

In the Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)

Present:

Mr. Justice S.M. Mozibur Rahman

Criminal Appeal No. 1160 of 2009.

Driver Md. Jahangir Alam alias Jahangir Alam
and another

..... Convict-Appellants.

-Versus-

The State

.....Respondent.

Mr. Mohammad Hossain, Advocate,

..... for the appellants.

Mr. Bibhuti Bhuson Biswas, A.A.G. with

Mr. Md. Abdul Bari, A.A.G

..... for the state

Heard and Judgment on: 12.12.2016.

This appeal is directed against the judgment and order of conviction and sentence dated 18.02.2009 passed by the learned Judge, Special Tribunal No.7, Jessore in Special Tribunal Case No. 231 of 2003 arising out of G.R. Case No. 26 of 2002 corresponding to Sharsha P.S. Case No. 10 dated 27.11.2002 convicting the accused-appellants under Section 25B(1)(a) read with section 25D of the Special Powers Act, 1974 sentencing him to suffer rigorous imprisonment for 05(five) years and also to pay a fine of Tk. 5,000/- (five thousand) in default to suffer rigorous imprisonment for 3(three) months more.

Short facts necessary for disposal of the appeal, are that on 27.11.2002, the informant P.W. 1 Nayek Md. Asraf Ali of 12 Rifle Battalion, Satkhira lodged a First Information Report with Sharsha Police Station against the accused-appellants alleging inter alia that on the basis of a secret information informant and his companion forces arrested the accused persons namely Driver Md. Jahangir Alam and Supervisor Samir Kumar Dey and recovered from them 36 pieces simens mobile phone sets along with chargers, 12600 pieces Sony machines of watch, 12000 pieces pins of watch, 12000 pieces wheels of watch by unlocking the cover of reading light attached to the passenger bus conducted by the convict appellants. Then the informant prepared a seizure list in presence of the local witnesses and lodged an F.I.R with the Sharsha Police Station, Satkhira.

After concluding the police investigation Charge Sheet No. 11 dated 24.02.2003 was submitted against the accused-appellants under section 25B(b) of the Special Powers Act, 1974. Subsequently, the case was transferred to the Court of Senior Special Tribunal No. 7, Jessore for trial and disposal who framed charge against the accused-appellants under the same section of

the Special Powers Act, 1974. Charge so framed was duly read over and explained to the accused-appellants to which they pleaded not guilty and claimed to be tried. During the trial of the case in total 11 charge sheet noted witnesses were examined by the prosecution in support of the allegation brought against the accused-appellants when the defence examined none.

The defence case as it appears from the trend of cross examination of the prosecution witnesses is that they were not involved with the occurrence of this case and nothing was recovered from their possession.

After the closure of prosecution evidences, accused appellants were duly examined by the Trial Court under section 342 of the Criminal Procedure Code 1898 to explain regarding the circumstances appeared against them in the evidence upon which they again pleaded to be not guilty stating that they would not adduce any defence witness nor submit any document in support of their defence.

The Learned Judge of the Special Tribunal after scrutinizing oral and documentary evidence led by the prosecution in support of the charge framed against the accused-appellants passed the

impugned Judgment and order of conviction and sentence dated 18.02.2009 convicting the accused-appellants under section 25B(1)(a) read with section 25D of the Special Powers Act, 1974 sentencing him to suffer rigorous imprisonment for 05(five) years and also to pay a fine of Tk. 5,000/- in default to suffer rigorous imprisonment for 3(three) months more.

Now I am to adjudge whether the impugned judgment and order of conviction and sentence is tenable in law after finding out how far the prosecution has been able to prove the case by adducing and producing oral and documentary evidences against the accused appellants beyond the shadow of all reasonable doubt.

P.W.1 Habildar Ashraf Ali is the informant of this case who stated in his evidence that he and his companion forces on 27.11.02 at 2.45 p.m. went to the Harikhali center and halted the bus bearing no. Jessore Be-11-0010 of M.R, Paribahan which was going from Dhaka to Satkhira. Then they searched the bus and recovered 36 Simens mobile phone sets along with chargers, 12600 pieces Sony machines of watch, 12000 pieces pins of watch and 12000 pieces wheels of watch by unlocking the cover

of reading light where the seized articles were kept hidden. Then they asked the passengers as to the recovered articles but nobody claimed the ownership of these materials. Subsequently, they interrogated the driver and the supervisor of the bus and arrested them as they could not answer satisfactorily about the articles found in their bus. Then they seized the articles recovered along with the passenger bus in presence of the witnesses by preparing a seizure list and lodged an F.I.R with the Police Station, Sharsha, Satkhira. He identified the ejahar, Exhibit-1 seizure list Exhibit-2 and his signatures therein as Exhibit-1/1 & 2/1 respectively.

In cross examination he stated that he did not mention the name of Deputy commandant Major Reja nor he mentioned the quantity of the recovered mobile set along with other articles giving full details in the ejahar. But he figured it in the seizure list. He did not seize nuts though he seized the articles by opening the nuts of the reading light. He did not seize the light that he mentioned in the ejahar. Nobody claimed the ownership of recovered articles for which they arrested the driver and the supervisor of the bus. He denied the suggestion that the accused

persons told them that the bus had been under the supervision of the helper for three hours or that the accused persons told at the time of occurrence that they had no idea about the recovered articles or that the articles were recovered from the luggage box of the bus and not from the reading light or that the recovered articles belonged to other unknown passengers and after their getting down from the bus a case has been started falsely against the accused persons.

P.W.2 Nayek Hazrat Ali stated in his evidence that he was the member of the raiding party. On 27.11.02 at 2.45 hours they searched a Satkhira bound bus and recovered from inside of the reading light 36 pieces mobile sets, 12600 pieces charger, 12000 pieces machines of watches and 12000 pieces wheels of clocks. Since the passengers were not claiming ownership of the articles, they arrested driver Zahangir alam and supervisor Samir Kumar of that bus.

In cross-examination he stated that they did not interrogate as to who was the driver of the bus. He entered into the bus and wrapped the packages of articles. He denied the defence suggestion that the owner of the recovered articles were

the unknown passengers for which these materials were kept in luggage box safely. He again denied the defence suggestion that they had made an altercation with the driver and the supervisor of the bus for which a case has been started falsely against them with the articles of the passengers.

P.W.3 Nayek Akbar Ali stated in his evidence that on 27.11.02 he and their companion forces searched the passenger of M.R. Bus which was coming back from Dhaka to Shatkhira and recovered 36 pieces mobile sets with chargers, machines of watches and other articles. As it was not possible for any other person to keep the articles in the inside of the reading light except the driver and the supervisor, informant filed a case against them and deposited the articles to the Customs authority of Satkhira.

In cross examination he stated that the bus was halted at a blank place. The Investigating Officer did not recover the articles from the reading light of the bus. He denied the defence suggestion that the accused persons are not the owners of the articles seized. He denied the suggestion that due to altercation

with the accused persons the case has been filed falsely against them.

P.W.4 Sepoy A. Alim P.W.5 Sepoy Islam Uddin and P.W.6 Rejaul Islam were tendered by the prosecution while the defense declined to cross them.

P.W.7 Liakat Hossain is the another member of the raiding party of this case. He stated in his evidence that on 27.11.02 as a Duty officer of Sharsha Police Station, he registered a case filling up the formal column of the prescribed F.I.R form and put his signature on the FIR after receiving informant's ajahar along with the accused persons. He identified the FIR form Exhibit-3 and proved his signature therein as Exhibit-3/1. He identified the ejahar Exhibit-1 and his signature therein as Exhibit-1/2.

In cross he stated that he handed over the accused persons to the Investigating officer on the following day. He did not mention the reason of delay in lodging ejahar in the prescribed column of FIR. He did not mention in the FIR that the recovered articles were deposited in the Satkhira Customs Godown.

P.W.8 Suranjan Biswas stated in his evidence that on 27.11.02 they halted a passenger Bus bearing no Jessore Ba-11-0010 and recovered 36 pieces Seimens A-35 mobile with charger, 1260 pieces Machines of new watch, 1200 pieces wheel of new watch and deposited these articles in the Satkhira Customs Godown as per register no. 49 dated 27.11.02 and the learned Magistrate gave back the said bus by passing an order dated 02.12.02 to Mr. Sanjoy Kumar Mondal and Menoka Mondan of Bejpara under P. S. Kotwali, District Jessore after identifying them as the owner of the bus.

In cross-examination he deposed that he did not receive the articles from the informant. He denied the suggestion that the deposited materials were not identified and marked as seized articles of this case.

P.W.9 Narayan Chandra Roy is the passenger of the said bus. He stated that on 27.11.2002 he was coming from Dhaka by M.R. Paribahan. While he reached at Harikhali, BDR personnel searched the bus and recovered the seized articles. He put his signature in the seizure list. He identified the seizure list and his signature therein as Exhibit-2 and 2/2.

In cross-examination he told that he had not seen the articles though he gave his signature in the seizure list.

P.W.10 Amir Hossain is the another passenger of the said bus who stated in his evidence that on 27.11.02 he was coming from Dhaka by M.R Paribahan. When they reached at Harikhali, the BDR personnel searched the bus and recovered the seized articles. He did not see the seized articles though he gave signature in the seizure list. He identified the seizure list Exhibit-2 and his signature therein as exhibit-2/3.

P.W.11 A. Sattar is the another passenger of the said bus who stated in his evidence that on 27.11.02 he was coming from Dhaka by the said bus. While he reached near Jamtala area, some BDR persons searched the bus and recovered the seized articles. They prepared a seizure list in presence of the local witnesses and took his signature. He identified the seizure list and his signature therein as Exhibit 2 and 2/4.

These are all about evidences put forwarded by the prosecution in proof of the charge framed against the accused appellants.

Mr. Mohammad Hossain, the learned Advocate appearing on behalf of the accused appellants submits that the impugned Judgment and order of conviction and sentence dated 18.02.2009 is illegal, unjust, improper and as such the same is liable to be set-aside. He further submits that the charge was not legally framed in as much as the alleged articles were not recovered from the possession of the appellants. Learned Advocate lastly submits that after concluding prosecution evidence the appellants were not properly examined under section 342 of the Code of Criminal Procedure and as per prosecution evidences, it is crystal clear that the appellants were arrested out of mere suspicion.

On the other hand Mr. Bibhuti Bhuson Biswas, Assistant Attorney General along with Mr. Md. Abdul Bari, learned Assistant Attorney General appearing on behalf of the State submits that the learned Judge of the Special Tribunal after evaluating the prosecution evidence, correctly arrived at the decision and rightly convicted and sentenced convict appellants by the impugned judgment and order of conviction.

In the light of the above submission of the learned Advocates for both the sides, I have carefully perused the record and all other relevant materials lying with the lower Court Record. On careful assessment of the prosecution evidences, it appears that in this case informant P.W. 1 Habilder Asrab Ali did not mention the name of original owner of the seized articles and stated that alleged articles were recovered from the bus of M.R. Paribahan. Seizure list noted witnesses P.W. 9, 10 and 11 clearly stated that they did not watch the seized articles though they put their signatures as per instruction of the B.D.R personnel. Even P.W. 1 seizure list maker also at one stage deposed that seized articles were not recovered from the exclusive possession of the accused appellants. As per prosecution evidences, it is manifested that the accused appellants were arrested at the place of occurrence out of mere suspicion.

In view of the discussion made above I am of the opinion that the prosecution hopelessly failed to prove the charge brought against the accused appellants beyond the shadow of all reasonable doubt. The learned Judge of the Special Tribunal totally failed to assess the evidence adduced by the prosecution.

As such, the impugned judgment and order of conviction and sentence is not tenable in law.

In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence dated 18.02.2009 passed by the learned Judge of the Special Tribunal No. 7, Jessore in Special Tribunal Case No. 231 of 2003 is hereby set-aside. The accused appellants are acquitted of the charge framed against them.

Send down the L.C.R. along with a copy of this judgment to the concerned court at once for information and necessary action.

Asad/B.O