

Present
Mr. Justice Borhanuddin
and
Mr. Justice Md. Ruhul Quddus

Criminal Appeal No.2797 of 2002

A. M. Anwarul Haque
... Appellant

-Versus-
The State

...Respondent

Mr. Abu Taher Md. Saifur Rahman, Advocate
...for the appellant

Mr. Md. Shohrowardi, D.A.G
... for the respondent

Judgment on 25.4.2011

Md. Ruhul Quddus, J:

This appeal under section 10 of the Criminal Law Amendment Act, 1958 is directed against judgment and order dated 29.8.2002 passed by the Special Judge, Sylhet in Special Case No.123 of 2001 convicting the appellant under section 409 of the Penal Code read with section 5 (2) of the Prevention of Corruption Act, 1947 and sentencing him thereunder to suffer rigorous imprisonment for five years with a fine of Taka 11,53,364/= in default to suffer rigorous imprisonment for another one year.

Prosecution case, in brief, is that the Officer-in-charge of Naoapara food godown, Mirza Monwar Hossain was in charge of the said godown from 11.3.1987 to 4.1.1991. He died on 5.1.1991. On his death the District Food Controller, Habiganj by his order dated 5.1.1991 transferred

Kazi Khalilur Rahman, Upazila Food Inspector, Madhabpur to be posted as Officer-in-charge at Naoapara food godown with a direction to make an inventory of the stock in presence of a Magistrate of First Class. Instantly the said Kazi Khalilur Rahman joined Naoapara godown, collected the key and kept the same with him. The Magistrate inspected the godowns and verified the stock from 19.1.1991 to 8.4.1991 and found shortage of 85.298 metric tons of rice, 221.952 metric tons of wheat and 185 pieces of bags worth Taka 23,06,728.80 in total. It was presumed that the said Mirza Monwar Hossain, since deceased and the co-accused in collusion with each other had misappropriated the said amount within the period from 29.3.1987 to 4.1.1991.

The District Anti-Corruption Officer, Habiganj initially had inquired into the allegations and thereafter, lodged an *ejahar* against the said Mirza Monwar Hossain and twenty-two others including the appellant, which gave rise to Madhabpur Police Station Case No.11 dated 27.9.1992. Two Sub-Inspectors of the then Bureau of Anti-Corruption consecutively investigated the case and one of them submitted charge sheet on 27.7.1996 against the appellant and twenty others under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act.

The case after being ready for trial, was sent to the Senior Special Judge, Habiganj and was registered as Special Case No.7 of 1997. The

learned Judge of the Tribunal framed charge against the appellant and others under the same sections of law by order dated 11.3.1999, to which the appellant pleaded not guilty and claimed to be tried. Subsequently the case was transferred to the Special Judge, Sylhet and was renumbered as Special Case No.123 of 2001.

The prosecution in order to prove its case examined as many as thirteen witnesses. After the prosecution was closed, the learned Judge examined the appellant under section 342 of the Code of Criminal Procedure, to which he reiterated his innocence, and declined to adduce any evidence in defense. The defense case, as it transpires from the trend of cross-examination that the appellant was innocent; he was released in a departmental proceeding on the self same allegation; he was not in charge of the godown at any point of time and was not individually or jointly liable for the deficiency of stock. The learned Judge, after conclusion of the trial, found the appellant guilty of charge framed against him and accordingly pronounced his judgment and order on 29.8.2002 convicting and sentencing him as aforesaid, while acquitted all other co-accused as the prosecution case was not proved against them. The appellant preferred the instant criminal appeal against the said judgment and order of conviction and sentence, and subsequently obtained bail from this Court.

Mr. Abu Taher Md. Saifur Rahman, learned Advocate appearing for the appellant after taking us through the *ejahar*, charge sheet, evidence on records and the impugned judgment submits that in the present case, the trial Judge proceeded on assumption and convicted the appellant on the basis of probability. He pointed that the appellant joined Naoapara godown on 17.8.1990 as an Assistant Sub-Inspector. According to his job description, he was not the custodian of the godown. There is no specific case that he misappropriated the entire food grains or any portion thereof during his tenure, or that he abetted the Officer-in-charge, Mirza Monwar Hossain or any other person in commission of the occurrence. But without any such specific allegation, or any proof to that effect, the learned Judge proceeded on assumption that Mirza Monwar Hossain, since deceased had misappropriated the food grains in connivance with the appellant, and passed the impugned judgment and order of conviction and sentence on surmise and conjecture, which is not sustainable in law.

The learned Advocate further submits that it came out from the cross-examination of the prosecution witnesses that in an earlier enquiry the said Mirza Monwar Hossain had confessed his guilt in respect of shortage of twenty-five metric tons of food grains. P.W.9, upon which the trial Judge relied to pass the impugned judgment, admitted in his cross-examination that while he had verified the stock and counted the bags on 19.1.1991, the godowns were not sealed. It also appears that the

appellant at no point of time, was in charge of the godown, or kept the key with him. In any view of the matter, the appellant cannot be held liable for the shortage of stock, if any.

On the other hand, Mr. Md. Shohrowardi, learned Deputy Attorney General appearing for the State referring to the evidence of P.W.5 and 9 submits that the stock of godown was verified on 30.6.1990 and was found correct. The appellant joined the godown on 17.8.1990 and the shortage of stock was detected during inspection from 19.1.1991 to 7.4.1991, which took place during the tenure of the appellant and being an Assistant Sub-Inspector of the godown, he was individually and jointly liable for the shortage of stock. He cannot escape from his liability taking advantage of the death of Mirza Monwar Hossain. The evidence of P.Ws.1, 5 and 9 clearly proved the case against him to the effect that the shortage took place during his tenure as well. The appellant has been rightly convicted and sentenced.

For better appreciation of fact, let us examine the evidence. P.W.1 Md. Zakir Hossain, the informant and the then District Anti-corruption Officer, Habiganj stated that before lodging the *ejahar*, there was a preliminary inquiry. The Officer-in-charge of the godown, Mirza Monwar Hossain with help of the accused had misappropriated rice, wheat and flour worth Taka 23,06,728.80 during his tenure. In cross-examination he affirmed that Mirza Monwar Hossain was the Officer-in-charge at

Naoapara godown from 23.3.1987 to 4.1.1991. He further stated that the successor Officer-in-charge of the godown, Kazi Khalilur Rahman took charge on 5.1.1991 in presence of the District Food Controller collecting key of godown from the house of Mirza Monwar Hossain through a cleaner. The inventory of stock was not prepared on 5.1.1991, it was prepared after fourteen days from taking over the charge by new Officer-in-charge. He did not examine the appellant and did not know who was assigned for loading and unloading the goods. The shortage was detected in godown No.3 as well. He also stated that in an earlier proceeding late Mirza Monwar Hossain had confessed his guilt of misappropriation of twenty-five metric tons of food grains. If any action could have been taken earlier, the present situation would not arise. Lastly he admitted that the Officer-in-charge (indicating Mirza Monwar Hossain) was individually liable. He could not say about the source, from where they received the information of the alleged misappropriation.

P.W.2, Md. Aminul Islam, a District Anti-Corruption Officer and predecessor-in-office to P.W.1, stated that he had received a secret information on 2.4.1991 that on death of the Officer-in-charge of Naoapara food godown, shortage of huge quantity of food grains were detected. He had initiated inquiry and at one stage handed it over to his successor Zakir Hossain (P.W.1). In cross-examination he stated that the Investigating Officer did not record his statement under section 161 of

the Code of Criminal Procedure. He himself did not conduct any inquiry in the present case, but had initiated inquiry to be done by others.

P.W.3 Md. Mostofa, an Inspector of the then Bureau of Anti-Corruption, stated that he had inquired the case in preliminary stage and submitted a report to the District Anti-Corruption Officer, Habiganj. In course of inquiry he seized the books of inspection, and some other documents. In cross-examination he stated that Mirza Monwar Hossain was in charge of the godown from 11.3.1987 to 4.1.1991. After his death Kazi Khalilur Rahman was in charge from 5.1.1991. Key of the godown was also kept with him (Khalilur Rahman). On the date of his joining, he did not make any inventory of stock. Inspection of the godowns started from 19.1.1991. The appellant joined Naoapara godown on 17.8.1990. He had not seized any fortnightly report of Upazila Food Controller. He further stated that key of the godown was kept with the Officer-in-charge, and every loading/unloading of goods took place only at his instance. P.W.4 Zahirul Islam, a security guard, stated that he joined Naoapara godown in June, 1991. In cross-examination he stated that on receipt of a telephone call, he came to record his evidence. The investigating officer did not examine him during investigation.

P.W.5 Md. Ilias, the then District Food Controller, Habiganj stated that he had received news on 5.1.1991 at about 7.30 a.m that the Officer-in-charge of Naoapara food godown, Mirza Monwar Hossain

died. Instantly he consulted with his superior authority and issued an order transferring Kazi Khalilur Rahman, Upazila Food Inspector, Madhabpur to be posted as Officer-in-charge at Naoapara godown. He himself visited Naoapara godown on 5.1.1991. A cleaner named Krishna Relli brought key of the godown from the house of Mirza Monwar Hossain. The godowns were not sealed. In his presence those were sealed under joint signatures of Kazi Khalilur Rahman and the appellant. In cross-examination he stated that there was provision of inspection of godown once in every fifteen days. But the Upazila Food Controller never did such inspection and gave any report to that effect. He further stated that he had seized a report containing confessional statement of Mirza Monwar Hossain and some other report furnished by the Upazila Food Controller regarding his (Monwar Hossain's) activities, wherein it was mentioned that the shortage was made in 1987-88. On 30th June in every year, the godowns were verified. During his tenure, such verification took place on 30.6.1990, and the verifying Magistrate found the stock okay. This P.W.5 could not reply whether the appellant and others were released in Departmental Case No.7 of 1992.

P.W.6 Kazi Khalilur Rahman, the Successor-in-office to Mirza Monwar Hossain stated that he did not know anything about shortage of stock in the godown. At this stage he was declared hostile and was cross-examined by prosecution as well as by defense. In cross-

examination he denied the prosecution's suggestion that he knew everything, or that he was influenced by the defense. In cross-examination by defense he stated that he took charge over the godown on 5.1.1991 in presence of the District Food Controller. Since then he was fully in charge of the godown. He collected key of the godown from the house of Mirza Monwar Hossain through a cleaner named Krishna Relli. At the time of taking over charge, the appellant was present there. The inventory was prepared on 19.1.1991, not on 5.1.1991. The number of bags in godown No.3 were counted and found correct. Over the self same allegation, there was a departmental proceeding. The appellant was proved to be innocent in the said proceeding. Mirza Monwar Hossain, during his life confessed that he had misappropriated twenty-five metric tons of food grains in 1988.

P.W.7 Abu Taher Miah, an Inspector of the then Bureau of Anti-Corruption, stated that he investigated the case in part. In cross-examination he stated that he himself did not see steeling of any food grains or any misappropriation, and nobody gave any such statement to him. He further stated that the Assistant Commissioners, Md. Saber Hossain had verified the stock on 30.6.1989 and Dilip Kumar Bhadra verified on 30.6.1990. P.W.8 Md. Eunos Mia, Successor-in-office to the appellant stated that at the relevant time he was not at Naoapara godown and knew nothing of the alleged misappropriation.

P.W.9 Md. Saber Hossain, the Magistrate stated that he inspected the godowns and verified the stock on 30.6.1989 and subsequently on several occasions. At the time of inspection he was accompanied by the Officer-in-charge, Kazi Khalilur Rahman and the Assistant Sub-Inspector Anwarul Haque (herein appellant). Key of the godown was being kept with Kazi Khalilur Rahman. He found shortage of stock in all the godowns. In cross-examination he stated that he had started inspection on 19.1.1991 and completed on 7.4.1991. At the time of opening the godowns, the locks were not sealed. He found artificial vacuum inside the stack of bags, although those were being shown alright from outside. In 1989 he had verified the stock on the basis of random sampling. After that inspection, he furnished a report stating that the stock was found correct. This witness could not ascertain whether the accused were involved in the alleged misappropriation.

P.W.10 Abdul Khaleque, the then Upazila Food Controller at Madhabpur, stated that after the death of Mirza Monwar Hossain, the stock of Naoapara godown was verified by a Magistrate, who found shortage of stock. This witness could not remember whether he gave any statement to police. At this stage the prosecution declared him hostile. In cross-examination by prosecution he denied that he suppressed the fact of giving statement to police. In cross-examination by defense, he stated that none of the accused had ever kept key of the

godown. At one stage he admitted that he was given force retirement because of non-submission of fortnightly report.

P.W.11 Zafar Ahmed, one of the Investigating Officers and an Assistant Inspector of the then Bureau of Anti-Corruption stated that after he was assigned for investigation of the case, he just examined the records and statements of the witnesses those were recorded by his previous Investigating Officer, and submitted the charge sheet. In cross-examination he stated that he himself did not visit the place of occurrence or examine any witness. P.W.12 Md. Sirajul Islam stated that on 27.9.1992 he was a Sub-Inspector of police and was attached with Madhabpur police station. As a Duty Officer he had filled up the form of first information report. P.W.13 Saroj Kumar Barua, Successor-in-office to Kazi Khalilur Rahman stated that he knew hand writing of Kazi Khalilur Rahman and proved his (Khalilur Rahman's) signatures on different tally books, seizure list and inventory. In cross-examination he stated that he was not at Naoapara godown at the relevant time and had no personal knowledge of the alleged misappropriation.

It appears from the impugned judgment that the learned Judge passed his judgment on the reasons that the stock was verified on 30.6.1990 and found okay. Therefore, the shortage was done at some point of time after 30.6.1990, and as the appellant joined Naoapara godown on 17.8.1990, he might be involved in the occurrence; that the

appellant as an Assistant Sub-Inspector of the godown used to maintain the register and was assigned for loading and unloading the goods. Since huge shortage of stock was proved beyond reasonable doubt, the learned Judge held each of Mirza Monwar Hossain, and the appellant liable to the extent of 50%, which comes at Taka 11,53,364.40. In convicting the appellant, the trial Judge relied upon the evidence of P.W.9 and that of P.W.5 in part, and referred to material exhibit-10, a tally book to show that the appellant was assigned for loading and unloading the goods.

It does not appear from the evidence of P.W.9 that he disclosed anything adverse against the appellant, or referred to any documents for which he (appellant) could be held individually or jointly liable for the shortage of stock. In cross-examination, P.W.9 could not ascertain whether the accused were involved in the alleged misappropriation. The evidence on records show that Mirza Monwar Hossain was in charge of the godown from 11.3.1987 to 4.1.1991. On his death, Kazi Khalilur Rahman joined Naoapara godown on 5.1.1991, took over the charge collecting key from the house of Mirza Monowar Hossain. At no point of time, the appellant was in charge of the godown, or was holding the key. There is nothing on records that he abetted Mirza Monwar Hossain or any other officer in commission of the occurrence. We have also examined exhibit-10 (tally book), which contains the signatures of the

Officer-in-charge Kazi Khalilur Rahman and the appellant and shows loading and unloading of goods from 25.2.1991 and onward.

The time of occurrence, as shown in the first information report, charge sheet as well as in the form of charge is 29.3.1987-4.1.1991. The above mentioned exhibit-10 shows loading and unloading from 25.1.1991 as a routine official work. P.W.5 Md. Ilias, who was District Food Controller at the relevant time, stated that he seized papers and documents, wherein it was mentioned that the shortage was made in 1987-88. Since the appellant joined Naoapara godown on 17.8.1990, he cannot be held liable for the shortage took place in 1987-88. The Magistrate, Dilip Kumar Bhadra who inspected the godown and verified the stock on 30.6.1990, was not examined. P.W.9 Md. Saber Hossain, the Magistrate who verified the stock on 30.6.1989 and also after the death of Mirza Monwar Hossain, stated that in 1989 he verified the stock on the basis of random sampling. The evidence of P.W.5 and 9 are contradictory on the point whether the godowns were sealed on 5.1.1991. It also appears from the evidence of P.W.5 and 10 that during the tenure of Mirza Monwar Hossain, no fortnightly inspection by the Upazila Food Controller on the stock of godown was made and no report to that effect was ever submitted. The Upazila Food Controller (P.W.10) himself admitted that because of non-submission of such report, he was given force-retirement. Besides, there are contradictions between the

prosecution witnesses on the time of occurrence. It is not very clear whether the shortage took place before or after 5.1.1991. In such a position, it is difficult to hold that the stock was found correct on 30.6.1990 only on the basis of the oral evidence of P.W.5, when the trial Judge himself discredited and disbelieved this witness in his judgment. In this regard, the trial Judge appears to have proceeded on mere assumption that the misappropriation took place after 30.6.1990.

P.W.7 Abu Taher Miah, one of the Investigating Officers, who conducted the main part of the investigation, stated that he himself did not see steeling of any goods or any misappropriation, and nobody gave any such statement to him. P.W.6 stated that on the self same allegation Departmental Case No.7 of 1992 was initiated against the appellant, wherein he was released.

P.W.1 in his cross-examination could not say anything about the source of the first information, upon which the preliminary enquiry was started, and he stated that he took charge of preliminary enquiry from his predecessor Md. Aminul Islam (P.W.2). P.W.1 also admitted that Mirza Monwar Hossain was individually liable for the misappropriation. While, P.W.2 stated that he had received a secret information on 2.4.1991 that on death of the Officer-in-charge of Naoapara food godown, huge shortage of stock had been detected. Some of the witnesses stated that they were not examined under section 161 of the Code of Criminal

Procedure by the Investigating Officer. So the initiation of preliminary enquiry before lodgment of the *ejahar* and the manner of investigation are also anomalous and questionable. Moreover, the alleged occurrence took place over a period exceeding one year from 29.3.1987 to 4.1.1991 (as mentioned in the first information report, charge sheet and charge), but the case was tried on one charge and in one proceeding, which was a clear violation of section 222 (2) of the Code of Criminal Procedure, and vitiated the trial itself due to defect of the charge [reliance placed on 58 DLR 500; 10 DLR (SC) 29 and 48 DLR (AD) 294].

In view of the above, no factual inference can be drawn that the appellant individually or jointly misappropriated any amount from the food grains stored in the godown or contributed in making the stock deficient. Therefore, he cannot be held guilty only because he was an Assistant Sub-Inspector of the godown and was supposed to know the real stock, or that he maintained the register and was assigned for loading and unloading the goods. The tally books and register are official records showing performance of official duty of the appellant. These records do not show that the appellant illegally lifted or shifted the goods elsewhere, or sold it for illegal gain. The learned trial Judge, in his judgment did not consider these aspects of the case and convicted the appellant on mere surmise and conjecture.

For the reasons stated above, we feel it difficult to agree with the learned Special Judge on his reasoning in convicting the appellant and awarding sentence upon him, and therefore, we are inclined to allow this appeal.

In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence dated 29.8.2002 passed by the Special Judge, Sylhet in Special Case No.123 of 2001 is hereby set aside. The appellant is released from his bail bond.

Send down the lower Court's records with a copy of this judgment.

Borhanuddin, J.

I agree.