

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 08 of 2010

Md. Muhibur Rahman Moyur and others

...Convict-petitioners

-Versus-

The State

...Opposite party

Mr. Golam Abbas Chowdhury, Advocate

...For the convict-petitioners

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan, A.A.G

...For the State

Mr. Tabarak Hussain, Advocate with

Ms. Urmee Rahman, Advocate

...For the informant

Heard on 31.07.2024 and 01.08.2024

Judgment delivered on 20.08.2024

On an application filed under Section 439 read with Section 435 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 11.11.2009 passed by the Additional Sessions Judge, Court No. 3, Sylhet in Criminal Appeal No. 58 of 2006 affirming the judgment and order of conviction and sentence dated 06.06.2006 passed by the Magistrate, First Class, Sylhet in G.R. Case No. 147 of 2003 arising out of Golapgonj Police Station Case No. 1 dated 01.11.2003 convicting the petitioners under Sections 447/379 of the Penal Code, 1860 and sentencing them under Section 447 to suffer rigorous imprisonment for 1(one) month and under Section 379 of the Penal Code, 1860 to suffer imprisonment for 5(five) months which will run consecutively should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

The prosecution case, in short, is that on 22.10.2003 at 4.15 pm the accused persons 1. Mohibur Rahman Moyur, 2. Abdur Rahman and 3. Zilani forcibly cut a raintree valued at Tk. 10,000

from the Abu Ali Mosque and took away the tree to the adjacent sawmill. At the time of cutting the raintree, the informant Md. Moin Uddin and the members of the Mosque Committee requested the accused persons not to cut the tree. Subsequently, they lodged GD No. 834 dated 29.10.2003 and the police recovered the said raintree from the sawmill.

The police took up an investigation of the case. During the investigation, the Investigating Officer visited the place of occurrence, prepared the sketch map and index, seized the alat and recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898. After completing the investigation found the prima facie truth of the allegation made against the accused persons and submitted charge sheet on 01.12.2003 against the convict-petitioners.

During the trial, the charge was framed under Sections 447/379/411/506 of the Penal Code, 1860 against the accused persons which was read over and explained to them and they pleaded not guilty to the charge and claimed to be tried following law. During the trial, the prosecution examined 5(five) witnesses to prove the charge against the accused persons and the defence cross-examined them. After examination of the prosecution witnesses, the accused persons were examined under Section 342 of the Code of Criminal Procedure, 1898 and the defence declined to adduce any D.W.

After concluding the trial, the learned Magistrate, First Class, Sylhet by judgment and order dated 06.06.2006 was pleased to convict the petitioners under Sections 447 and 379 of the Penal Code, 1860 and sentenced them under Section 447 to suffer rigorous imprisonment for 1(one) month and under Section 379 of the Penal Code, 1860 to suffer rigorous imprisonment for 5(five) months which will run consecutively. Against the said judgment passed by the trial Court, the convict-petitioners preferred Criminal Appeal

No. 58 of 2006 before the Sessions Judge, Sylhet which was heard by the Additional Sessions Judge, Court No. 3, Sylhet and the appellate Court below by impugned judgment and order dated 11.11.2009 affirmed the judgment and order passed by the trial Court against which the convict-petitioners obtained the instant Rule.

P.W. 1 Moin Uddin is the informant. He stated that the occurrence took place at Abu Ali Jame Mosque on 22.10.2003 at 4.15 pm. The accused persons Moyur, Abdur Rahman and Zilani cut a raintree valued at Tk. 10,000 from the land of the Mosque and took away the said tree to the sawmill. At the time of cutting the tree, the locals tried to restrain them. He proved the FIR as exhibit 1 and his signature as exhibit 1/1. During cross-examination, he stated that he was the Motwalli. He affirmed that in the FIR there is no schedule of the mosque and there is also no dag, khatian and the boundary of the mosque. There is a wall beside the 3 sides of the mosque and the west and back side are open. There is a wall to the east, north and south side of the mosque. There is no deed of the mosque. He denied the suggestion that the grandfather of the accused Moyur gifted the land of the mosque. He affirmed that Asob Ali is the President of the Mosque Committee and Gias Uddin is the Secretary. There were 9 other members in the Committee and Mosque Committee took a resolution to file the case. In reply to a query by the Court, he stated that the resolution was not submitted before the Court. GD No. 840 was lodged. The Imam and Moazzin of the mosque are not the witnesses in the case. The President and Secretary were not cited as witnesses. The witness Lalon lodged G.R. Case 124 of 98. He admitted that the accused persons possessed the land of the mosque. The witness Akmal filed Case No. 42 of 86 against Anfar Ali who is the uncle of the accused Muhibur Rahman. Suruj Ali filed Title Suit No. 8 of 96. He denied the suggestion that he was not the motwally of the mosque.

P.W. 2 Akmal Ali stated that the informant, accused and the place of occurrence is known to him. The occurrence took place on 22.10.2003 at 4.15 pm. The accused persons Muhibur Rahman, Abdur Rahman and Zilani cut down a tree from the mosque valued at Tk. 10,000 and sold the raintree. Subsequently, police seized the tree. During cross-examination, he stated that there is a wall to the east, south and north of the mosque and the west side is open. He denied the suggestion that the accused persons did not cut the tree from the mosque. The mosque is situated in dag No. 1801. The uncle of the accused filed Other Case No. 42 of 86 against his uncle Kala Mia. He admitted that the informant and the witnesses belonged to the same group. There is a dispute regarding the land between the accused persons and the informant. He denied the suggestion that the accused were falsely implicated in the case.

P.W. 3 Suruj Ali stated that the occurrence took place 1 year ago. The accused Muhibur Rahman cut down a raintree of the mosque. The police recovered the tree from the sawmill. During cross-examination, he admitted that he is the cousin of the informant Moinuddin. In Title Suit No. 8 of 96 filed by the accused persons, he was a witness. The title suit was filed in respect of dag Nos. 1799, 1803, 1802 and 3446. The Court passed the decree in favour of both parties. There is a pond to the north and the house of the accused persons was situated to the west of that pond. The tree was located beside the road of the accused. The tree was situated in the land of the mosque but outside the boundary. He affirmed that the accused persons did not cut down any tree from the land of the mosque. He could not say whether the predecessor of the accused persons gifted their land in favour of the mosque.

P.W. 4 Md. Asik Uddin stated that the informant, accused persons and the place of occurrence are known to him. On 22.10.2003 at 4.15 pm, he went to near the mosque and found that the accused Mohibur Rahman and Zilani cut down a raintree from

the land of mosque, dag No. 1799. The mosque is situated in dag Nos. 1799, 1801 and 1802 within the boundary. There was a wall around the mosque. He denied the suggestion that the accused persons did not cut the tree from the land of the mosque.

P.W. 5 Alamgir is the Investigating Officer. He stated that he visited the place of occurrence, prepared the sketch map, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and seized alamat. During the investigation, he found the prima facie truth of the allegation against the accused persons and submitted a charge sheet. He proved the jimmanama as exhibit 2 and his signature as exhibit 2/1. He went to the place of occurrence on 02.11.2003 and subsequently on 29.11.2003.

Learned Advocate Mr. Golam Abbas Chowdhury appearing on behalf of the convict-petitioners submits that the alleged occurrence took place on 22.10.2003 at 4.15 pm and before lodging the FIR, on 01.11.2003 the informant lodged a GD but the said GD was not proved by the prosecution. He further submits that in the FIR there is no dag number and schedule of the mosque. P.W. 4 admitted in cross-examination that the accused persons did not cut any tree from the land of the mosque. Having drawn the attention of this Court to the evidence of P.Ws. 1 to 4, the learned Advocate submits that many civil and criminal cases are pending between the informant and the accused persons. The President, Secretary of the mosque committee, Moazzin and Imam of the mosque were not examined by the prosecution and the accused-persons were falsely implicated in the case and the prosecution failed to prove the charge against the accused-persons beyond all reasonable doubt. Both the Courts below failed to assess and evaluate the evidence of the prosecution witnesses in its true perspective and arrived at a wrong decision as to the guilt of the convict-petitioners. He prayed to make the Rule absolute.

Learned Deputy Attorney General Mr S.M. Golam Mostofa Tara appearing on behalf of the State submits that the raintree cut down from the mosque was recovered from the nearest sawmill and P.Ws. 1, 2 and 4 stated that the accused persons cut down the raintree from the land of the mosque and the prosecution proved the charge against the convict-petitioners beyond all reasonable doubt and both the Courts below on correct assessment of the evidence convicted the accused persons. Therefore, he prayed for discharging the Rule.

I have considered the submission of the learned Advocate Mr. Golam Abbas Chowdhury who appeared on behalf of the convict-petitioners and the learned Deputy Attorney General Mr. S.M. Golam Mostofa Tara who appeared on behalf of the State, perused the evidence, impugned judgments and orders passed by both the Courts below and the records.

On perusal of the evidence, it appears that P.W. 1 Main Uddin stated that on 22.10.2003 at 4.15 pm the accused Moyur, Abdur Rahman and Jilani cut down a raintree from the land of the mosque. P.W. 2 Akmal Ali stated that on 22.10.2003 at 4.15 the accused Muhibur Rahman, Abdur Rahman and Jilani cut down a raintree from the land of the mosque. P.W. 3 Suruj Ali stated that the accused Muhibur Rahman cut down the raintree from the land of the mosque. P.W. 4 Md. Asik Uddin stated that on 22.10.2003 at 4.15 pm the accused Muhibur Rahman and Jilani cut down a raintree from dag No. 1799 belonged to the mosque. The alleged occurrence took place on 22.10.2003 at 4.15 pm and the FIR was lodged on 02.11.2003 but no explanation has been given in the FIR as to the delay of 10 days in lodging the FIR. There is no boundary of the mosque where from the raintree was allegedly cut down by the accused-persons.

It reveals that the mosque was constructed on gifted land but there is no registered deed of gift. The house of the accused-persons

is situated adjacent to the west side of the mosque and there is no boundary to the west side of the mosque which is an open place. During cross-examination, P.W. 4 stated that “আসামীরা মসজিদের জায়গা থেকে কথিত কোন গাছ কাটে নাই। মসজিদ গাছ কাটলে (অস্পষ্ট) এত লোকের সামনে গাছ নিতে পারত না-সত্য।” During cross-examination, P.W. 3 Suruj Ali stated that in Title Suit No. 8 of 1996 filed by the accused-persons decree was passed in favour of both parties. He could not say whether the said suit was filed in respect of dag Nos. 1799, 1803, 1802 and 3446. He could not say whether the accused persons obtained the judgment in respect of dag No. 1802 from the appellate Court. P.W. 3 also affirmed that the tree was located beside the road of the accused-persons. P.W. 1 stated that a resolution was taken by the mosque committee for lodging the FIR. The prosecution did not prove the resolution. The prosecution did not examine any members of the mosque committee including the president and secretary. There is no specific boundary to the west side of the mosque which is an open place and the tree was located beside the road of the accused persons. The evidence discussed hereinabove, reveals that both civil and criminal cases are pending between the accused persons and the informant-party.

The above evidence of the prosecution witnesses depicts that the land where from the tree was allegedly cut down is a disputed land. The prosecution failed to prove that the raintree was cut down from the land of the mosque. Furthermore, the prosecution did not examine President Asab Ali, Secretary Gias Uddin, members of the mosque committee, Moazzin and Imam of the mosque. The witnesses examined by the prosecution are inimical to the accused persons. The informant failed to prove any document that he is the motwally of the mosque. Non-examination of the President, Secretary, Moazzin, Imam and members of the mosque committee gives rise to an adverse presumption under Section 114(g) of the Evidence Act, 1872 against the prosecution.

In view of the above evidence, facts and circumstances of the case and proposition, I am of the view that the prosecution failed to prove the charge against the convict-petitioners beyond all reasonable doubt. The Courts below failed to assess and evaluate the evidence of the prosecution in its true perspective and arrived at a wrong decision as to the guilt of the convict-petitioners.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgments and orders of conviction and sentence passed by both the Courts below against the convict-petitioners Muhibur Rahman Moyur, Abdur Rahman (Abdul) and Zilani are hereby set aside.

However, there will be no order as to costs.

Send down the lower Court's records at once.