

Present:

Mr. Justice Borhanuddin

and

Mr. Justice Md. Ruhul Quddus

Criminal Appeal No. 2565 of 2000

Md. Bablu and another

...Appellants

-Versus-

The State

...Respondent

Mr. Probir Neogi with

Mr. Suvra Chokravarty, Advocates

...for the appellants

Mr. Md. Monwar Hossain, A.A.G.

...for the respondent

Judgment on 25.7.2011

*Md. Ruhul Quddus, J:*

This appeal has been heard analogously with Criminal Appeal No.2567 of 2000 in pursuance of order dated 23.2.2006 passed in the said appeal. Since the first information reports, charge sheets, evidence and judgments giving rise to the appeals are separate, it would be expedient to dispose of the same by two separate judgments.

The present Criminal Appeal No.2565 of 2000 is directed against judgment and order dated 10.9.2000 passed by the Special Tribunal No.3, Sirajgonj in Special Tribunal Case No.81 of 1995 convicting the appellants under section 4 of the Explosive Substance Act and sentencing each of them thereunder to suffer rigorous imprisonment for five years with a fine of Taka one thousand for each in default to suffer rigorous imprisonment for a further period of three months.

Prosecution case, in brief, is that the informant S. M. Jamilur Rahman (P.W.1), an Inspector of the Detective Branch of Police at Sirajgonj had received secret information on 27.7.1995 that appellant No.1, an accused in a case of dacoity with murder was roaming around Bhadrghat Bazar within Kamarkhand Police Station. On obtaining approval from his Superior Officer, he (informant) along with Sub-Inspector Md. Abdur Rahman (P.W.3) Constable Balai Chandra (P.W.2), Constable Golam Mostofa (P.W.4) and Constable Sarwar instantly raided Bhadrghat Bazar and arrested him (appellant No.1) at 21.00 hours. They brought him to Sirajgonj Police Station and on interrogation, he disclosed that he kept illegal arms and explosive with one Rubel (appellant No.2) at village Raghunathpur. The informant along with M. A. Kafhi, Officer-in-charge of Sirajgonj police station (P.W.5), Satya Ranjan Bhadra, a Sub-Inspector of police (P.W.06), Sub-Inspector Asaduzzaman (P.W.7), and some other police constables namely, Aynul Haque, Jashim, Abu Musa and Serajul Islam raided the house of appellant No.2 at village Raghunathpur at 2 o'clock in the night following 27.7.1995. The police team arrested appellant No.2, recovered a country-made pipe gun with a cartridge, a long sword and bomb wrapped with black plastic tape from his bed-room and prepared seizure lists in presence of two local witnesses namely Mazid Sheikh (P.W.8) and Amir Hossain (P.W.9).

The informant along with the forces produced arrested appellant No.2 to the police station with the arms and explosive recovered and lodged two separate *ejahars* including the present one against the appellants for illegal possession of the bomb, which gave raise to Sirajgonj Police Station Case No.16

dated 28.7.1995 under section 4 of the Explosive Substance Act read with Special Powers Act, 1974. The police, after investigation submitted charge sheet on 26.9.1995 under the said section of law against them. During investigation, appellant No.2 made statement before the Magistrate of first class, Sirajgonj under section 164 of the Code of Criminal Procedure.

The case after being ready for trial, was sent to the Special Tribunal No.1, Sirajgonj wherein it was registered as Special Tribunal Case No.81 of 1995. Thereafter, it was sent to the Special Tribunal No.3, Sirajgonj for hearing and disposal. The learned Judge of the Tribunal framed charge against the appellants under the said section of law by his order dated 24.9.1997, to which they pleaded not guilty and claimed for trial.

The prosecution in order to prove its case examined as many as nine witnesses out of thirteen, who were named as such in the charge sheet. The defense case, as it transpires from the trend of cross-examination and suggestion put to the prosecution witnesses, is that the appellants are innocents, and no arms and explosive were recovered from the house of appellant No.2. After closing the prosecution, the trial Judge examined the appellants under section 342 of the Code of Criminal Procedure, to which they reiterated their innocence. In addition appellant No.2 furnished a statement stating that because of physical torture he had to make statement under section 164 of the Code and that he did not make it voluntarily. He did not know appellant No.1 and that the statement recorded were not read over to him. No arms and explosive were recovered from his possession.

After conclusion of trial, the learned Judge of the Special Tribunal found the appellants guilty of charge under section 4 of the Explosive Substance Act and accordingly pronounced his judgment and order of conviction and sentence on 10.9.2000 as aforesaid. The appellants preferred the instant Criminal Appeal against the said judgment and order of conviction and sentence and subsequently obtained bail from this Court.

Mr. Probir Neogi, learned Advocate appearing for the appellants has taken us through the evidence on records, statement of appellant No.2 made under section 342 of the Code of Criminal Procedure and the impugned judgment and order. At the very outset, he submits that the learned Judge of the Tribunal appears to be prejudiced and bias against the appellants inasmuch as before arriving at any finding of guilt, he mentioned the name of appellant No.1 with the adjectives “wanted terrorist”, “accused in case of dacoity with murder” etc. The learned Judge considered his previous ‘bad character’ which was not relevant in view of section 54 of the Evidence Act. He further submits that in view of section 25 of the said Act, the statement allegedly made by appellant No.1 at Sirajgonj Police Station immediately after securing his arrest was not admissible in evidence.

Mr. Neogi also submits that the local seizure list witnesses namely, P.Ws.8 and 9 did not support the prosecution case and clearly stated that they had signed on blank paper and did not see recovery of any arms. In such a case the alleged recovery of arms and explosive from the appellants’ control and possession was not proved beyond reasonable doubt. The impugned judgment and order of conviction has been passed only on the basis of the evidence of

police personnel having interest in the result of prosecution case. Moreover, the statement of appellant No.2 made under section 342 of the Code of Criminal Procedure was not considered, which caused serious miscarriage of justice. Mr. Neogi lastly submits that the evidence of the prosecution witnesses in the connected Special Tribunal Case No.76 of 1995 have been copied and signed for the purpose of forming records in the present case, which is illegal and not approved by law. In support, he refers to the case of State Vs. Ershad Ali Sikder and others reported in 56 DLR 185. In the said case a Division Bench of the High Court Division set aside a judgment and order of conviction against well known Ershad Ali Sikder and his accomplices on the reason that the record of each proceeding should be self contained and complete, and the record of one proceeding cannot be treated as a part of record in another proceeding.

On the other hand, Mr. Monwar Hossain, learned Assistant Attorney General appearing for the State submits that following the information provided by appellant No.1, a police team including two responsible police officers raided the house of occurrence within the shortest possible time and recovered the arms and explosive from direct control and possession of appellant No.2. In view of section 27 of the Evidence Act, the information of appellant No.1 so far it relates to recovery of the arms and explosive is admissible in evidence. The evidence of P.W.1 having been corroborated by the evidence of P.Ws.2-7 and those of P.Ws.8-9 in part, the learned Judge of the Special Tribunal rightly convicted and sentenced the appellants. Since the depositions of the prosecution witnesses are signed by the witnesses in separate sheets, these have formed complete records in the present case and cannot be brushed aside only because the contents

thereof incidentally appear to be similar with that of Special Tribunal Case No.76 of 1995.

In order to appreciate the submissions of the learned Advocates, let us examine the evidence on records and other materials. P.W.1 S. M. Jamilur Rahman, the Informant and Investigating Officer stated that at the relevant time he was posted to the Detective Branch of Police at Sirajgonj as an Inspector. He received secret information on 27.7.1995 that a wanted terrorist named Md. Babul (appellant No.1) was roaming around the Bhadrachhat Bazar within Kamarkhand Police Station. On obtaining approval from Superior authority, he along with police forces raided Bhadrachhat Bazar, arrested him (appellant No.1) at about 21.00 hours and took him to Sirajgonj Police Station. On interrogation, he disclosed that the arms and explosive used by him were kept with one Rubel (appellant No.2) at village Raghunathpur. He along with the Officer-in-charge, Sirajgonj Police Station and some other police personnel rushed to village Raghunathpur at 2 o'clock in the night, surrounded the house of appellant No.2, arrested him and recovered a country-made pipe gun with a cartridge, sword and bomb wrapped with black plastic tape from his bed-room in presence of the local witnesses. He had seized the said arms and explosive, brought appellant No.2 to the police station and lodged the *ejahar* to that effect. He also proved the *ejahar*, seizure list and his signatures thereon. As an Investigating Officer he further deposed that after assignment of investigation, he had visited the place of occurrence and prepared the sketch map with index. He examined the witnesses under section 161 of the Code of Criminal Procedure. During investigation appellant No.2 made statement under section 164 of the Code. In cross-

examination he stated that in both the cases he was the Informant and Investigating Officer. He denied the defense suggestions that because of inhuman torture, appellant No.2 was compelled to make statement under section 164 of the Code, or that no arms and explosive were recovered from his house.

P.W.2 Balai Chandra, a Constable of Police and member of raiding party stated that in 1995 he was posted to the Detective Branch of Police at Sirajgonj. He accompanied Inspector Jamilur Rahman in arresting appellant No.1 from Bhadraghat Bazar. In his presence appellant No.1 disclosed that the arms were kept with appellant No.2. Following his information, the police team raided the house of appellant No.2 and recovered the gun with a cartridge, sword and bomb from his house and brought him to the police station with the arms and explosive recovered. In cross-examination he stated that when they had raided the house of appellant No.2, no Chairman or local elite was there, but at the time of recovery, they had called the villagers to the house of occurrence. He denied the defense suggestion that no local seizure list witness was called there.

P.W.3 Abdur Rahman, a Sub-Inspector of Police and member of raiding party stated that at the relevant time he was posted to Sirajgonj. On receipt of secret information, he went to Bhadraghat Bazar with Inspector Jamilur Rahman, arrested appellant No.1 and brought him to Sirajgonj Police Station. According to his (appellant No.1's) statement, they rushed to village Raghunathpur, raided the house of appellant No.2 and recovered a country-made pipe gun loaded with cartridge, a live bomb and sword. They seized the said arms and explosive in presence of the witnesses. He proved the pipe gun and sword as material exhibit Nos.I and II.

P.W.4 Golam Mostafa, a Constable of Police stated that at the relevant time he was posted to the Detective Branch. He accompanied Inspector Jamilur Rahman in arresting appellant No.1 from Bhadraghat Bazar within Kamarkhand Police Station on 27.7.1995. Following his (appellant No.1') statement they raided the house of appellant No.2 at village Raghunathpur and recovered a country-made gun, sword and bomb. He identified the gun and sword produced before the Court.

P.W.5 M. A. Kafi, the then Officer-in-charge, Sirajgonj Police Station and a member of raiding party stated that Inspector Jamilur Rahman had arrested appellant No.1 from Bhadraghat Bazar at about 9 o'clock in the night following 27.7.1995 and brought him to the police station. On interrogation he (appellant No.1) disclosed that the arms and bomb used by him were kept with appellant No.2 at village Raghunathpur. Following his (appellant No.1's) statement Inspector Jamilur Rahman accompanied by him and some other police men raided the house of appellant No.2 at 2 a.m. on 28.7.1995. They arrested appellant No.2, recovered a country-made pipe gun with a live cartridge, sword and bomb wrapped with black plastic tape from his bed-room in presence of the witnesses. On such recovery, Inspector Jamilur Rahman made seizure lists. Later on, the bomb was defused under order of the Magistrate. He identified the pipe gun, cartridge and sword produced before the Court. He further stated that Inspector Jamilur Rahman as informant had lodged the *ejahar*, which he endorsed and filled up the form of first information report. He proved his endorsement on the *ejahar*, the form of first information report and his signature thereon. In cross-examination he stated that out of self same occurrence two



cases namely Sirajgonj Police Station Case Nos.15 and 16 were lodged. He himself was present at the time of recovery of the arms and explosive, and subsequently made statement under section 161 of the Code of Criminal Procedure to the Investigating Officer. He denied the defense suggestions that appellant No.1 did not make any statement to the police or that the police team did not raid the house of appellant No.2.

P.W.6 Satya Ranjan Bhadra stated that at the relevant time he was posted to Sirajgonj Police Station as a Sub-Inspector. In the night following 27.7.1995 Inspector Jamilur Rahman came to the police station along with arrested appellant No.1, who disclosed that his arms were kept in the house of appellant No.2. Inspector Jamilur Rahman made requisition for police forces and after observing necessary formalities, they rushed to village Raghunathpur, raided the house of appellant No.2 in presence of two witnesses and recovered a country-made pipe gun with a cartridge, sword and cocktail wrapped with black tape. Inspector Jamilur Rahman prepared two sets of seizure lists, took signatures of the local witnesses thereon and they came back to the police station. He identified the appellants standing on dock and also identified the arms produced before the Court.

P.W.7 Asaduzzaman, a Sub-Inspector of Police and member of raiding party stated that on 27.7.1995 Inspector Jamilur Rahman came to the police station along with arrested appellant No.1 and made a requisition for police forces to raid the house of appellant No.2. The police team including him and the Officer-in-charge M. A. Kafi, Sub-Inspector Satya Ranjan Bhadra and some other police men rushed to the house of appellant No.2 at village Raghunathpur.

They searched the house in presence of two local witnesses and recovered a country-made pipe gun with a cartridge, sword and cocktail wrapped with plastic tape from his bed-room. Inspector Jamilur Rahman prepared the seizure lists in presence of the witnesses. They came back to police station along with the appellants and the arms and explosive recovered. He identified them (appellants) standing on dock and also identified the arms produced before the Court. He denied the defense suggestion that no arms were recovered from the house of appellant No.2.

P.W.8 Mazid Sheikh, a seizure list witness stated that he knew the appellants. He put his thumb impression on the seizure list, while Amir Hossain (P.W.9) gave his signature. It was at about 2 o'clock in the night, when the Police Inspector brought them (appellants) into his room, asked him to sign the seizure list and took his thumb impression on a blank paper. He did not see any arms. In cross-examination by the prosecution, he stated that in the night of occurrence he was in his house. At about 2 o'clock he waked up as the Inspector of Police had called him. He denied the suggestions that the police along with him went to the house of appellant No.2, and the arms and explosive were recovered from the house of occurrence. He further stated that appellant No.2 was a son-in-law at their village and used to call him (P.W.8) as like an elder brother.

P.W.9 Amir Hossain, a local seizure list witness stated that he knew the appellants. One of them was Rubel and another was Babul. Although he proved the seizure list and his signature thereon, stated that in the night of occurrence, the police brought the arrested appellants at their village and took his signature

on blank paper. He did not see any recovery. At this stage he was declared hostile and cross-examined by the prosecution. In cross-examination he denied the prosecution suggestion that in the night of occurrence the police raided the house of appellant No.2 in his presence. He, however, stated that appellant No.2 was a son-in-law at their village and was a friend to appellant No.1.

During analogous hearing of the two appeals, we have noticed that in course of simultaneous trial of the cases, the evidence of the present case have been copied from the evidence of Special Tribunal Case No.76 of 1995, but were singed in originals to give an impression that these were recorded separately. From a comparative scrutiny of the evidence in both the cases, it appears that the prosecution witnesses are same except the Magistrate, who deposed in Special Tribunal Case No.76 of 1995 as P.W.5, but did not depose in the present case. The narration of facts by all witnesses are exactly same in both cases, but only in the examination-in-chief of P.W.5, M. A. Kafi a few more lines were added. All other depositions are same except the word 'bomb' used in the present case, where the word 'arms' used in the other case. The order of placement of different names and articles appeared to be same in both sets of evidence. The question by the Court to P.W.6 Satya Ranjan Saha was put at a particular place of his evidence in both the cases. Same mistakes in construction of sentences are also common in the evidence of the witnesses. At a particular place of their evidence, the seizure list witnesses were declared hostile and the questions put towards them in their cross-examinations appear to be exactly same in both the cases, which is absurd because the questions to dig out the facts in a case under Explosive Substance Act and in a case of arms recovery cannot be same. These similarities are humanly impossible, if the evidence of the

prosecution witnesses were recorded separately in the two cases. Under the peculiar facts of the present case, we hold that the evidence copied from another proceeding is not evidence in the eye of law. This sort of practice is quite unknown to law and a serious abuse of process of the Court, which vitiates the trial and also the impugned judgment and order in conclusion thereof. Since the appellants have suffered a considerable period of imprisonment and already undergone the ordeal of trial, we are not inclined to send the case on remand.

For the reasons stated above we find substance in the submissions of the learned Advocate for the appellants and the decision cited by him also matches with the present appeal.

In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence dated 10.9.2000 passed by the Special Tribunal No.3, Sirajgonj in Special Case No.81 of 1995 is hereby set aside. The appellants are released from their bail bond, so far it relates to the instant Criminal Appeal No.2565 of 2000.

Send down the lower Court records.

Borhanuddin, J:

I agree.