No. 262 Khairuzzaman C.I.D Camp, Sirajganj, Constable No. 473 A. Sattar, Constable No. 60 Abdul Bashar and Constable Khairuzzaman of Police Farry No. 2, Sirajganj on 21.02.1995 at 1.45 pm remained on guard at Hossainpur beside the Office of T.N.O, Sirajganj. At that time, four persons by three rickshaws were going to the launch ghat along with bags. At that time, the police personnel have challenged them. They tried to flee away, but the police

personnel detained them. On interrogation, they disclosed that they were carrying the Indian shares kept in bags made of plastic and disclosed their name as 1. Lal Chand, 2. Momtaz Ali, 3. Anowar 4. Md. Solaiman. In the presence of witnesses, opening the bags recovered Indian georgette and silk shari and took the signature of the witnesses. The accused Lal Chand, Momtaz Ali, Anowar and Md. Solaiman were arrested.

The informant P.W. 4 Mirza Md. Sarafat Ali himself took up the investigation of the case, 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 found prima facie truth of the allegation made against the accused-persons and submitted charge sheet under Section 25B of the Special Powers Act, 1974.

After that the case record was transmitted to the Special Tribunal, Sirajganj and the case was registered as Special Tribunal Case No. 45 of 1996. After that, the case was transferred to the Special Tribunal No. 2, Sirajganj for trial. During the trial, the charge was framed on 24.10.1996 against the accused persons under Section 25B of the Special Powers Act, 1974 and the charge framed against the accused persons was read over and explained to them. The accused persons pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 12 witnesses to prove the charge against the accused persons. After concluding the trial, the trial Court by impugned judgment and order convicted the accused persons and sentenced them as stated above against which the accused persons filed the instant appeal.

P.W. 1 Md. Mofakhkharul Haque is the Officer of the Customs, Ishwardi Customs House. He stated that on 03.05.1995, 104 pieces of georgette shares made in India were handed over to the customs. He produced 5 shares in Court.

P.W. 2 Md. Sanwar Hossain was tendered by the prosecution and declined by the defence.

P.W. 3 Md. Akter Hossain was tendered by the prosecution and declined by the defence.

P.W. 4 Mirza Md. Sarafat Ali is the informant. He stated that on 21.02.1995 while he was discharging his duty as Inspector of Police C.I.D, Sirajganj based on secret information, he along with S.I. Saiful Islam, Constable No. 477 Abdul Majid, Constable No. 262 Khairuzzaman and other police personnel took position on Dhaka road at Hossainpur beside the Office of TNO. At 1.45 pm, three rickshaws were going to the Sirajganj riverside and at that time, he instructed the rickshaws to stop. The passengers of the rickshaws attempted to flee away but the police personnel detained them. On interrogation, they disclosed that there were Indian shares in the bags made of plastic. They admitted that they have no documents to import the Indian shares and disclosed their names and addresses. He prepared the seizure list in the presence of witnesses and took their signatures and arrested the accused persons and lodged the FIR. He proved the FIR as exhibit 1 and his signature as exhibit 1/Ka. He proved the seizure list as exhibit 2 and his signature as exhibit 2/Ka. He stated that a few shares are available in Court amongst the recovered shares. He proved the four shares made in India as material exhibit I series. He identified the arrested four accused persons in Court. He also stated that he is the investigating officer of the case. He affirmed that there was another investigating officer in the case.

P.W. 5 Ratan stated that the accused persons were not known to him and he knew nothing about the occurrence. During cross-examination, he affirmed that the accused persons present in Court were not known to him. He is not also aware of the facts of the case.

P.W. 6 Babul Hossain was tendered by the prosecution and declined by the defence.

P.W. 7 Amin Uddin was tendered by the prosecution and declined by the defence.

P.W. 8 Md. Abdul Majid is a Constable of the Police. He stated that on 21.02.1995 under the leadership of Police Inspector Mirza Md. Sarafat Ali, C.I.D Camp, Sirajganj along with his force at 1.45 pm reached in front of the Office of the T.N.O, Sirajganj and saw that three rickshaws were going quickly and there were four passengers in those rickshaws. The members of the police force had challenged them. At that time, they attempted to flee away from rickshaws but the police personnel detained them. On interrogation, they recovered 93 pieces of shares made in India kept in bags and in the presence of witnesses, a seizure list was prepared and the four accused persons were arrested. He identified the four accused persons present in Court who were detained by the police personnel at the time of recovery of the Indian shares. During cross-examination, he stated that the accused persons were not known to him earlier. He affirmed that there were many houses beside the place of occurrence. The informant counted the bags. The informant prepared the seizure list standing on the road. He could not say the name of the rickshaw puller. He denied the suggestion that no Indian shares were recovered from the possession of the accused persons.

P.W. 9 Kanu was tendered by the prosecution and declined by the defence.

P.W. 10 Md. Khairuzzaman is a Constable of the Police. He was tendered by the prosecution and declined by the defence.

P.W. 11 S.I. Saiful Islam was tendered by the prosecution and declined by the defence.

P.W. 12 Md. Abdus Sattar is a police constable. He was tendered by the prosecution and declined by the defence.

Learned Advocate Mr. Md. Israfil Hossain appearing on behalf of the accused persons submits that there is a contradiction in the evidence of P.Ws. 4 and 8 as regards alleged recovery of the quantum of the

Indian shares from possession of the accused-persons and the P.Ws. 2, 3, 6, 7, 9, 10, 11 and 12 were tendered by the prosecution and the prosecution did not examine the investigating officer who submitted charge sheet against the accused persons. He also submits that the three rickshaw pullers and the locals of the place of occurrence were not examined by the prosecution. The prosecution failed to prove the charge against the appellants beyond all reasonable doubt.

Learned Deputy Attorney General Mr S.M. Golam Mostofa Tara appearing on behalf of the State submits that P.Ws. 4 and 8 are the witnesses of the recovery of the Indian shares from possession of the accused persons. The Customs Officer P.W. 1 stated that 104 pieces of Indian shares were handed over to the customs and the prosecution proved that the accused persons illegally brought the Indian shares without any valid documents. Therefore, they committed an offence under Section 25B of the Special Powers Act, 1974 and the prosecution proved the charge against the accused persons to the hilt beyond all reasonable doubt.

I have considered the submissions of the learned Advocate Mr. Md. Israfil Hossain who appeared on behalf of the accused persons and the learned Deputy Attorney General Mr. S.M. Golam Mostofa Tara who appeared on behalf of the State, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the evidence, it reveals that P.Ws. 4 and 8 are the only witnesses of the alleged recovery of Indian shares from the alleged possession of the accused persons. In the FIR, the informant stated that he along with S.I. Saiful Islam, Constable Md. Abdul Majid, Constable Md. Khairuzzaman, Constable Md. Abdus Sattar, Constable Md. Abul Bashar and Constable Md. Khairuzzaman were present at the place of occurrence. P.W. 4 stated that he recovered 104 pieces of Indian silk and cotton shares from the possession of the accused persons. P.W. 8 stated that 93 pieces of Indian shares were recovered from the possession of the

accused persons. P.W. 4 is the informant as well as the investigating officer but he was not examined as investigating officer. P.W. 4 was examined as an informant. P.W. 4 stated that there are two investigating officers in the case. Although P.W. 4 Mirza Md. Sarafat Ali submitted the charge sheet but he did not prove the sketch map and index to prove the place of occurrence. The first investigating officer was not examined by the prosecution. Out of 12 witnesses, the prosecution tendered the P.Ws. 2, 3, 6, 7, 9, 10, 11 and 12. P.Ws. 2, 3 and 9 are seizure list witnesses of the case. No explanation has been given by the prosecution as regards the non-examination of the witnesses on the seizure list

The evidence of the investigating officer is indispensable to prove the place of occurrence. P.W. 8 stated that there were many houses of the locals adjacent to the place of occurrence. It has been alleged that the accused persons were the passengers of three rickshaws but the prosecution did not examine the locals and the rickshaw pullers. When there is a contradiction in the evidence of witnesses of recovery of foreign goods illegally brought into Bangladesh, examination of the locals and neutral persons admittedly present at the place of occurrence is necessary. Tendering a large number of witnesses including the seizure list of witnesses whose evidence is necessary to prove the recovery creates doubt about the prosecution case. The evidence of the investigating officer is indispensable to prove the place of occurrence and to allow the defence to cross-examine the investigating officer regarding a fair investigation of the case.

The above view of this Court lends support from the decision made in the case of Shamsul Huq @ Shamsul and ors Vs. The State reported in 38 DLR (AD) (1986) 75 wherein at para 7 it has been held that

“A witness may be tendered by the prosecution if his evidence is not of much importance or his evidence will make unnecessary addition to the evidence already adduced by other witnesses.

Sometimes, a witness is tendered by the prosecution from motive, and not examined lest something undesirable comes out of his lips. Be that as it may, there is no witness from the village Dudhiagacha where the incident took place. It is understandable that no relation or inmate of the house of the accused would depose in favour of the prosecution, but for the purpose of general corroboration to the incident, some people of the neighbourhood should have been examined. The Investigating Officer (PW 20) has explained that though he visited the place on three occasions he did not find any inmates in the neighbouring houses; this means the inmates of those houses deliberately avoided the presence of the police lest they were brought into the picture and compelled to give evidence.”

Due to the non-examination of the investigating officer, the defence could not contradict the statement of witnesses in Court and their statement recorded under Section 161 of the Code of Criminal Procedure, 1898. Non-examination of the investigating officer, seizure list witnesses, the locals and three rickshaw pullers give rise to an adverse presumption against the prosecution under Section 114(g) of the Evidence Act, 1872.

In the case of Bahar Uddin Vs. The State, Criminal Appeal No. 7648 of 2014, this Court after elaborate discussion as regards non-examination of a vital witness and the investigating officer it has been held that

“Although the prosecution did not prove the sketch map and index, the accused is entitled to get benefit from the prosecution materials. In the sketch map, the place of occurrence has been shown 400 yards away from the house of P.W. 2 and none of the neighbouring witnesses mentioned in the sketch map were examined by the prosecution. In the instant case, no alamat was seized and proved by the prosecution. No explanation has been

given by the prosecution for the non-examination of the Investigating Officer whose evidence is indispensable in the case to prove the exact location of the place of occurrence. Non-examination of the neighbouring witnesses mentioned in the sketch map and failure of the prosecution to exhibit the wearing apparel of the victim P.W. 1 also give rise to an adverse presumption against the prosecution under Section 114(g) of the Evidence Act, 1872.”

In the case of Bhagaban Chandra Chakma vs. The State reported in 7 [1987] BLD (HC) 351 para 27 it has been held that

“It appears that the defence did not and could not draw the attention of any of the witnesses examined to any contradiction to have been made by them between their deposition in court and their statements recorded under Section 161 of the Code of Criminal Procedure. Therefore non-examination of S.I. Habibur Rahman the first I.O did not prejudice the defence in any manner. Moreover, Mr Golam Rabbani Sub-Inspector of Police who investigated into the case partly and submitted charge sheet was examined as P.W. 5 who proved the signatures of S.I. Habibur Rahman and the then Police diary before him and was cross-examined by the defence.”

At this stage, it is relevant here to refer to a decision made in the case of Mokbul Hossain and another vs. State reported in 55 DLR 396 para 13 wherein it has been held that

“In the present case in view of the first information report and deposition of PW 1, it appears that occurrence took place at a place 200 yards west from the house of one Gofur. Such a fact as to the exact place of occurrence is usually shown by investigation officer on a map and index. Unfortunately, in this case of murder no map and index of the place of occurrence could be proved at the trial to be marked Exhibit in the case for the prosecution and

it was because of non-examination of the investigation officer namely, Alam Sarker who was made CS witness No. 16 in the charge sheet but we already stated earlier that said investigation officer was withheld without offering any explanation from the side of the prosecution. Therefore non-examination of the investigation officer being very vital witness in the case will be obviously fatal for the prosecution inasmuch as due to the non-examination of investigation officer prosecution failed to prove the seizure list prepared during the investigation. The prosecution also failed to prove other connection links to the case. Map and Index of the place of occurrence could not be proved and marked Exhibits due to the non-examination of investigation officer. Without a Map and Index of the place of occurrence, it became impossible to ascertain and determine the exact location of the place of occurrence of the case.”

Indian shares are importable goods and are available in Bangladesh. The place of occurrence is situated at Sirajganj Sadar, not any border area. Mere possession of Indian shares does not prove that those were brought into Bangladesh illegally. Because of the above evidence, facts and circumstances of the case and the proposition, I am of the view that the prosecution failed to prove the charge against the accused persons beyond all reasonable doubt.

I find merit in the appeal.

In the result, the appeal is allowed.

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

Send down the lower Court's records at once.