

Present:

Mr. Justice Md. Nazrul Islam Talukder
And
Mr. Justice K.M. Hafizul Alam

Criminal Appeal No. 5498 of 2012

Md. Abul Kalam alias Abul Kalam

...Convict-Appellant

-Vs-

The State and another

.....Respondent

Mr. Md. Ziaur Rahman, Advocate

.....For the Convict-Appellant

Mrs. Rona Naharin, D.A.G with

Mr. A.K.M. Amin Uddin, D.A.G and

Mrs. Helena Begum (Chaina), A.A.G

... For the Respondent

Mr. Shah Md. Zahirul Haque, Advocate

.....For the Anti-Corruption Commission.

Heard on 08.07.2018 and 15.07.2018

Judgment on 22.07.2018

Md. Nazrul Islam Talukder, J.

By this appeal, the appellant has challenged the legality and propriety of judgment and order of conviction and sentence dated 02.11.2008 passed by the learned Divisional Special Judge, Chattogram in Special Case No.118 of 2001 arising out of Kotwali Police Station Case No. 49(11)95 dated 26.11.1995 corresponding to D.A.B G.R. No.39 of 1995 convicting the appellant and others under sections 409/420/109 of the Penal Code along with section

5(2) of the Prevention of Corruption Act, 1947 convicting and sentencing the appellant to suffer rigorous imprisonment for 5(five) years under section 409 of the Penal Code and a fine of Tk.5,000/- in default to suffer 06(six) months more and further convicting him under section 420 of the Penal Code and sentencing him to suffer rigorous imprisonment for 1 year and a fine of Tk.3,000/- in default to suffer 03(three) months and further convicting him to suffer rigorous imprisonment for 03(three) years under section 5(2) of the Prevention of Corruption Act, 1947 and a fine of Tk.30,00,000/- payable as public demand and accordingly moveable and immovable property of the appellant have been forfeited in favour of the State with a direction upon the concerned Judicial Magistrate and District Magistrate to recover the money as public demand and to deposit the same in the Government account. Sentences passed will run simultaneously.

Facts, relevant for the purpose of disposal of the appeal, in short, are one Rais Uddin Ahmed, Assistant Inspector, District Durnity Daman Bureau,

Chittagong on 26.11.1995 lodged a First Information Report (hereinafter referred to as FIR) with Kotwali Police Station alleging *inter alia* that the accused no.1 opened an account in the name of his fake business enterprise namely M/S Md. Firoz Ahmed with Rupali Bank, Amit Market Branch on 05.08.1989 and Tk. 1701/- was deposited in the said account in between 31.03.1992 to 02.07.1992 but he had withdrawn Tk.60,00,000/- from that account and hence he misappropriated Tk.84,68,258.50 with interest. The accused no.2, appellant aided the accused no.1 in opening the said account. The accused nos. 2-4 jointly passed the cheques, thereby all the accused persons have committed offence under sections 409/420/34 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 by misappropriating the above mentioned amount from the above noted account of Rupali Bank. Accordingly, Kotwali Police Station Case No. 49(11)95 was started against the convict-appellant and others under sections 409/420/34 of the Penal

Code read with section 5(2) of the Prevention of Corruption Act, 1947.

The investigating officer after holding investigation having found *prima-facie* case submitted charge-sheet no.230 dated 18.05.1998 under sections 409/420/34 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 against the convict-appellant and others.

Thereafter the Metropolitan Senior Special Judge, Chattogram after accepting the charge-sheet, took cognizance under sections 409/420/34 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 against the appellant and others on 26.08.2001. Thereafter, the case record was transmitted to the Divisional Special Court, Chattogram for trial and the same was registered as Special Case No.118 of 2001.

The learned Divisional Special Court, Chattogram on receiving the records framed charge against the accused Firoz Ahmed under section 409 and accused A.K.M. Lutful Karim and Abul Kalam

under sections 409/420/34/109 of the Penal Code along with section 5(2) of the Prevention of Corruption Act, 1947. The charge was read over to the accused Firoz Ahmed and A.K.M. Lutful Karim but they pleaded not guilty and claimed to be tried. Accused Abu Kaisar Chowdhury and appellant Abul Kalam are found absent and charge framed could not be read over to them.

At the time of trial prosecution examined 9(nine) witnesses but the defence did not examine any witness.

The depositions of 09 (nine) prosecution witnesses are as follows:

P.W.1, Roisuddin Ahmed, DAB Assistant Inspector, District Durnity Daman Bureau deposed that he was inquiry officer of the instant case. He scrutinized the seized documents and interrogated the concern persons and he found that the accused Firoz Ahmed opened an account in the name of his fake business enterprise namely M/S Md. Firoz Ahmed with Rupali Bank, Amit Market Branch on

05.08.1989 being account no. 9879. During the period of 31.03.1992 to 20.07.1992, only Tk.1701.50/- was deposited in that account, but he had withdrawn Tk.24 lakhs and 36 lakhs on 02.07.1992 and 23.07.1992 respectively and in total he had withdrawn Tk.60,00,000/- from that account thereby he withdrew tk.59,98,298.50 more than his deposit and hence till 29.04.1994 he misappropriated Tk.84,68,258.50 with interest. The then Manager of the said Bank namely accused Lutful Karim in violation of banking Rules and by misusing his power opened the fake account in the name of accused Firoz Ahmed. Accused Lutful Karim, bank officer accused Abu Kysar Chowdhury and Md. Abul Kalam jointly in collusion with each other passed the cheques in question and misappropriated the above mentioned money. Thereafter he being informant lodged the FIR on 26.11.1995 against the accused with Kotwali Police Station. He exhibited the FIR as Exhibit-1 and his signature as Exhibit-1/1, seizure list of documents

dated 15.12.1994 as Exhibit-2 and signature on it as 2/1 as well as seizure list dated 06.06.1995 as Exhibit-4 and signature on it as Exhibit-4/1.

The appellant being fugitive could not cross examine the PW-1. However in reply to cross examination of other accused he denied the defence suggestion that all the accused did not misappropriate any money.

P.W.2 Md. Khaled Hossain, police inspector deposed that on receipt of the written petition he as duty officer filled up the FIR form. He exhibited the FIR form as Exhibit -5 and his signature on it as Exhibit-5/1 and his signature put on the FIR as Exhibit-1/2.

P.W.3, Md. Abdul Hannan, ex-Manager of the Bank deposed that when he had been working as Manager of Rupali Bank, Amir Market Branch on 15.12. 1995 then the Inspector of DAB seized the papers and documents relating to the opening of account of Firoz Ahmed, cheque being no. 091107 dated 02.07.1992 for an amount of tk. 24,00,000

and cheque being no. 091108 dated 23.07.1992 for an amount of tk.36,00,000 and he put his signature in the seizure list [Exhibit-2] as jimmdar as Exhibit-2/2. He deposed that till 30.12.1992 the outstanding dues were at tk. 6505538.50 including interest. The seized papers including audit report dated 20.05.1993 and page no. 276 of the ledger of account no.9879 are exhibited as Exhibit-6-10 series.

P.W.4, Tusha Kkanti Kanungo, PO, Rupali Bank Ltd, Modon Branch, Chottagram deposed that he was on duty on 15.12.1994 in Rupali Bank, Amir Market Branch as Senior Officer. On that date the officer of Anti-corruption seized some documents and gave the same in jimma to the Branch Manager. He put his signature in the seizure list which is exhibited as Exhibit -2/3.

P.W. 5 Md. Ali Hossain deposed that on 6.06.1995 he would work as caretaker in Rupali Bank, Amir Market Branch. On that date the officer of Anti-corruption seized some documents and gave the same in jimma to the Branch Manager. He put

his signature in the seizure list [Exhibit-4] being serial no.2 as Exhibit -4/2. He also deposed that he found Firoz Ahmed to come to the Bank often and subsequently he heard about the misappropriation of money.

P.W.6, Md. Mamun-Or-Rashid, Senior Executive Officer deposed that on 15.12.1994 he would work as Junior Officer in Rupali Bank, Amir Market Branch. On that date the officer of Anti-corruption seized some documents and gave the same in jimma to the Branch Manager. He put his signature in the seizure list [Exhibit-2] being serial no.2 as Exhibit-2/4. He deposed that at the time of misappropriation of money he was in that bank. At that time Lutful Karim was the Manager of the said branch. He further deposed that Lutful Karim issued two O/D [Exhibit-7 series] in favour of Md. Firoz Ahmed which was beyond his limit. He also identified the signature of the ledger in charge Md. Abul Kalam, Manager Lutful Karim and cash in charge Abu Kaisar Chowdury appeared in the cheque dated

02.07.1992 for an amount of tk. 24 lakhs and dated 23.07.92 for an amount of tk. 36 lakhs. The said cheques were passed by the above mentioned officer beyond their jurisdiction. He also deposed that incident of misappropriation came to the light subsequently after conduction Audit by the Head office of the bank.

The appellant being fugitive could not cross examine the PW-6. However in reply to cross examination of other accused he denied the defence suggestion that the manager issued two OD lawfully and he testified falsely.

P.W.7 Md. Sirajuddin, Assistant Inspector of DAB deposed that he received the task of investigation of the instant case on 04.08.1996. He further deposed that after investigation he found that (1) Firoz Ahmed (2) Lutful Karim, A.G.M, Rupali Bank Ltd, Amir Market Branch (3) Abu Kysar Chowdhury, Junior officer and (4) Md. Abul Kalam, Junior officer, Rupali Bank, Amir Market Branch, Chattogram in connivance with each other

fraudulently misappropriated tk,8738772 including interest till 31.12.1994 and thereby they committed offence under sections 409/420/34 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947. Accordingly he submitted charge sheet on 18.05.1998.

He denied the defence suggestions.

P.W.8 Mozibur Rahman, S.P.O of Rupali Bank, Head Office, Dhaka deposed that pursuant to the order of the Head office they conducted an audit and he had been one of the members of the audit team and at the time of audit it was found that an account being no.9879 was opened in the name of M/S Md. Firoz Ahmed with balance of tk.1701.50 in the year 1989. Against that account two cheques were issued in favour of that account on 02.07.1992 and 23.07.1992 for an amount of Tk.24 lakhs and 36 lakhs respectively as OD i.e. total tk.60,00,000 which reached to the extent of tk. 84,000/- at the audit time. They also found that no weekly report has been sent to the regional or Head Office to that effect; that

O/D was given without receiving any security and without any prior approval from the authority; that accordingly after conducting the audit on 14.07.1994 they submitted their report on 26.11.94 and he marked the same as Exhibit-11. He also deposed that the illegality was also detected in the routine audit and he marked the said Routine Audit report prepared in the year 1992 as Exhibit- 12. The two cheques by which above mentioned OD loan was given has been earlier marked as Exhibit-7 which is in the record.

He was not cross examined by any accused.

P.W. 9 ATM Salauddin Khan, Manager of Rupali Bank, Amin Bazar Branch deposed that in the name of M/S Md. Firoz, an account bearing Account No.9879 was opened on 05.08.1989. From the said account vide cheque no. 091107 dated 02.07.1992 and cheque no. 091108 dated 23.07.1992 Firoz withdrew Tk.24 lakhs and Tk. 36 lakhs respectively in total additional amount of Tk. 59,98,298.50 which was beyond the deposited money of Tk. 1701.50. He

also recounted that without any application of the account holder and without having any jurisdiction and without prior permission from the authority Manager illegally gave the said money. He exhibited the Bank Ledger and Cards as exhibit 13 series. At that time total dues including interest was tk.87,44,442.59.

Thereafter the learned Divisional Special Judge considering the evidences and materials on records vide judgment and order dated 02.11.2008 convicted the appellant in absentia under sections 409/420/109 of the Penal Code along with section 5(2) of the Prevention of Corruption Act, 1947 and sentenced him to suffer rigorous imprisonment for 5(five) years under section 409 of the Penal Code and a fine of Tk.5,000/- in default to suffer 06(six) months; 01 year rigorous imprisonment under section 420 of the Penal Code and a fine of Tk.3,000/- in default to suffer 03(three) months and 03(three) years rigorous imprisonment under section 5(2) of the Prevention of Corruption Act, 1947 and a

fine of Tk.30,00,000/- payable as public demand and accordingly directed to forfeit moveable and immovable property of the appellant in favour of the State.

The convict-appellant was not present at the time of trial of the case but police subsequently arrested him on 17.05.2011 and produced him before the Judicial Magistrate, Chattogram. The learned Magistrate sent him to jail custody on 17.05.2011.

Thereafter the convict-appellant being aggrieved by and dissatisfied with the impugned Judgment and order of conviction and sentence dated 02.11.2008 preferred the instant appeal before the High Court Division and the appeal was admitted on 12.08.2012.

At the time of hearing of appeal, Mr. Ziaur Rahman, the learned Advocate, appearing on behalf of the convict-appellant submits that the convict-appellant is innocent and he is not connected with the aforesaid misappropriation of money and being a junior officer he did everything under the instruction

and supervision of the senior officer and bank manager of the said bank as such the conviction and sentence is liable to be set aside.

Mr. Rahman further submits that the prosecution has miserably failed to prove that the convict-appellant was responsible for opening and maintaining the account of which the alleged offence was committed by the accused no.1 as such the impugned judgment and order of conviction and sentence is illegal and is liable to be set aside.

He further submits that there is a huge contradiction between the FIR story and the statement as such the impugned judgment and order of conviction and sentence is liable to be set aside.

Mr. Rahman submits that the appellant has not signed the cheques and hence he is not responsible person for passing the cheques as such the impugned judgment and order of conviction and sentence is liable to be set aside.

He next submits that the convict-appellant was not aware of the instant proceeding as such he could

not face the trial and he has been convicted and sentenced in absentia and subsequently he was arrested by the police on 17.05.2011 and he preferred this appeal and obtained bail on 15.03.2015 and in the meantime he has already suffered maximum period of sentence in the jail, as such the appeal may kindly be allowed.

He lastly submits that the ingredients of sections 409/420/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 is not available in the prosecution materials and that the allegation has not been proved by adducing oral and documentary evidences but the Divisional Special Judge, Chattogram most illegally without considering the same convicted the appellant and others and as such the impugned judgment and order of conviction and sentence may kindly be set aside.

On the other hand, Mr. Shah Md. Zahirul Haque, the learned Advocate appearing on behalf of the Anti-Corruption Commission has pointed out

that the prosecution has examined as many as 9 (nine) witnesses and proved the allegation against the appellant beyond doubt that the convict-appellant in collaboration with by opening fake account withdrew the money from that account of the Bank and misappropriated the money in question as such the appeal should be dismissed.

Mr. Haque next submits that the appellant without proper scrutiny opened the account in question with fake documents with ulterior motive. He further submits that at the time of opening of business account no business documents were provided.

He submits that prior to the disbursement of the over draft no security was taken and as well as no prior sanction of the authority was obtained. He next submits that the bank officials have not sent any report of loan to the Regional office. He lastly submits that all the transaction were forged to defraud and misappropriate the money of the bank.

We have meticulously examined the FIR, charge-sheet, depositions of the witnesses, the judgment and order of the trial court and the memo of appeal as well as the relevant laws. We have heard the learned Advocate Mr. Md. Ziaur Rahman for the appellant and Mr. Shah Md. Zahirul Haque, learned Advocate for the Anti-Corruption Commission at length and considered their submissions.

Now let us examine whether the prosecution has been able to prove the above allegations against the convict -appellant.

Assessment of the Evidence:

On perusal of the evidence on record it appears that P.W.1, Roisuddin Ahmed, DAB Assistant Inspector, District Durnity Daman Bureau in his deposition supported the preliminary inquiry and the FIR story. He categorically deposed that after scrutinizing the seized documents he found that in the name of M/S Md. Firoz Ahmed a fake account was opened on 05.08.1989 being account no. 9879 with Rupali Bank, Amit Market Branch. From the

said account vide cheque tk. 24 lakhs was withdrawn on 02.07.1992 and tk.36 lakhs was withdrawn on 23.07.1992 and in total Tk.60,00,000/- were withdrawn but during the period of 31.03.1992 to 20.07.1992, there was only tk.1701.50/- in said account, thereby beyond the deposit amount he additionally withdrew tk.59,98,298.50 lakhs and till 29.04.1994 the said money stood at tk.84,68,258.50 with interest, thereby he misappropriated the same. He also testified that the then Manager of the said Bank namely accused Lutful Karim in violation of banking Rules and by misusing his power opened the fake account in the name of accused Firoz Ahmed. Accused Lutful Karim, bank officer accused Abu Kysar Chowdhury and Md. Abul Kalam jointly passed the said cheques and thereby in collusion with each other they misappropriated the above mentioned money. After scrutiny and inquiry he as informant lodged the FIR on 26.11.1995 against the abovementioned accused with Kotwali Police Station.

He exhibited the FIR as Exhibit-1 and his signature as Exhibit-1/1, seizure list of documents dated 15.12.1994 as Exhibit-2 and signature on it as 2/1 as well as seizure list dated 06.06.1995 as Exhibit-4 and signature on it as Exhibit-4/1. As the appellant was fugitive he could not cross examine the PW-1. However in reply to cross examination of other accused Pw-1 denied the defence suggestion that all the accused did not misappropriate any money.

P.W.2 Md. Khaled Hossain was the duty officer of the police station who filled up the FIR form. He exhibited the FIR form as Exhibit -5 and his signature on it as Exhibit-5/1 and his signature put on the FIR as Exhibit-1/2. P.W.3, Md. Abdul Hannan, ex-Manager of the Bank deposed that when he had been working as Manager of Rupali Bank, Amir Market Branch on 15.12.1995 then the Inspector of DAB seized the papers and documents relating to the opening of account of Firoz Ahmed, cheque being no.091107 dated 02.07.1992 for an amount of tk.24,00,000 and cheque being no.

091108 dated 23.07.1992 for an amount of tk.36,00,000 and he put his signature in the seizure list [Exhibit-2] as jimmdar as Exhibit-2/2. He deposed that till 30.12.1992 the outstanding dues were at tk. 65,05,538.50 including interest. The seized papers including audit report dated 20.05.1993 and page no. 276 of the ledger of account no.9879 are exhibited as Exhibit-6-10 series. P.W.4, Tusha Kkanti Kanungo, PO, Rupali Bank Ltd, Modon Branch, Chottagram, Pw-5 Md. Ali Hossain and P.W. 6, Md. Mamun-Or-Rashid, Senior Executive Officer also corroborated with the Pw-3 as to the seize and seizure of the documents from the said branch in respect of the account in question. Pw-4 exhibited his signature in the seizure list being serial no.1 as Exhibit -2/3. P.W. 5 put his signature in the seizure list [Exhibit-4] being serial no.2 as Exhibit -4/2. He also deposed that he found Firoz Ahmed to come to the Bank often and subsequently he heard about the misappropriation of money. P.W.-6, also deposed that he put his signature in the seizure list [Exhibit-2]

being serial no.2 as Exhibit-2/4. He testified that at the time of misappropriation of money he was in that bank. At that time Lutful Karim was the Manager of the said branch who issued two O/D [Exhibit-7 series] in favour of Md. Firoz Ahmed which was beyond his limit. He also identified the signatures of the appellant, ledger in charge Md. Abul Kalam, Manager Lutful Karim and cash in charge Abu Kaisar Chowdury in the cheques in questions. The said cheques were passed by the above mentioned officer beyond their jurisdiction. He also recounted that the incident of misappropriation came to the light subsequently after conduction of audit by the Head office of the bank. As the appellant was fugitive he could not cross examine the PW-6. However in reply to cross examination of other accused he denied the defence suggestion that the manager issued two OD lawfully and he testified falsely.

P.W.8 Mozibur Rahman, S.P.O of Rupali Bank, Head Office, Dhaka testified that he was a member of audit team. At the time of audit it was found that an

account being no.9879 was opened in the name of M/S Firoz Ahmed with balance of tk.1701.50 in the year 1989. Against that account two cheques were issued in favour of that account on 02.07.1992 and 23.07.1992 for an amount of Tk.24 lakhs and 36 lakhs respectively as OD i.e. total tk.6000000 which reached to the exacted to the extent of tk. 84,000/- at the audit time. It is also revealed that no weekly report has been sent to the regional or Head Office to that effect and O/D was given without receiving any security and without any prior approval from the authority. He exhibited the audit report dated report on 26.11.94 and he marked the same as Exhibit-11. He also exhibited routine audit report prepared in the year 1992 as Exhibit- 12 in which the illegality was also detected. The two cheques by which above mentioned OD loan was given has been earlier marked as Exhibit-7 series which is in the record. He was not cross examined by any accused.

P.W. 9 ATM Salauddin Khan, Manager of Rupali Bank, Amin Bazar Branch also corroborated with

Pw-1, Pw-6, Pw-7 and Pw-8 with regard to opening of a bank account in the name of M/S Firoz Ahmed bearing Account no.9879 dated 05.08.1989 and withdrawal of tk.60 lakhs from the said account vide cheque no.091107 dated 02.07.1992 and cheque no. 091108 dated 23.07.1992 beyond the deposit money of tk.1701.50. He also recounted that without any application of the account holder and without having any jurisdiction and without prior permission from the authority, Manager illegally gave the said money. He exhibited the Bank Ledger and Cards as exhibit 13 series. P.W.7 Md. Sirajuddin, Assistant Inspector of DAB, the investigation officer deposed that after investigation he found that (1) Firoz Ahmed (2) Lutful Karim, A.G.M, Rupali Bank Ltd, Amir Market Branch (3) Abu Kysar Chowdhury, Junior officer and (4) Md. Abul Kalam, Junior officer, Rupali Bank, Amir Market Branch, Chattogram in connivance with each other fraudulently misappropriated tk,87,38,772 including interest till 31.12.1994 and thereby committed offence under sections

409/420/34 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947. Accordingly he submitted charge sheet on 18.05.1998. He corroborated with other prosecution witnessess. He denied the defence suggestions.

From the materials on records and evidence adduced and examined it is apparent that one Enus Ali having account no.9865 as a introducer helped Firoz Ahmed to get his account being no. 9879 dated 05.08.1989 opened showing a fake business entity without having any trade license in his name in violation of banking Rules. Lutful Karim being a Bank Manager put his signature in the relevant papers. It is also established that during the time of providing O/D Lutful Karim had been the manager, appellant Md. Abul Kalam and Abu Kaisar had been officer of Rupali Bank, Amir Market Branch, Chattogram. They without compliance of banking Rules provided O/D loan amounting to tk. 60,00,00/- and passed the cheque No. 091107 dated 02.07.92 and cheque no. 091108 dated

23.07.92 beyond his deposit at tk.17.01.50 and till 29.04.1994 the said amount stood at tk.84,68,258.50. It is also proved that O/D was given without receiving any security and without any prior approval from the authority even after transaction no weekly report has been sent to the regional or Head Office to that effect.

It is also proved that Abul Kaisar and appellant Abul Kalam as bank official assisted the bank manager Lutful Karim in issuing cheque no. 091107 dated 2.9.92 and cheque no. 091108, dated 23.07.92.

In view of the above corroborative evidence we don't find any force in the submissions of the learned Advocate for the appellant regarding the contradiction among the FIR, charge sheet and the depositions of the witnesses. On perusal of the judgment and order of the trial court it also appears that the learned trial court elaborately discussed the depositions of the witnesses and considered the prosecution materials and relevant laws. More so the

impugned judgment and order of conviction and sentence in its entirety is well founded in the facts and circumstances of the case.

In view of the above discussions and the facts and circumstances of the case, and the evidence of the P.W-1, P.W-2, P.W-3, P.W-4, P.W-5, P.W-6, P.W-7, P.W-8 and P.W-9 particularly the evidence of Pw-1, Pw-6, Pw-7 and Pw-8 we are of the view that the prosecution has been able to prove the prosecution case beyond all reasonable doubt and the convict-appellant is guilty for commission of offence. Therefore, we are of the view that the impugned judgment and order of conviction and sentence suffers from no legal infirmity thus the conviction is upheld.

In view of the above we don't find any merit in the appeal.

Accordingly the appeal is dismissed.

The convict-appellant, namely Md. Abul Kalam alias Abul Kalam son of Md. Noor Ahmed is directed to surrender before the concern Court below within 2

months from the date of receipt of the copy of the judgment and order.

Let a copy of this judgment and order along with Lower Court's Records (LCR) be communicated to the court below forthwith.

K.M. Hafizul Alam, J.

I agree