

Present:
Mr. Justice Mohammad Marzi-ul-Huq
and
Mr. Justice Md. Ruhul Quddus

Jail Appeal No.1836 of 1996

Oli Ahmed

... Appellant

-Versus-

The State

...Opposite Party

Mrs. Zinat Akhter Nazley Begum, Advocate

... for the appellant

Mr. Yousuf Mahmud Morshed, A.A.G.

í for the respondent

Judgment on 13.6.2012

Md. Ruhul Quddus, J:

This appeal under section 420 of the Code of Criminal Procedure is directed against judgment and order dated 15.2.1995 passed by the Assistant Sessions Judge, First Court, Coxø Bazar in Session Trial Case No.33 of 1993 convicting the appellant under sections 457 and 382 of the Penal Code and sentencing him thereunder to suffer rigorous imprisonment for seven years with a fine of Taka 500/- in default to suffer rigorous imprisonment for three months more. By the same judgment, learned Assistant Sessions Judge also convicted and sentenced two others co-accused.

Informant Serajul Haque finding the Officer-in-charge of Chokoria Police Station, Coxø Bazar available at the office of Taitong Union Parishad on 10.1.1993 lodged an *ejahar* to him alleging, *inter alia*, that in the night following 7.1.1993 he was sleeping at home. At about 12.00 p.m. he woke up

with some sounds in his room and awaked his wife. Seeing the door open he raised alarm, to which his son Abbas Uddin also woke up and rushed into his room. They saw three/four thieves inside the room and noticed some cloths and articles were missing. They tried to catch hold of the thieves, in which event they threatened them to kill and fled away towards the east. Among the thieves, they could recognize the principal accused Zafar. After sometime the neighbors rushed to his house and he disclosed the identity of Zafar. On the following day he informed the local Chairman and Member about the occurrence. The Chairman along with the Member and Chowkider went to the house of Zafar, searched the house and recovered the stolen articles therefrom. They confined him and communicated the police. The said Zafar confessed that while he had committed the theft was accompanied by the appellant and another named Kalu.

The *ejahar* gave rise to Chokoria Police Station Case No.12 dated 10.1.1993. Police investigated the case and submitted charge sheet on 30.4.1993 under sections 457, 382 and 411 of the Code against the appellant and two others.

The case having been ready for trial was sent to the Sessions Judge, Coxø Bazar and was registered as Session Trial Case No.33 of 1993. Learned Sessions Judge took cognizance of offence under sections 457, 382 and 411 of the Code against the accused and subsequently transferred the case to the Assistant Sessions Judge, First Court, Coxø Bazar for hearing and disposal. The Assistant Sessions Judge framed charge under the said penal sections

against the appellant and another in absentia and in presence of accused Zafar by order dated 10.1.1994.

Prosecution examined eight witnesses in support of its case. After closing the prosecution, the principal accused Zafar pleaded guilty while he was examined under section 342 of the Code of Criminal Procedure. After conclusion of trial, the Assistant Sessions Judge found all the accused including the appellant guilty and accordingly pronounced his judgment and order of conviction and sentence as aforesaid. The trying Judge convicted and sentenced the appellant and co-accused Kalu on the reason that most of the prosecution witnesses had stated that accused Zafar disclosed their names to be involved in the occurrence. However, the police arrested the appellant on 5.10.1996 and sent him to jail, wherefrom he filed the instant jail appeal.

Mrs. Zinat Akhter Nazley Begum, a panel lawyer appointed by the Ministry of Law and Parliamentary Affairs to provide legal aid to the appellants in jail appeals, submits that in the present case there is no iota of evidence against the appellant. None of the witnesses raised any allegations against him even mentioned his name in their evidence. Still the learned Judge awarded conviction on him without any support from evidence and as such the impugned judgment and order of conviction should not sustain in law.

Mr. Yousuf Mahmud Morshed, learned Assistant Attorney General appearing for the State-respondent submits that the inmates of the house of occurrence identified the principal accused Zafar, and subsequently the stolen articles were recovered from his house. The said Zafar himself confessed that the appellant and another named Kalu had accompanied him in commission of

the occurrence. The trying Judge thus rightly passed the impugned judgment and order.

We have examined the evidence on record and gone through the impugned judgment and order. It appears that P.W.1 Serajul Haque though supported the *ejahar* in the main, did not raise any allegation against the appellant or even mention his name. P.W.2 Mahbubur Rahman, a hearsay witness mentioned the appellant's name without disclosing the source of his knowledge. No other witness mentioned the appellant's name. He was not identified by any witness and no stolen articles were recovered from him.

So, the reasoning of the trying Judge that most of the prosecution witnesses stated that accused Zafar disclosed the appellant's name to be involved in the occurrence is not based on evidence. Moreover, learned Judge failed to consider that mere absconsion cannot form the basis of conviction unless the guilt of the accused is brought home by independent and corroborative evidence. Accused Zafar himself did not make any statement under section 164 or 342 of the Code to show complicity of the appellant in the alleged occurrence. The reference to his (Zafar's) extra judicial confession coming out of the mouth of a hearsay witness is not a piece of evidence and cannot form the basis of conviction of the appellant.

It further appears that against the same judgment and order of conviction and sentence, co-convict Kalu filed Jail Appeal No.1261 of 1996. A Division Bench of this Court allowed the same by judgment and order dated 2.8.2001. The present appellant Ali Ahmed stands on same footing with the said Kalu.

For all the reasons stated above the impugned judgment an order of conviction and sentence so far it relates to the appellant appears to be based on no legal evidence and therefore, it should not sustain in law. We find merit in the appeal.

Accordingly this jail appeal is allowed. The impugned judgment and order dated 15.2.1995 passed by the Assistant Sessions Judge, First Court, Cox's Bazar in Session Trial Case No.33 of 1993 so far it relates to conviction of the appellant Oli Ahmed is set aside. The appellant is acquitted of the charge leveled against him.

Send down the records of lower Court.

Mohammad Marzi-ul-Huq, J:

I agree.