

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 7123 of 2014

Md. Abdul Kaium

...Convicted-appellant

-Versus-

The State and another

...Respondents

Mr. Mohammed Elias Bhuiyan (Kachee), Advocate with
Mr. Mohammad Selim Jahangir, Advocate

...For the convicted-appellant

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

Mr. A. Monnan (Manna), A.A.G with

Mr. Md. Shaifour Rahman Siddique Saif, A.A.G

...For the State

Mr. A.K.M Fazlul Hoque, Advocate

...For the respondent No. 2,

Anti-Corruption Commission

Heard on 16.07.2023, 17.07.2023 and 27.08.2023

Judgment delivered on 30.08.2023

This appeal under Section 10 of the Criminal Law Amendment Act, 1958 (Act No. II of 1958) is directed against the impugned judgment and order of conviction and sentence dated 14.10.2014 passed by Divisional Special Judge, Rajshahi in Special Case No. 30 of 2011 (Raj) arising out of Boalia Model Police Station Case No. 34 dated 25.02.2010, Metropolitan G.R. No. 200 of 2010 convicting the appellant under Section 408 of the Penal Code, 1860 and sentencing him thereunder to suffer imprisonment for 3(three) years and fine of Tk. 2,99,390, in default, to suffer imprisonment for 6(six) months more.

The prosecution case, in short, is that P.W. 1 Md. Salah Uddin is the owner of a shop "High Lights Garments" at Hawker's Market, New Market, Rajshahi and the accused is an Officer of the BRAC. He took loan from the BRAC and subsequently repaid the money and in the meantime, the informant was introduced to the accused. On 06.11.2008, he obtained loan amounting to Tk. 4,00,000. Total Tk. 4.90,000 including the service charges was required to repay in eighteen equal installments. From 15.12.2008 to 27.07.2009 he paid total Tk. 4,90,000 including service charges amounting to Tk. 90,000 through accused Md. Abdul Kaium.

Lastly, on 27.07.2009 he paid Tk. 2,99,390 and the accused recovered the loan by signing the passbook of the informant. The accused mentioned in the passbook that the total loan was nil. On 24.12.2009, a notice was served upon him stating that total Tk. 2,99,390 was due. After inquiry, he came to know that accused Abdul Kaium was dismissed from service and he did not deposit the instalments recovered from him.

P.W. 2 Inspector Md. Hafizur Rahman took up the investigation of the case. During the investigation, he visited the place of occurrence and prepared the sketch map and index. Thereafter, he was transferred and he handed over the records to the Officer-in-Charge of Boalia Model Thana. After that P.W. 10 Sheikh Faiaz Alam, Assistant Director, Anti-Corruption Commission, Rajshahi took up the investigation of the case. During the investigation, he sent the handwriting of the accused to C.I.D for expert opinion, seized documents and after investigation found the prima facie truth of the allegation against the accused and submitted charge sheet on 06.07.2011 against the accused under Section 408 of the Penal Code, 1860.

After that, the case record was sent to the Senior Divisional Special Judge, Rajshahi who by order dated 17.08.2011 took cognizance of the offence against the accused under Section 420/409 of the Penal Code, 1860. Thereafter, the Senior Divisional Special Judge, Rajshahi by order dated 02.10.2011 send the case to the Divisional Special Judge, Rajshahi for trial. The trial Court by order dated 18.11.2012 was pleased to frame charge against the accused under Section 408 of the Penal Code, 1860 and the charge was read over to the accused and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined ten witnesses to prove the charge against the accused. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he examined 4(four) D.Ws including himself as D.W. 1. After concluding the trial, the trial Court by impugned judgment and order convicted the accused and sentenced him as stated above against which he filed the instant appeal.

P.W. 1 Md. Salah Uddin is the informant. He stated that he is the owner of the shop namely “High Light Collection” at New Market, Rajshahi. On 06.11.2008 he took loan of Tk. 4,00,000 from the BRAC to be paid in 18 equal instalments along with Tk. 90,000 as interest. He paid Tk. 27,322 as the first instalment on 15.12.2008 through accused Md. Abdul Kaium and paid total 6(six) instalments and the accused Abdul Kaium received the money by signing the passbook. On 27.07.2009, he paid total Tk. 2,99,390 and accused Abdul Kaium received the money by signing the passbook and writing in the passbook that the loan was nil. On 24.12.2009, a notice was issued from the BRAC that the last instalment amounting to Tk. 2,99,390 was not deposited in the office. After that, he came to know that the accused Abdul Kaium was dismissed from service and he did not deposit the instalments in the office. When the informant met with the accused on 25.02.2010, he wanted to know why he did not deposit the instalments. At that time, he refused to pay instalments and on that day, he lodged the FIR. He claimed that the owners of the two neighbouring shops were well acquainted with the facts of the case. He proved the passbook as material exhibit I and his signature as exhibit I/I. He proved the notice issued from the BRAC as exhibit 2. During cross-examination, he stated that he paid six instalments and thereafter, he paid the entire money at a time. After lodging the FIR, no instalment was deposited. He affirmed that in the passbook, the accused had written the recovered instalments. He produced the passbook. He affirmed that on 26.06.2009, he paid total 12 installments and the writing in the passbook is correct. At the time of payment of the seventh instalment, he paid the entire money. The accused Quaiyum is a credit officer. He claimed that the president of the market witnessed that he paid the money and the employees of his shop also witnessed that he paid the money. On the date of lodging the FIR on 25.02.2010 accused wanted the passbook but he did not hand over the passbook to the accused. He denied the suggestion that the credit officer did not sign the passbook.

P.W. 2 Md. Hafizur Rahman is the Inspector of Police, Boalia Thana. He stated that on 25.02.2010, he was posted as Sub-Inspector at

Boalia Model Thana. On that day, the Officer-in-Charge Md. Jashim Uddin appointed him as the Investigating Officer. During the investigation, he visited the place of occurrence, prepared the sketch map and index, and arrested the accused Abdul Kaium. On perusal of the records, he found that the offence alleged in the FIR is a scheduled offence under the Anti-Corruption Commission Act, 2004 for which he applied to the Deputy Director of the Anti-Corruption Commission. After the transfer, he handed over the case docket to the Officer-in-Charge. He proved the sketch map and index as exhibit 3 and his signature as exhibit 3/1. During cross-examination, he stated that on 25.02.2010, he visited the place of occurrence and recorded the statement of witness Shafiur Rahman Sharif who had a garments shop at New Market.

P.W. 3 Md. Abdul Hannan is the Inspector of Police and the Handwriting Expert. He stated that while he was posted at C.I.D, Dhaka as a handwriting expert, he received memo No. Dudak/Sajeka/Raj:1353 dated 02.12.2010 in connection with Boalia Police Station Case No. 34 dated 25.02.2010 and he examined the handwriting of Md. Abdul Quaium by scientific machinery and after careful examination submitted the report. He proved the report as exhibit 4 and his signature as exhibit 4/1. During cross-examination, he stated that from the office of the Anti-Corruption Commission, a report was asked for. The signature of the accused Quaiyum appeared in serial Nos. 1, 2, and 3 and in the office of the C.I.D, he examined the signature of accused Quaiyum. He denied the suggestion that his report was not correct.

P.W. 4 Md. Shahjahan Ali is the Data Entry Control Operator of the Anti-Corruption Commission, Dhaka. He stated that on 28.11.2010, he was posted in the same post at the office of the Anti-Corruption, Rajshahi. On 28.11.2010, the Investigating Officer Md. Abdul Kaiyum seized the applications for leave dated 23.06.2007 and 24.06.2007, the joining report (1 page), the application for leave dated 04.09.2007 and the joining report dated 05.09.2007. He proved the seizure list as exhibit 5 and his signature as exhibit 5/1. He proved the seized documents as material exhibit II series. During cross-examination, he stated that the documents were seized

in his presence and he knew nothing about the seized documents. The investigating Officer brought those documents from the office of the BRAC and seized those documents sitting in the office of the Anti-Corruption Commission, Rajshahi. He denied the suggestion that without knowing anything, he signed the seizure list.

P.W. 5 Md. Motahor Hossain stated that on 31.10.2010, he was posted at the office of the Anti-Corruption Commission, Rajshahi. On that day, Assistant Director Sheikh Faiaz Alam of the Office of the Anti-Corruption Commission, Rajshahi seized documents and prepared the seizure list. He proved the seizure list as exhibit 6 and his signature as exhibit 6/1. He proved the seized documents as material exhibit III. During cross-examination, he stated that he had no involvement with the seized documents.

P.W. 6 Md. Jashim Uddin is the Inspector of Police, Manda Thana, Naogaon. He stated that on 25.02.2009, he was the Officer-in-Charge of Boalia Model Thana, R.M.P, Rajshahi. The informant Md. Salah Uddin lodged the FIR against the accused for misappropriation of Tk. 2,99,390. He filled up the FIR form and registered the same as Boalia Model Police Station Case No. 34 dated 25.02.2010 under Sections 420/409 of the Penal Code, 1860. He proved the FIR form as Exhibit 7. He proved his signature on the FIR form as exhibits 7/1 and 7/2. During cross-examination, he stated that he recorded the FIR.

P.W. 7 Md. Rokanuzzaman is the Credit Officer of BRAC. He stated that he was posted at Shaheb Bazar Branch, Rajshahi and at the time of occurrence, he was posted at Rajparat Branch. On 28.11.2010, he went to the Office of the Anti-Corruption Commission, Rajshahi along with the application of accused Abdul Kaium and the Deputy Director seized those applications. He signed the seizure list. He proved his signature on the seizure list as exhibit 5/2. During cross-examination, he stated that the manager instructed him to send the applications to the Office of the Anti-Corruption Commission.

P.W. 8 Md. Abul Kashem is the Credit Officer of BRAC, Shaheb Bazar Branch, Rajshahi. He stated that on 28.10.2010, he was serving in

the same post. He presented the loan application of Md. Salah Uddin and relevant documents (21 twenty-one pages). During cross-examination, he stated that the documents presented by him were under the custody of the area manager who instructed him to hand over those documents to the Office of the Anti-Corruption Commission and the Investigating Officer seized those documents. He had no personal knowledge about the seized documents. On recall, he stated that he deposited 22(twenty-two) documents to the Office of the Anti-Corruption Commission and the defence declined to cross-examine him.

P.W. 9 Md. Mashidul Huq is the Area Manager of Progati Karmashuchi. He stated that on 28.10.2010, 24 pages of documents regarding the loan of Md. Salah Uddin was seized at the Office of Anti-Corruption Commission in his presence. He proved the seizure list as Exhibit 7. He proved his signature as exhibit 7/1. After seizing the documents a jimmanama (bond) was prepared and the documents were handed over to them. He proved the jimmanama (bond) as exhibit 8 and his signature as exhibit 8/1. He proved 22(twenty-two) pages of documents as material exhibit III. During cross-examination, he stated that the Exhibit III series was subsequently prepared.

P.W. 10 Sheikh Faiaz Alam is the Deputy Director, Anti-Corruption Commission, Head Office, Dhaka. He stated that when he was posted at Rajshahi as Assistant Director, he was appointed as Investigating Officer of the case. During the investigation, he seized the documents regarding the allegation and sent the signature of the accused to C.I.D. for expert opinion. On perusal of the seized documents and the expert opinion, he found that on 03.11.2008 Md. Salahuddin applied for loan from BRAC, Shaheb Bazar Branch and thereafter, the BRAC sanctioned loan of Tk. 4,00,000(four lac) and he withdrew Tk. four lakh. After payment of several instalments, the balance amount was 2,99,390 as of 27.07.2009 but the accused did not deposit the realized amount and misappropriated. He submitted memo of evidence to the Anti-Corruption Commission and after getting approval, he submitted charge sheet on 06.07.2011 under Section 408 of the Penal Code, 1860 against the

accused. During cross-examination, he stated that all the documents were seized relating to the allegation made against the accused. He proved the seizure list dated 28.11.2010 as exhibit 5. He proved his signature as exhibit 5/3. On recall, he proved the seizure list dated 31.10.2010 as exhibit 6 and his signature as exhibit 6/2. He proved the seizure list dated 28.10.2010 as exhibit 7 and his signature as exhibit 7/2. He proved the jimmanama (bond) as exhibit 8 and his signature as exhibit 8/2. The signature of the accused on the passbook was sent for expert opinion. The passbook No. 631154 was issued in the name of Md. Salahuddin but the loan was recovered through the passbook No. 722530. During the investigation, he did not find the passbook No. 631154. Passbook No. 722530 was not issued from the office but the money was recovered by the said passbook. He affirmed that the accused prepared passbook No. 722530 malafide. He heard that the accused was dismissed from service.

D.W. 1 Md. Abdul Kaium is the accused in the case. He stated that earlier he was the Credit Officer of BRAC, Natore Sadar Branch. He retired from service on 13.10.2009. Thereafter, the office accepted his resignation and discharged him. He proved his letter of resignation as exhibit Ka and his signature as exhibit Ka/1. He proved the photocopy of the letter of resignation as exhibit Ga and the letter of handing over charge (4 pages) as exhibit Gha. During cross-examination, he stated that on 27.07.2009 he was the Credit Officer of BRAC Shaheb Bazar, Rajshahi. He denied the suggestion that on 27.07.2009, he received Tk. 2,99,390(two lac ninety-nine thousand three hundred ninety) from Md. Salah Uddin. He also denied that he wrote in the passbook that there was no debt.

D.W. 2 Md. Majibar Rahman Tony stated that the informant Salah Uddin and accused Abdul Kaium are known to him. His shop was situated after 2 shops to the east of the shop of Salahuddin. He is not aware of the loan paid through the accused. He stated that now he has no shop at the market. The accused was discharging duty regarding the payment and realization of the loan. He affirmed that today the learned Advocate of the accused brought him to Court.

D.W. 3 Md. Majibar Rahman (Jahangir) is the adjacent shopkeeper of Salauddin. He is not aware as regards the payment and realization of the loan of Salahuddin. He denied the suggestion that the Credit Officer received the instalments from the loanee.

D.W. 4 Md. Asadul Islam is the Area Manager, Pragati, Natore. He stated that the accused Abdul Kaium resigned from his office. He did not pay the entire debt. At that time, he was declared hostile. During cross-examination, he affirmed that the resignation of the accused was accepted. He denied the suggestion that before acceptance of the resignation, all the debts were realized from the accused. During cross-examination, on behalf of the State, he stated that the accused resigned on 13.09.2010 but his resignation was not accepted by the head office.

Learned Advocate Mr Mohammed Elias Bhuiyan (Kachee) appearing along with learned Advocate Mr. Mohammad Selim Jahangir on behalf of the appellant submits that the informant took loan of Tk. 4,00,000 on 06.11.2008 on condition to pay Tk. 4,90,000 by 18 equal installments and from 15.12.2008 to 25.06.2009, he paid total Tk. 1,90,610. There was no reason for payment of the entire loan amounting to Tk. 2,99,390 on 27.07.2009. The passbook was not issued from the BRAC and the appellant did not sign the passbook before full payment of the loan. The accused resigned from service on 13.10.2009 and before resignation, no allegation was made against the accused to the BRAC. He further submits that the offence alleged under Section 408 of the Penal Code, 1860 is a compoundable offence and he is ready to pay the entire amount alleged to have been misappropriated.

Learned Advocate Mr. A.K.M Fazlul Hoque appearing on behalf of respondent No. 2, Anti-Corruption Commission, submits that the accused received the instalments from P.W. 1 and signed the passbook (material exhibit I) and P.W. 3 Md. Abdul Hannan in his report (exhibit 4) opined that the signatures of the accused in the passbook marked as Ka, Ka/1-Ka/7 and the specimen signature of the accused in the application for leave dated 23.06.2007, the joining letter dated 24.06.2007, application dated 21.07.2007, report dated 23.07.2007, the application dated

04.09.2007 and the letter of joining dated 05.09.2007 marked as exhibits Kha, Kha/1-Kha/5 are identical. The evidence of P.W. 1 as regards the realization of Tk. 2,99,390 by accused Abdul Kaium signing the passbook is corroborated by the expert opinion (exhibit 4). The prosecution proved the charge against the accused beyond all reasonable doubt.

I have considered the submission of the learned Advocates Mr. Mohammed Elias Bhuiyan (Kachee) who appeared along with learned Advocate Mr. Mohammad Selim Jahangir and the learned Advocate Mr. A.K.M Fazlul Hoque who appeared on behalf of the Anti-Corruption Commission, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the records, it appears that admittedly the informant P.W. 1 took loan of Tk. 4,00,000 from BRAC to pay the same in 18 equal installments and the accused Abdul Kaium is the Credit Officer of BRAC. P.W. 1 paid 6 installments through the accused and after realization of the installments, accused Abdul Kaium recorded payment of 6 installments in the passbook (material exhibit I). On 27.07.2009, the informant P.W. 1 paid total Tk. 2,99,390 and after realization of the said amount, the accused Abdul Kaium signed the passbook and wrote that dues are nil. The specimen signature of the accused on material exhibit I was sent to the handwriting expert along with the applications dated 23.06.2007, the joining letter dated 24.06.2007, the application dated 21.07.2007, the report dated 23.07.2007, the application dated 04.09.2007 and the letter of joining dated 05.09.2007 and the signature of accused on those documents were exhibited as exhibits Kha, Kha/1-Kha/5. Handwriting expert P.W. 3 in his report (exhibit 4) opined that the alleged signatures of the accused Abdul Kaium on the passbook exhibit i.e Kha, Kha/1-Ka/7 are identical to the admitted signature of the accused i.e exhibits as Ka, Ka/1-Ka/5. Therefore, I am of the view that on 27.07.2009 accused Abdul Kaium realized Tk. 2,99,390 from P.W. 1 and without depositing the said amount against loan liability of P.W. 1, he misappropriated the same and thereby committed the offence under Section 408 of the Penal Code, 1860.

As regards the submission of the learned Advocate Mr Mohammed Elias Bhuiyan (Kachee) regarding compounding the offence out of Court, I hold the view that the alleged offence under Section 408 of the Penal Code, 1860 is compoundable with the leave of the Court. In a criminal case, the Court will not insist any party to compromise a dispute between them. The parties are at liberty to make the compromise. No step was taken by the BRAC or the informant to settle the dispute out of Court.

Considering the facts and circumstances of the case, I am of the view that ends of justice would be best served if the sentence passed by the trial Court is modified as under;

The accused Md. Abdul Kaium is found guilty of the offence under Section 408 of the Penal Code, 1860 and he is sentenced to suffer imprisonment already undergone and to pay a fine of Tk. 2,99,390, in default, to suffer rigorous imprisonment for 6(six) months more.

The accused is directed to deposit Tk. 2,99,390 in the trial Court below within 30(thirty) days from the date of receipt of the copy of the judgment.

In the result, the appeal is disposed of with modification of the sentence.

Send down the lower Court's records at once.