

Present:

Mr. Justice Mohammad Ullah

Criminal Appeal No. 6345 of 2023

Md. Azimel Kadar

... Appellant

-Versus-

The State and another

...Respondents

Mr. Sarwar Ahmed, with
Ms. A.K.M. Mamunur Rashid, Advocates

... For the appellant

Mr. A.K.M. Alamgir Parvez Bhuiyan, Advocate

...For respondent No.2

Heard on 10.01.2024, 17.01.2024,
31.01.2024, 28.02.2024, 06.03.2024,
13.03.2024, 20.03.2024 and 29.05.2024

Judgment on 05.06.2024.

This criminal appeal, at the instance of the convict-appellant, is directed against the judgment and order of conviction and sentence dated 15.06.2023 passed by the learned Divisional Special Judge, Chattogram in Special Case No. 2 of 2021 arising out of G.R. Case No. 45 of 2019 corresponding to Fatikchari Police Station Case No. 15 of 2019 dated 28.03.2019.

By the impugned judgment and order, the learned Divisional Special Judge (hereinafter referred to as "the Trial Court") convicted the appellant under section 161 of the Penal Code and sentenced thereunder to suffer rigorous imprisonment for 1(one) year and 6(six) months with a fine of Taka of 25,000/- (twenty-five thousand) in default to suffer rigorous imprisonment for 1(one) month more and under section 5(2) of the Prevention of Corruption Act, 1947 (in brief "the Act, 1947") and sentenced thereunder to suffer rigorous imprisonment for 1(one) year with a fine of Taka 20,000/- (twenty thousand) in default to suffer rigorous imprisonment for 1(one) month more with the direction to run both the sentences concurrently.

The prosecution version of the case, in short, is as follows:

The informant Nurul Islam, Deputy Assistant Director, Anti-Corruption Commission (henceforth "the ACC"), combined

district office, Chattogram-1, lodged a first information report (FIR) with the Officer-in-Charge, Fatikchari Police Station, Chattogram, against the convict-appellant Md. Azimel Kadar, the then Upazila Education Officer (current charge), Fatikchari, Chattogram, alleging, *inter alia*, that one Mrs. Taslima Akter, Assistant Teacher, Berajali Government Primary School, Fatikchari, Chattogram, submitted a written complaint to the Director, ACC combined district office, Chattogram against the convict-appellant contending, *inter alia*, that the convict-appellant demanded Taka 10,000/- (ten thousand) for her transfer from one school to another i.e., from her school, Berajali Government Primary School, to a nearby school of her village. The initial informant, Mrs. Taslima Akter, on, 24.02.2019, submitted an application to the Upazila Education Officer through the proper channel stating the names of three primary

schools for her transfer. After school hours on 20.03.2019, she went to the Upazila Education Officer, Fatikchari, Chattogram, to find out about her transfer. At that time, the convict-appellant demanded Taka 30,000/- (thirty thousand) for the transfer. She told the convict-appellant that she, a low-income family member, could not pay the claimed amount. The convict-appellant asked her to pay him the money with her then. Disappointed, she told the convict-appellant that she had Taka 5,000/- (five thousand), and she gave the same on his demand. The convict-appellant asked her to pay more Taka 30,000/- (thirty thousand). She expressed her inability to pay further. The convict-appellant told her to come with Taka 10,000/- (ten thousand) more.

She agreed to his proposal and requested the convict appellant to prepare her transfer file. The convict-appellant told her over the telephone to pay the amount of Taka 10,000/-

(ten thousand); otherwise, she would not be transferred. Mrs. Taslima Akter recorded the conversation between the convict-appellant and her. Mrs. Taslima Akter, on 27.03.2019, filed a written complaint to the Director of ACC, Divisional Officer, Chattogram, alleging that she is ready to pay Taka 10,000/- (ten thousand) to the convict-appellant as a bribe and requested him to catch hold of the convict-appellant red-handed at the time of payment of bribe money. Accordingly, the date was fixed on 28.03.2019.

An inventory list was prepared on 27.03.2019, and a list of twenty pieces of notes of Taka 500/- (five hundred) was recorded therein in the presence of two independent witnesses, namely Jafor Ahmed, Assistant Director, ACC combined district Office, Chattogram-1 and Md. Wahidur Rahman, process server, Tax Division, Circle-52, Tax Area-3, 2, Agrabad, Chattogram. A seven-member trap committee was formed to catch

hold of the convict-appellant red-handed. Jafor Ahmed, Assistant Director, ACC combined district, Chattogam-1, counter-signed on the inventory list. When, on 28.03.2019, Mrs. Taslima Akter went to the office of the convict-appellant to pay him bribe money of Taka 10,000/-, the witnesses, namely members of the trap committee laid an ambush near the office of the Education Officer, Fatikchari. When the bribe money of Taka 10,000/- was taken over from Mrs. Taslima Akter, the trap committee caught hold of the convict-appellant and recovered 20 pieces of notes of taka 500/- each from the left pocket of his full shirt in the presence of the witnesses. The raiding party seized the recovered bribe money through a seizure list. The convict-appellant took bribe money of Taka 10,000/- (ten thousand) while discharging his official duty by breaching the trust and misusing the official power for his financial gain other than legal remuneration for sending a

proposal in the name of Mrs. Taslima Akter for her transfer purpose. Hence, the convict-appellant committed an offence punishable under section 161 of the Penal Code read with section 5(2) of the Act, 1947, and thus the case.

The case was entrusted to Jafor Ahmed, Assistant Director, ACC combined district office, Chattogram-1, to investigate the allegation brought against the convict-appellant.

Having taken up the investigation of the case, the Investigating Officer visited the place of occurrence, examined the witnesses, and recorded their statements under section 161 of the Code of Criminal Procedure.

After ending the investigation, the Investigating Officer, having found a prima facie case and having obtained sanction, submitted a charge sheet on 02.03.2020 under section 161 of the Penal Code read with

section 5(2) of the Act, 1947 recommending the trial of the convict-appellant.

The Trial Court on 14.09.2021 framed charge against the convict-appellant under section 161 of the Penal Code read with section 5(2) of the Act,1947, and the charge was read over and explained to him to which he pleaded innocence and claimed to be tried.

In order to prove the charge, the prosecution examined 9(nine) witnesses.

After the conclusion of the trial, the convict-appellant was examined under section 342 of the Code of Criminal Procedure, to which he pleaded not guilty and expressed his unwillingness to examine defence witnesses, but he submitted certain papers with a list (firisti).

From the trend of cross-examination of the prosecution witnesses, the defence plea as it appears that the convict-appellant is innocent, he did not take any bribe money from initial informant Mrs. Taslima Akter,

and he was implicated in this false case at the instance of the vested quarters and his official rivals.

After hearing the prosecution and considering the evidence on record, the Trial Court found that the prosecution brought the charge home against the appellant. Accordingly, he was convicted and sentenced by the impugned judgment and order.

Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence, the appellant has preferred Criminal Appeal No. 6345 of 2023 before this court.

At the time of admission of appeal, on 20.07.2023, the appellant was granted bail.

Mr. Sarwar Ahmed, learned Advocate appearing for the convict-appellant, at the outset, submits that though the prosecution examined 9(nine) witnesses, failed to prove the charge against the appellant beyond reasonable doubt and, as such, the impugned

judgment and order of conviction and sentence are liable to be interfered with by this court.

The learned Advocate submits further that the prosecution failed to prove the charge against the appellant upon providing impartial and independent witnesses, and as such, the impugned judgment, order of conviction, and sentence cannot be sustained at all.

The learned Advocate next submits that the prosecution hopelessly failed to prove the allegation of taking a bribe on 28.03.2019 by the appellant for sending a proposal in the name of the initial informant, Mrs. Taslima Akter, for her transfer, and the allegation was preposterous, unbelievable, false and fabricated.

The learned Advocate next submits that the appellant sent the letter of proposal for the transfer of Taslima Akter on 21.03.2019

to the District Education Officer, Chattogram, and as such, there is no reason for giving 10,000/- Taka to the appellant after seven days on 28.03.2019 and that being so, the finding of guilty arrived at by the Trial Court is perverse.

The learned Advocate again submits that the convict-appellant, at the time of examination under section 342 of the Code of Criminal Procedure, submitted papers and documents through a list and insisted on his innocence and false implication in the case. But the Trial Court, without considering those documents, most arbitrarily convicted the appellant, and as such, the finding of guilt is manifestly illegal, and in this perspective, it is liable to be struck down.

The learned Advocate for the appellant, in support of his submissions in this regard, referred to reliance in the cases of-

- (1) Kazi Mahbubuddin Ahmed alias Mahbub Vs. The State represented by the DC, Dhaka, reported in 57 DLR (2005)513
- (2) Ibrahim (Md) & others Vs. The State reported in 58 DLR(2006) 598
- (3) Md. Abdul Awal Khan Vs. The State reported in 16 SCOB (2022)AD 22

The learned Advocate again submits that the prosecution examined three seizure list witnesses, P.W. 4, 5, and 8, to prove the charge, but the deposition of those witnesses did not help the prosecution substantiate the charge brought against the appellant in any way. Moreover, P.W.4 found no bribe money transactions, and P.W.8 is an interested witness, and seized notes were not placed before him in court. As such, the impugned judgment is liable to be set aside.

The learned Advocate next submits that out of the self-same allegation, a departmental proceeding was started against the appellant and the same inquired by the

concerned authority; after holding the inquiry, a report was submitted to the Senior Secretary of Primary and Mass Education Ministry discharging the appellant from the departmental case and the appellant submitted those documents to the Trial Court but the Trial Court kept silent to say anything about those papers which prejudiced the appellant and as such, non-consideration of those documents the merit of the case has been materially affected.

To substantiate his submission in this regard, the learned Advocate placed reliance on the case of Kazi Mahbubuddin Vs. The State reported in 57 DLR (HCD) 513 = 58 DLR 598

On the other hand, Mr. A.K.M. Alamgir Parvez Bhuiyan learned Advocate appearing for the Anti-Corruption Commission, contends that the learned Trial Judge minutely having considered the material evidence on record, found the appellant guilty of the offence of taking the bribe from Taslima Akter and as

such, the appellant was rightly convicted and hence no exception can be taken thereto.

I have heard the submissions of the learned Advocate, Mr. Sarwar Ahmed, for the appellant and the counter submission of the learned Advocate, Mr. A.K.M. Alamgir Parvez, for the Anti-Corruption Commission.

In order to come to a conclusion, I need to assess and examine the evidence on record keeping in view of the charge framed by the Trial Court against the appellant.

With a view to arriving at a correct decision in the case, I am to advert and scrutinize the relevant evidence and attending circumstances with searching eyes.

At the trial, the prosecution has examined 9(nine) witnesses.

The defence cross-examined the prosecution witnesses, and though the defence did not produce counter-evidence, the appellant, at the time of examination under section 342 of the Code, submitted certain

papers and documents indicating his innocence.

P.W. 1 Nurul Islam, Deputy Assistant Director, ACC, SAJEKA, Chattogram, was the informant and a member of the trap party. He is more or less deposed, supporting the prosecution's version of the story in his evidence.

The P.W. 2 Md. Wahidur Rahman, the process server, the tax office, Anchal-3, and Chattogram are witnesses to the inventory list.

In his deposition, he stated that he did not know whether the notes had any specific mark.

P.W.3 Mrs. Taslima Akter, Assistant Teacher, Berajali Government Primary School, is the initial complainant whose instructions trap case was initiated about taking a bribe by the appellant, and she is also a witness of the inventory list.

In her examination-in-chief, she more or less disclosed the prosecution version of the case.

But in her cross-examination by the defence, she stated that she could not know whether the appellant on 21.03.2019 sent the proposal for her transfer to the District Education Officer.

She further stated that when she gave a bribe to the appellant, no one was present in the appellant's room. Later on, many people came there.

At the defense's suggestion, she deposed that she did know whether her proposal for transfer was sent before the occurrence.

She further deposed that there is a different association of the teachers. One Rahima Akter was a leader of the association.

She denied the defence suggestion that Rahima Akter pressured her to file an allegation against the convict appellant and

whether Rahima Akter filed a complaint against the appellant.

She further denied the defence suggestion that the appellant was innocent and did not take any bribe money from her.

P.W.4 Md. In his evidence, Hasanul Kabir, Upazila Education Officer, deposed that he had seen two men caught hold of the convict-appellant. A woman raising hue and cry was trying to give him something, and the appellant refused to accept the same.

P.W. 5 Shariful Islam, Upazila Education Officer, and a seizure list witness stated that the particulars had been written in the papers by computer before he went to the place of occurrence.

He further deposed that he did not see to give the bribe money to the appellant by Taslima Akter.

P.W.6 Mohammad Lutful Kabir Chandan, Deputy Director, ACC, SAJEKA, Chattogram team

leader of trap case at whose initiative trap case was conducted.

In his cross-examination, P.W.6 stated that when the trap was conducted, he was in front of the office, and the seizing officer was on the other side.

He denied the defence suggestion that the appellant was implicated in this case due to the internal conflict between the teachers.

P.W. 7 Md. Abdul Karim, Director, ACC, Sajeka, Chattogram, formed the trap team.

P.W. 8 Nabiul Islam, Sub-Inspector of Police, ACC, SAJEKA, Chattogram, was a member of the trap party and a seizure list witness.

P.W. 8 stated that he was a seizure list witness.

According to the defence, he is an interested witness for the result of the case; as such, his evidence does not help the prosecution prove the case against the appellant. Moreover, seized notes were not placed before him in court. According to the

prosecution, non-production of seized goods creates highly doubt about the prosecution story.

P. W. 9 H. M. Aktaruzzaman, Deputy Director, ACC, SAJEKA, Chattogram, is not a charge-sheeted witness. He was examined on behalf of the Investigating Officer, Jafor Ahmed.

From the evidence of P.W. 9, it appears that the appellant approved the proposal of the initial informant, Taslima Akter, for her transfer on 21.03.2019 and sent it to the District Education Officer, Chattogram. So, there was no earthly reason for demanding a bribe of Taka 10,000/- by the appellant from the initial complainant, Taslima Akter, after seven days on 28.03.2019. Hence, the allegation of taking a bribe is false and baseless, and the appellant is entitled to be acquitted.

In this case, the prosecution examined three seizure list witnesses, namely P.W. 4,

5, and 8, to prove the allegation brought against the convict-appellant. P.W. 4 Hasanul Kabir stated that he found no money transaction among those seizure list witnesses. The convict-appellant told him that attempts were taken to implicate him in a false case. He heard that the initial complainant, Taslima Akter, was engaged with a group of teachers. Perhaps the proposal for transfer was sent on 21.03.2019. The seizure list was brought by way of a pen drive, and after printing it, he put his signature thereon.

The statement of P.W. 4 indicates that the appellant did not receive bribe money from initial informant Taslima Akter.

The prosecution has to place all available witnesses before the court, regardless of their favorable or unfavorable evidence, where a necessary witness is cited in the charge sheet. But the Investigating Officer was not examined mysteriously. The

court may draw an adverse inference against the prosecution. If a material witness has been deliberately kept back, then a serious reflection is cast on the validity of conviction. A crime has been committed, but there is no satisfactory ground for the guilt; thus, there is no option but to give the benefit of the doubt to the appellant.

During examination under section 342 of the Code of Criminal Procedure, the convict-appellant bestowed a written statement insistent he was innocent and false implication in this case. In the written statement, the convict-appellant presented a complete picture of the case he programmed and explained the circumstances that led P.W. 3 Taslima Akter to implicate him in the false case. But the Trial Court did not at all care to consider the written statements and papers enclosed in the statement to support the appellant's innocence. The departmental proceeding was also conducted, indicating

that the appellant has been falsely implicated in a planted case at the instance of P.W.3 with the internal conflict between the group of teachers. However, the learned Divisional Special Judge did not at all care to take into account the written statement and the documents and papers produced by the convict-appellant.

From the evidence on record, it is clear that only after the alleged occurrence some of the prosecution witnesses appeared at the scene. Therefore, it is evident that they did not see anything; instead, they relied upon the evidence of the P.W. 3 and 8 as stated above.

The P.W. 3 and 8 are interested parties; therefore, their evidence cannot be relied upon. The Trial Court should be very cautious in prosecuting cases under section 161, as it is very easy to implicate a person in such a case on false allegation.

In order to prove this type of offence, the prosecution has to confirm that the accused person had conscious acceptance of the bribe money.

In the facts and circumstances of the case in hand, I am of the considered view that it could not be proved in the trial that there was any conscious acceptance of bribe money by the appellant. The hearsay evidence of the other Prosecution witnesses is somewhat inconsistent and cannot be considered reliable.

The fundamental principle of a criminal trial is that the accused shall be presumed innocent and that he is not required to adduce evidence to prove his innocence, but the entire burden of proof of his guilt lies upon the prosecution alone, and till that time, his innocence continues.

In criminal law, the onus of establishing all ingredients which could make a criminal

offence always lies on the prosecution, and this burden never shifts upon the accused.

Criminal misconduct is a new offence created under the Prevention of Corruption Act, which is quite distinguishable from criminal breach of trust and is punishable under section 409 of the Penal Code.

The offence of criminal misconduct under section 5 of the Act, 1947 postulates distinct and specific crimes apart from those in the penal code.

A public servant can only be prosecuted for the offence of criminal misconduct under section 5(2) of the Act, 1947, as well as for the offence under section 161 of the Penal Code.

Unfortunately, on misreading the material evidence of the witnesses and non-consideration of the documents produced by the appellant, the learned Trial Judge found the appellant guilty of the charge levelled against him.

In the facts and circumstances and the evidence on record, the impugned judgment and order of conviction and sentence passed on surmise, conjecture, and wholly irrelevant consideration.

In the case under review, I am constrained to hold that the prosecution has failed to prove its case.

Having given my best consideration to the materials on record and after hearing the learned Advocates of both sides, I hold that there is a fit case where the court should interfere.

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

As a result, the appeal is allowed.

The impugned judgment and order of conviction and sentence dated 15.06.2023 passed by the learned Divisional Special

Judge, Chattogram, in Special Case No. 2 of 2021, is hereby set aside.

The appellant is found not guilty of the charge levelled against him.

The convict-appellant Md. Azimel Kadar is currently on bail and is discharged from the liability of bail bond if furnished.

Send down the lower court's record (LCR) at once.

Communicate this judgment and order to the court concerned forthwith.