

Present:

Ms. Justice Naima Haider
and
Mr. Justice Md. Ruhul Quddus

Criminal Appeal No.1315 of 1996

Mokbul Hossain and others

...Appellants

-Versus-

The State

...Respondent

No one appears for the appellant

Mr. Salma Rahman, A.A.G.

...for the respondent

Judgment on 19.4.2011

Md. Ruhul Quddus, J:

This appeal under section 410 of the Code of Criminal Procedure is directed against judgment and order dated 31.8.1996 passed by the Assistant Sessions Judge, Bogra in Session Case No.93 of 1994 convicting the appellants under section 395 of the Penal Code and sentencing them thereunder to suffer rigorous imprisonment for six years with a fine of Taka two thousand for each in default to suffer rigorous imprisonment for three months more.

Facts relevant for disposal of the appeal, in brief, are that one Md. Abdul Hakim as informant lodged an *ejahar* with Nandigram Police Station, Bogra on 13.9.1991 alleging *inter alia* that he was running with business of kerosene and diesel in a shop consisting of two rooms at Kunderhat beside Natore-Bogra highway. He used to reside in southern room and keep his goods in the northern room of the shop. He kept twenty-two kerosene barrels at courtyard of the shop.

Out of the said barrels nineteen were full and three were empty. In the previous night at about 8 p.m. his nephew Ayez and the Chairman of Bohail Union Parishad Md. Altaf Hossain were stuck off with their motor-bikes because of heavy rain fall and kept the motor-bikes in the northern room under lock and key. After having meal, the informant slept in the southern room at 10 p.m. He waked up at about 3.30 a.m. as some persons were talking outside the room. He saw in electric light that some thieves were lifting the motor-bikes in a truck parked on main-road. He also noticed that some of the kerosene barrels kept at the courtyard, were not available. Instantly he came out from his room and raised alarm, when two or three of them chased him, and he entered into the room out of fear of life. Thereafter the thieves went away towards Bogra by the said truck. The informant came out from his room again and called a night-guard named Sree Nath. Meanwhile some other witnesses namely Makbul, Uzir and others rushed to the shop in response to his alarm. In the next morning Chairman Altaf Hossain, Noor Mohammad and others had come to the shop and heard about the occurrence in details.

The *ejahar* gave rise to Nandigram Police Station Case No.2 dated 13.9.1991. The police, after investigation submitted charge sheet on 30.4.1992 against twelve accused persons including the appellants under sections 382 and 457 of the Penal Code. During investigation the police arrested many suspects including the appellants, who made statements under section 164 of the Code of Criminal Procedure. The case after being ready for trial, was sent to the Sessions Judge, Bogra, wherein it was registered as Session Case No.93 of 1994. Thereafter the case was sent to the Assistant Sessions Judge, Court No.1, Bogra for hearing and disposal. The learned Assistant Sessions Judge by his order

dated 14.2.1995 framed charge against the accused persons including the appellants under sections 395 and 397 of the Penal Code, to which they pleaded not guilty and claimed to be tried.

The prosecution examined eleven witnesses in support of its case. After closing the prosecution, the learned Assistant Sessions Judge examined the appellants under section 342 of the Code of Criminal Procedure, to which they reiterated their innocence, and in addition appellant No.1 stated that he was a simple farmer owning some agro-land. The police had arrested him on 4.7.1992 and took him on remand for five days. The Investigating Officer (briefly I.O.) inhumanly tortured him in custody and threatened him to kill. He (I.O.) took him on remand for further three days on 8.7.1992 as he declined to make any statement before the Magistrate. The I.O. again tortured him causing bloodily injuries on him and threatened him to kill like Jabber, whom he (I.O.) had killed earlier. Still appellant No.1 did not agree to make any statement. Then the I.O. poured chilli-mixed water into his nostrils. At that stage he had no way but to make the statement. Appellant No.2 in his statement under section 342 of the Code, also stated that the I.O. had inhumanly tortured him in custody and compelled him to make the statement before the Magistrate under threat of life.

Thus the defense case is that the appellants were innocent and their statements were recorded under inhuman physical torture and threat of life. The further defense case as it transpires from the trend of cross-examination is that the informant himself made shortage of the kerosene barrels and shifted the motor-bikes elsewhere to escape liability of loan to his Principal Merchant.

After conclusion of trial, the learned Judge found the appellants guilty of offence under section 395 of the Penal Code and accordingly pronounced his

judgment on 31.8.1996 convicting and sentencing them as aforesaid, while acquitted nine others as the charge was not proved against them. The appellants moved in this Court with the instant criminal appeal against the said judgment and order of conviction and sentence, and subsequently obtained bail.

The appeal has been appearing in the cause list since 4.4.2011 i.e before six days of starting the vacation. It was taken up for hearing on 17.4.2011, but no one appeared to press the appeal. In view of its long pendency for nearly fifteen years, we took it up for disposal even in absence of the appellants and allowed the learned Assistant Attorney General to make her submissions.

Ms. Salma Rahman, learned Assistant Attorney General submitted that the appellants themselves confessed their involvement in the occurrence by making statements under section 164 of the Code of Criminal Procedure and the Magistrate himself proved the said statements before the trial Court and deposed that their statements were voluntary. The learned Judge rightly passed the judgment and order of conviction and there is nothing to interfere with the same.

We have carefully examined the evidence and other materials on records. P.W.1, the informant Abdul Hakim Khondker in his deposition supported the prosecution case, but with departure from his *ejahar*. He stated that the occurrence took place on 12.9.1991. In the previous night, he slept in the southern room of his shop at 9/9.30 p.m. He waked up at about 3.30 a.m. and saw the dacoits to carry cut-rifle. When he had come out from his room, the dacoits chased him. In cross-examination he failed to reply what he had stated in the *ejahar*. He, however, denied the suggestion that he himself had committed the occurrence to escape liability of loan to his Principal Merchant.

P.W.2 Md. Mamunur Rashid stated that in the next morning he heard about the occurrence and went to the shop along with Makbul, Uzir and others. P.W.3 Makbul Hossain stated that on the following day he heard about the occurrence and went to the shop of the informant. He saw Shamsul, Uzir Ali, Mamun and others there. He met the informant, who told him that the dacoits had taken away nineteen barrels of kerosene and two motor-bikes. In cross-examination he stated that he saw the shop open and did not see anything broken. He further stated that the informant used to gamble and was not a good man. P.W.4 Uzir Ali, another witness cited in the *ejahar* was tendered by the prosecution and the defense declined to cross-examine him.

P.W.5 Ayez Uddin, whose name is cited in *ejahar* as nephew of the informant, stated that he and Altaf Chairman kept their motor-bikes inside the shop-room of the informant. In the next morning he heard that nineteen barrels of kerosene, three empty barrels, one bi-cycle and their motor-bikes were taken away by the dacoits. In cross-examination he stated that he himself was arrested in connection with the case and subsequently obtained bail from the Court of Sessions Judge, Bogra.

P.W.6 Sree Nath, another *ejahar* named witness stated that he was a night-guard at Kunderhat. At the night of occurrence 3/4 dacoits had fastened him with a rope and kept him lying on the veranda of the informant's shop. They took nineteen barrels of kerosene, three empty barrels, two motor-bikes and one bi-cycle. Thereafter the informant Gasu unfastened him at about 3.30 a.m. In cross-examination he explained that he did not see lifting of the barrels on truck as the dacoits had blindfolded him.

P.W.7 Md. Shamsuzzoha stated that he knew nothing adverse about the appellants and that appellant No.1 came out of a respectable family. P.W.8 Md. Azizul Mondal stated that he knew the informant Gasu. During the relevant time, he (P.W.8) used to ply a rickshaw-van at Kunderhat. He learnt about the dacoity while came to Kunderhat on next day of the occurrence. In cross-examination he stated that a police camp was situated by hundred cubits from the shop of occurrence. He did not say from whom he heard about the occurrence.

P.W.9 Kiran Chandra Roy stated that at the relevant time he was the Thana Magistrate at Nandigram. He recorded the appellants' statements under section 164 of the Code on 9.3.1992. He proved the said statements and his signatures thereon. In cross-examination he stated that on 8.3.1992 the appellants were produced before him, but they declined to make any statements. They were produced again on the following day, when they made the confessional statements. He further stated that he did not fill up column Nos.2, 8, 9 and 10 of the prescribed form. He could not reply as to when and according to what order their statements were recorded.

P.W.10 Md. Safir Uddin, a Sub-Inspector of Police and the Investigating Officer stated that after assignment for investigation of the case, he visited the place of occurrence, prepared the sketch map with index and recorded statements of the witnesses under section 161 of the Code. During investigation he arrested as many as twenty-three persons, out of whom seventeen were involved in the occurrence. He arranged for recording the statements of the appellants under section 164 of the Code. In cross-examination he stated that he did not find any sign of dacoity at the place of occurrence. He could not reply

and recollect as to whether any criminal case under section 302 of the Penal Code was pending against him allegedly for killing one Jabbar in his custody, or that he was discharged in the said case by exerting undue influence, and whether Criminal Revision No.24 of 1992 against the said order of discharge was pending. He further stated that he had produced the appellants before the Magistrate on 8.3.1992 and took them on remand for second time and produced them before the Magistrate again on 9.3.1992. He, however, denied the suggestion that under inhuman physical torture and threat of life he had compelled the appellants to make the confessional statements.

P.W.11 Md. Abul Hashem, the last Investigating Officer stated that he submitted charge sheet against twelve accused. In cross-examination he stated that he found the names of Babu, Mokhles, Ayez and Noor Mohammad in the confessional statements, still he submitted final report in their favour. The accused persons stated to him that the informant himself had committed the occurrence to escape liability of loan to his Principal Merchant and that he (P.W.11) did not examine the Principal. He also could not reply whether there was any criminal case pending against Sub-Inspector Safir Uddin, the first Investigating Officer.

From the above evidence it appears that P.W.1, the informant Abdul Hakim stated in his evidence that the occurrence took place on 12.9.1991 and the dacoits were carrying cut-rifle, but in *ejahar* he mentioned 13.9.1991 as the date of occurrence, described the offenders as thieves and stated nothing about cut-rifle. Similarly he stated in *ejahar* that the night-guard Sree Nath (P.W.6) came to his shop in response to his call and some other persons including Makbul and Uzir (P.Ws.3-4) rushed to the shop immediately after the

occurrence as he had raised alarm, but in his evidence he kept silent about the time of their appearance at the shop of occurrence. P.W.2 Md. Mamunur Rashid stated that in the next morning he heard about the occurrence and went to the place of occurrence along with Makbul, Uzir and others. P.W.3 Makbul Hossain also stated that he heard about the occurrence on the following day. Therefore the evidence of P.Ws.2 and 3 are inconsistent with that of P.W.1 and contrary to the *ejahar*. These inconsistencies and departure of P.W.1 from the *ejahar* version makes his evidence unworthy of credit.

P.W.6 Sree Nath stated that he was a night-guard at Kunderhat. At the night of occurrence 3/4 dacoits had fastened him with a rope and kept him lying on veranda of the informant's shop. In contrary, the informant stated in *ejahar* that the said Sree Nath came to his shop just after the occurrence in response to his call, but he (informant) kept silent in his evidence about the appearance of Sree Nath at the shop of occurrence. In the *ejahar* it has been stated that the informant (P.W.1) saw the thieves in electric light, but he did not identify any of them on the dock in course of trial. The night-guard (P.W.6) did also not identify any of the accused on the plea that the dacoits had blindfolded him. But so blindfolding he could have seen those dacoits and also could have identified them on the dock. So these inconsistencies and contradictions also discredited the evidence of P.W.6.

P.W.3 Makbul Hossain stated in cross-examination that he saw the shop open and did not see anything broken there. P.W.10 Safir Uddin, the Investigating Officer stated that he did not find any sign of dacoity at the place of occurrence. In *ejahar*, the informant stated that the motor-bikes were kept in the northern room under lock and key. If the dacoits entered into the room

breaking the door/lock, there must be some sign of breaking. But the seizure list shows that no *alamat* indicating breaking of any door or lock was seized. P.W.7 stated that appellant No.1 came out of a respectable family and he knew nothing adverse of him. P.Ws.2 and 8 being hearsay witnesses did not mention from whom they heard about the occurrence and therefore their evidence so far it relates to the commission of occurrence cannot be considered. Beside that, P.W.8 stated in cross-examination that a police camp was situated by hundred cubits from the shop of occurrence. There is nothing on records to show that the informant or any other person/witness had approached the police camp immediately after the occurrence, which is unusual. It is also unusual that the dacoits would commit dacoity at a shop so close to police camp. Admittedly there was no test identification parade and recovery of any goods. It also appears from the records that the shop of occurrence, houses of some of the witnesses and accused were within the villages of Singjani. The other witnesses and accused hail from different village within the same police station of Nandigram. It is not believable that the appellants would commit dacoity in their own area without any mask taking the risk of identification.

P.W.9 the Magistrate stated that on 8.3.1992 the appellants were produced before him, but they declined to make any statements. They were produced again on the following day, when they made the confessional statements. He further stated that he did not fill up column Nos.2, 8, 9 and 10 of the prescribed form.

The learned Judge found the appellants guilty on the basis of confessional statements made by them. Although he noticed that there were irregularities in recording the statements, ignored those irregularities as it would

not help the accused to prove them innocent. The learned Judge missed that in a criminal case, the onus is not upon the accused to prove themselves innocent. He was to see whether the prosecution was able to prove its case beyond reasonable doubt, and whether the confessional statements were recorded in accordance with law and were made voluntarily. It is pertinent to see that the appellants were arrested and taken on police remand for five days. After expiry of first round of remand they were reproduced before the Magistrate on 8.7.1992, when they officially declined to make any statements. Then the Investigating Officer (Md. Safir Uddin) took them on remand for the second time and produced them before the same Magistrate again on 9.7.1992, who passed the repeated orders of remand. These are evident from the order sheet of the Magistrate. They were in custody of such a Police Officer, against whom a criminal case for custodial death was pending. It also appears that the confessional statements of appellant Nos.1 and 3 were allegedly made on 9.3.1992 at 1.15 p.m. i.e at same point of time two statements were recorded by one Magistrate, which is absurd. Before recording the statements they were in police custody for five days. If we consider these circumstances with the statement of appellant Nos.1-2 made under section 342 of the Code, the confessional statements cannot be considered to have been recorded in accordance with law, or made voluntarily and can also not form the basis of conviction. It is also difficult to hold that the prosecution has been able to prove commission of the alleged dacoity.

Furthermore, the learned Judge in passing his judgment and order of conviction did not consider the statements of appellant Nos.1 and 2 made under section 342 of the Code. It is a well settled principle of law that non-consideration of statements under section 342 of the Code causes miscarriage of

justice [reliance placed on *Manu Miah Vs. The State* reported in 54 DLR (AD) 60]. Since the appellants have already undergone the ordeal of trial and have suffered a considerable period of imprisonment, we are not inclined to send the case on remand especially when the confessional statements of the appellants appear to be not voluntary, and that there are major contradictions between the evidence of prosecution witnesses and major departure in evidence of the informant from his *ejahar*, which cast reasonable doubt over the prosecution case entitling the appellants to be acquitted on benefit of doubt.

In the result, the appeal is allowed. The judgment and order dated 31.8.1996 passed by the Assistant Sessions Judge, Bogra in Session Case No.93 of 1994 is hereby set aside. The appellants are acquitted of charges leveled against them. They are also released from their bail bonds.

Send down the lower Court records.

Naima Haider, J:

I agree.