

Present

Madam Justice Kashefa Hussain

Criminal Appeal No. 1717 of 2016

Md. Siddique Hossain

..... Appellant-petitioner

-Versus-

The State and another

----- Respondent.

Mr. A.B.M. Altaf Hossain, Advocate

.... for the appellant-petitioner

Mr. Hasan M. S. Azim, Advocate

.... for the respondent No. 2

Mr. Md. Mohiuddin Dewan, D.A.G with

Ms. Syeda Sabina Ahmed Molly, A.A.G

----- For the State.

Heard on: 11.05.2023, 12.07.2023,
02.08.2023 and

Judgment on 09.08.2023

This appeal is directed against the judgment and order of conviction and sentence dated 24.02.2016 passed by the learned Special Judge No. 3, Dhaka in Special Case No. 07 of 2010 arising out of Dhaka Metro. Special Case No. 31 of 2010 corresponding to BAC G.R. Case No. 206 of 2003 arising out Motijheel P.S. Case No. 31 dated 13.12.2003 convicting the appellant under Section 4(2)(a) of the Prevention of Corruption Act, 1957 and Sentenced him to suffer rigorous imprisonment for (three) years and to pay a fine of Tk. 1,00,000/-, in default, to suffer rigorous imprisonment for 3 (three) months more

should not be set-aside and/or pass such other or further order orders as to this court may seem fit and proper.

The prosecution case, in short is that Nur Hossain Khan, (Task Force-3), Durniti Damon Bureau, Bangladesh as the informant on 13.12.2003 lodged FIR with Motijheel Police Station under Dhaka District alleging inter alia that the DUDAK issued a notice to the appellant under section 4(1) of Durniti Damon Ain, 1957 (Act No. 26) for submitting wealth statement within 45 days and on reply the appellant received Wealth Statement form but he did not submit the wealth statement within 45 days. Thereafter the informant lodged the above noted FIR against the appellant.

That the investigating officer after perfunctory investigation submitted charge sheet being No. 834 dated 31.12.2009 under Section 4(2) (Act No. 26) of the Durniti Damon Ain, 1957 against the appellant and others.

That the trial court examined 3 witnesses but no witness was examined from accused's side and after closing evidence of the prosecution the accused were examined under Section 342 of the Code of Criminal Procedure when he pleaded not guilty.

Learned Advocate Mr. A.B.M. Altaf Hossain appeared for the convict appellant petitioner while learned advocate Mr. Hasan M. S. Azim represented the respondent No. 2 while learned Deputy Attorney General Mr. Mohiuddin Dewan along with Ms. Syeda Sabina Ahmed Molly represented the respondent No. 1.

Learned Advocate for the accused convict appellant submits that the court below upon misreading of facts came upon wrong finding and therefore the judgment is not sustainable. He submits that although it could not be proved by cogent evidence that the seal and signature does belong to the Anti Corruption Commission and the concerned ACC official respectively but however the court upon total misconception of mind wrongly convicted the appellant under Section 4(2)(a) of the Anti Corruption Act, 1957. To substantiate his arguments, he draws attention to the cross examination of the PW-4 who is the concerned official and draws upon his oral evidences He particularly draws upon the oral evidences wherefrom he submits that in the oral evidences the PW-4 stated that although the signature and the seal is not given by him but however he is not aware as to who gave the signature. He draws upon the further evidences of the PW-4 wherefrom he points out that

since the দুনীতি দমন ব্যুরো was abolished therefore the concerned register dated 20.10.2003 could not be preserved. He submits that the PW-4 admitted that for this reason the veracity of the seal and signature could not be ascertained.

On the issue of seal and signature he next contends that since there since a dispute arose over the signature and seal on the relevant document that is the wealth statement submitted by the appellant, it was the duty of the court to call for expert opinion to ascertain the seal and signature following the provisions of Section 73 of the Evidence Act, 1872. He submits that seal and signature were never ascertained by hand writing expert therefore it could not be conclusively proved that the seal and signature is not an official seal and signature of the Anti Corruption commission respectively. He agitates that therefore the court below also upon conjecture and surmise arrived upon wrong finding and such judgment is not sustainable and ought to be set aside and the appeal be allowed.

On the other hand learned Advocate for the respondent No. 2 vehemently opposes the appeal. Against the issue of the oral evidence of the PW-4 which contention was raised by the learned for the appellant, the learned advocate again draws attention upon the oral evidence of the PW-4. He argues that the

PW-4 correctly denied that the signature is not his (PW-4's) and nor is he aware of the seal or as to whose signature it actually is in the said wealth statement which the appellants claim to have been received by the respondents represented by the PW-4. He takes me to the relevant documents in the Lower Court Record to the said সম্পত্তির বিবরণ statement claimed to be submitted by the appellant dated 20.10.2003. He points out that the PW-4 who was called by the court as CW-1 categorically denied the signature not to be his. He continues that the PW-4 the concerned official Md. Mahmudur Rahman as a court witness CW-1 categorically denied the seal and signature in the document. He further submits that the concerned official PW-4 also categorically stated that he is not aware to whose signature it actually is and further categorically stated that the signature is not that of any official of the Anti Corruption Commission. He argues that evidently the PW-4 was also produced as CW-1 since he is an official of the Anti Corruption Commission. He contends that under the provisions of Section 114 E of the Evidence Act, 1872 the regularity of all official acts must be presumed. He continues that on the same principle it may also be presumed that the court witness or the officials of the Anti Corruption Commission denying the signature to be his is also correct. He reiterates that the regularity of the statement of CW-

1 must be presumed following the spirit of Section 114 (e) of the Evidence Act, 1872. Regarding the onus of proof as to whose signature and seal those actually are the learned advocate for the opposite party draws attention to Section 106 of the Evidence Act, 1872. He submits that Section 106 expressly contemplates that when any fact is specially within the knowledge of any person the burden of proof shifts on that person who claim such fact. He also submits that Section 106 is applicable here since it is the appellant's claims that the official seal and official signature belongs to the Anti Corruption Commission and the officials signature of the ACC official respectively. He contends that therefore such alleged facts claimed to being specially within the appellant's knowledge the burden of proving such fact evidently lies on him. He submits that however it is evident that the appellant could not prove that the signature belongs to the ACC and the ACC officials respectively.

There was a query from this bench upon the learned Advocate for the respondent regarding the appellant's contention that on the face of dispute over seal and signature such seal and signature whatsoever ought to have been examined by hand writing expert. He argues that in this

particular case there is no necessity to ascertain the veracity of the seal and signature since the case and the facts and the circumstances conclusively prove that the seal and signature does not belong to the Anti Corruption Commission respectively. In support of his submission he draws upon the wealth statement from the Lower Court Record dated 20.10.2007. He next draws upon Writ Petition No. 7161 of 2010 filed by the said appellant arising out of the same case. He draws upon writ petition No. 7161 of 2010 and submits that in Writ Petition No. 7161 of 2010 the date of the wealth statement appears to be 15.09.2003. He next points out that however in the examination under Section 342 of the Code of Criminal Procedure, 1898 the appellant in his statement under Section 342 stated that the wealth statement is dated 20.09.2003. He agitated that such inconsistency in the date and the documents and self contradiction regarding the wealth statement is clear enough to prove that in reality there was no wealth statement prepared by the appellant at all. He submits that it is clearly proved that the document is only a piece of paper which was created by the appellant subsequently after the case was filed. He argues that since it is clear from the petitioner's inconsistency and conflicting statements regarding the date also therefore the documents here are created documents and in this

particular case there is no need to call for hand writing expert. He draws upon the relevant portion of the finding of the court on the issue of inconsistency between the date. He submits that the court before coming to its finding elaborately discussed the issue of inconsistency in the statement regarding date and therefore there is no need to further ascertain the veracity of the signature.

He reiterates that under Section 106 of the Evidences Act, 1872 or other relevant provisions of law the onus lies on the appellant to prove that the seal and signature belongs to the Anti Corruption Commission but however the appellant here miserably failed. Summing up his submissions he concludes that the trial court correctly gave its judgment and order and the appeal ought to be dismissed for ends of justice.

I have heard the learned advocate from both sides and perused the application and materials on record before me. The main issue we are dealing presently in this case is the issue as to whether the wealth statement was genuinely submitted by the appellant and whether the seal and signature upon which he relies upon to prove his case was actually given by the Anti Corruption Commission. To adjudicate on the matter I have

examined the materials in the Lower Court Record and I have also perused the judgment of the courts below.

In my considered opinion the oral evidences of the PW-4 who was particularly called and produced by the court as CW-1 is significant. It appears that the PW-4 (CW-1) in his oral evidence categorically stated that the signature in the document dated 20.09.2003 is not his and further categorically stated that he was not aware as to who signature it is. He further categorically stated that it appears that the signature does not belong to any officials of the Anti Corruption Commission.

It may be necessary to be reminded that evidently the appellants claim that the signature belongs to the concerned officials PW-4 CW-1 Md. Mahmudur Rahman who is Assistant Director of Anti Corruption Commission. For that purpose he was produced as CW-1 by the court. His oral evidence amount to a categorical denial of both the signature and the seal. Under the provisions of Evidence Act, 1872 such categorical denial can only be disproved if it can be controverted by the witness of the opposite parties satisfactorily. In this case however it is clear that the DW-4 appellant himself could not controvert the denial of the CW-1. Following the basic principle of Section 114 E of the Evidence Act, 1872 it may be presumed that

official acts have been regularly performed. Following the spirit of the principle of Section 114E of the Evidence Act, 1872 it may also be presumed that the CW-1 is making a correct statement of facts since it could not be controverted by any evidence of the DW-1. I have next drawn upon the provisions of Section 106 of the Evidence Act, 1872 which is reproduced here under:

“When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

It is evident that in this case the appellant claims that the seal and signature belong to the Anti Corruption Commission and the wealth statements are genuine statements. To ascertain the veracity of the wealth statement it is necessary to ascertain the veracity of the seal and signature. Since the appellant relies upon his claim that the seal and signature belongs to the Anti Corruption Commission and which the other side denies in this case it is the duty of the appellant to satisfactorily prove that the seal and signature belongs to the ACC since his claim that the seal and signature of the ACC is within his special knowledge within the meaning of Section 106 of the Evidence Act, 1872.

However as stated above, the appellant could not prove his claim by cogent evidences.

Next I have drawn attention to the Lower Court Records particularly to the document which the appellant claims to be the wealth statement submitted by him before the Anti Corruption Commission. In the document the wealth statement is dated 20.10.2003. However it also appears that after the case was initiated by the respondent, this appellant also filed a writ petition being Writ Petition No. 7161 of 2010 before this division. It appears that in the writ petition the date of the wealth statement is dated 15.09.2003. Also from the examination under Section 342 of the Code of Criminal Procedure it appears that the appellant in his examination stated that the wealth statement is dated 20.09.2003. It goes without saying that such inconsistency and self contradictory statements of the appellant reveal that the document is not a genuine document but it was created only after the case of started.

On this issue I have examined the judgment of the court below. It appears that the court satisfactorily discussed the issue of inconsistency of the claim of the date in the wealth statement.

I have also perused the decision cited by the learned Advocate for the appellant in the case of Abdus Samad Vs Sekendar Ali reported in 20 BLC2015. It may be reiterated that in this case this decision is not applicable since it is clear that the fact of seal and signature is not the ACC's and therefore, I am of the considered opinion, that since the other evidence and circumstance further clearly show that the seal and signature including the wealth statement is a created document, therefore there is no necessity for examination of seal and signature by any expert.

Under the facts and circumstances and forgoing discussions, I am of the considered view that the court correctly gave its order which needs no interference with. I do not find any merit in the appeal.

In the result, the appeal is dismissed.

The impugned judgment and order of conviction and sentence dated 24.02.2016 passed by the learned Special Judge No. 3, Dhaka in Special Case No. 07 of 2010 arising out of Dhaka Metro. Special Case No. 31 of 2010 corresponding to BAC G.R. Case No. 206 of 2003 arising out Motijheel P.S. Case No. 31 dated 13.12.2003 convicting the appellant under Section 4(2)(a) of the Prevention of Corruption Act, 1957 and

Sentenced him to suffer rigorous imprisonment for (three) years and to pay a fine of Tk. 1,00,000/-, in default, to suffer rigorous imprisonment for 3 (three) months more.

The convict-appellant is directed to deposit the balance amount of cheque to the trial court within 45 days from the date of received of this judgment along with lower court records to be paid to the respondent in accordance with law.

The convict-appellant is further directed to surrender before the trial court within 60 days from the same date for serving out the remaining sentence of imprisonment.

The respondent is allowed to withdraw the 50% of the cheque amount which has been deposited by the convict-appellant in the trial court through Chalan within 1(one) month from the date of receipt of this judgment.

Communicate the judgment at once.

Shokat (B.O.)