

**13 SCOB [2020] HCD****HIGH COURT DIVISION****CRIMINAL APPELLATE JURISDICTION**

Criminal Appeal No. 8720 of 2016.

**Md. Abu Yousuf Shah.**

...Convict-appellant.

Mr. Golam Kibria, Advocate

With

Mrs. Nashreen Siddique, Advocate.

...For the Convict-appellant.

-Versus-

Mr. Shaheen Ahmed, Advocate.

..For the Respondent (A.C.C) No.2.

**The State**

....Respondent.

Heard in part on 26.02.2019, 11.03.201  
and Judgment on: 09.05.2019.**Present:****Mr. Justice Md. Shawkat Hossain****Anti-Corruption Commission, Prevention of Corruption Act, 1947, demanding bribe, substantive evidence, extra-judicial confession;****It appears from the impugned judgment that the learned Judge took step of hearing the audio cassette in his chamber and he himself alone heard it behind the knowledge of the convict-appellant. No doubt, for securing justice the learned trial Judge rightly displayed it and heard it but he could also make arrangement to be heard it in open Court in presence of the convict-appellant under trial. ... (Para 25)****That the investigation officer being over interested produced the inquiry report before the Court making as exhibit-VIII series and the learned trial Court being misconceived also based on papers of the inquiry as to extra-judicial confession of the convict-appellant in proving the charge against the convict-appellant. ... (Para 27)****In no way, such extra-judicial confession, if any, can be based on and it can't be considered as evidence at all. ... (Para 28)****JUDGMENT****Md. Shawkat Hossain, J:**

1. The instant Criminal Appeal, by the convict-appellant Md. Abu Yousuf Shah is directed against the judgment and order of conviction and sentence dated 30.08.2016 passed by the learned Special Judge, Rangpur in Special Case No. 23 of 2014 arising out of Gaibandha Police Station Case No. 36 dated 30.06.2009 convicting the appellant under Section 161 of Penal Code and sentencing him to suffer rigorous imprisonment for 02(two) years with a fine of Tk/- 10,000(ten thousand) in default to suffer rigorous imprisonment for 06(six) months more and also convicting him under Section 5(2) of the Prevention of Corruption Act 1947 and sentencing him to suffer simple imprisonment for 04(four) years and to run both the sentences concurrently.

2. Prosecution case, in short, is that while the convict-appellant had his posting at Anti-Corruption Office, Gaibandha as Data-entry-Control Operator he talked with Md. Abu Yousuf, Principal-in-charge, Siddikia Bilateral Senior Madrasha, Gaibandha on 15.07.2007 and initially demanded bribe of Tk/- 1,50,000/- and later on Tk/- 1,00,000/- for disposal of the complaint petition No. 188 of 2007 and that the Principal-in-charge conveyed it to his teacher Md. Mattaleb and recorded their conversation with the convict-appellant on 05.08.2007 of demanding bribe and afterwards brought it to the notice of Md. Abdur Rashid, A.D.C. (Rev), the Chairman of the Managing Committee of the Madrasha and on preliminary enquiry the prima facie case being made out the Anti-Corruption department lodged the instant case.

3. The case was investigated by Anti-Corruption Commission and afterwards submitted charge-sheet against the convict-appellant under Section 161/420/419 of the Penal Code along with 5(2) of the Prevention of Corruption Act, 1947.

4. Learned Chief Judicial Magistrate sent the case record to the Court of learned Sessions Judge and Senior Special Judge, Gaibandha.

5. Learned Senior Special Judge, Gaibandha on receipt of the record registered the case as Special Case No. 03 of 2010 and took cognizance of the offence and having found prima facie case charged the convict-appellant under Section 161/420/419 along with Section 5(2) of the Prevention of Corruption Act, 1947. The convict-appellant being present pleaded his innocence and claimed to be tried.

6. After examination of the prosecution witnesses Learned Special Judge took up the case for examination of the convict-appellant under Section 342 of the Code of Criminal Procedure. The convict-appellant being present pleaded his innocence once again and declined to adduce any evidence.

7. Learned Special Judge on appreciation of the prosecution case, the evidence, other materials on record and in view of the facts and circumstances of the case found the convict-appellant guilty of the offence under Section 161/420/419 of the Penal Code along with Section 5(2) of the Prevention of Corruption Act, 1947 and sentenced him as aforesaid.

8. Having aggrieved at and dissatisfied with the impugned judgment for conviction and order of sentence the convict-appellant preferred the instant Criminal Appeal.

9. Mr. Golam Kibria with Nashreen Siddique, the learned Advocates appearing on behalf of the convict-appellant submits that prosecution could not bring home the charge against the convict-appellant by adducing any substantive evidence and trial Court having failed to sift and weigh the evidence, oral and documentary, in view of the facts and circumstances of the case, erroneously found him guilty of the offence as charged for and sentenced him illegally and arbitrarily.

10. Mr. Kibria further submits that there was no disclosure of conversation of the convict-appellant in audio cassette and it was not displayed before the Court and the voice of the convict-appellant could not be identified in presence of the convict-appellant before the Court and that hearing of the audio cassette by the trial Judge himself in his chamber beyond judicial process and behind knowledge of the convict-appellant can't be appreciated as evidence against the convict-appellant.

11. Mr. Kibria also submits that there was no allegation against P.W. 2, the Principal in charge who was, in fact, in- charge of the Principal in leave vacancy for pilgrimage and there was no occasion of his alleged contact with the convict-appellant for disposing of the compliant petition 188 of 2007.

12. Mr. Kibria further submits that the convict-appellant had no judicial confession and extra-judicial confession if any obtained during inquiry can't be based on for proving the charge against the convict-appellant and the learned trial Judge committed gross illegality having taken it into consideration.

13. Mr. Kibria also submits that learned trial Judge failed to apply his judicial mind in appreciating the evidence on record in view of the attending facts and circumstances of the case and erroneously found him guilty of the charges without proof to the allegation against him beyond reasonable doubt and sentenced merely on surmise and conjecture and the instant Appeal deserves consideration.

14. Mr. Shaheen Ahmed, the learned Advocate appearing on behalf of the Anti Corruption Commission submits that prosecution examined as many as 10 P.Ws and all are competent witnesses and their evidence being consistent, corroborative together with video-cassette of the conversation of the convict-appellant the learned Judge of the trial Court in view of the facts and circumstances case rightly found the convict-appellant guilty of the offence and sentenced him rightly and lawfully.

15. Mr. Ahmed further submits that it is apparent that for disposal of the complaint petition No. 188 of 2007 against P.W. 2, the Principal in charge, the convict-appellant himself called him and demanded Tk/- 1,50,000 for disposal of the petition and later on, it was settled at Tk/-1,00,000 and the conversation with the convict-appellant on above point was recorded in video-cassette and was submitted before the Court as material exhibit-1 and the learned Judge for securing justice heard the conversation and being satisfied to the prosecution case rightly found him guilty of the offence as charged for.

16. Mr. Ahmed also submits that the convict-appellant had his inculpatory confessional statement before the authority during enquiry and that appears true and in addition to that together with consistent and corroborative evidence of the prosecution witnesses in view of the facts and circumstances of the case trial Court rightly found him guilty of the offence as charged for and sentenced him rightly and lawfully and it does not warrant any interference.

17. I have gone through the record in detail, scanned the evidence adduced by the prosecution considered, the submissions of the learned Advocates for both the sides.

18. It appears that prosecution in support of it's case examined P.W. 1 Md. Kamrul Ahsan, P.W. 2 Sharif Md. Abu Yousuf, P.W. 3 Md. Abdul Aziz, P.W. 4 Balram Proshad Eshak, P.W. 5 Md. Ismail Hossain, P.W. 6 Md. Abdul Mottalib, P.W. 7 Md. Shasul Alam, P.W. 8 S.M. Nazim Uddin, P.W. 9 Md. Nuruzzaman Khan and P.W. 10 Md. Nazrul Islam.

19. It further appears that among the prosecution witnesses P.W. 1 is the Deputy Director of the ACC, P.W. 2 is the Principal-in-charge of Siddika Bilateral Kamil Madrasha, Gaibandha, P.Ws. 3, 4, 8 and 9 are the seizure witnesses, P.W. 5 is the lecturer of the Siddika Bilateral Kamil Madrasha, Gaibandha, P.W. 6 is the Assistant Teacher of the Siddika

Bilateral Kamil Madrasha, Gaibandha, P.W. 7 is a tendered witness and defence declined cross-examine him and P.W. 10 is the investigation officer.

20. P.W. 1 is the director of ACC the informant of the instant case. He appears as merely a formal witness. He admitted in his cross-examination ‘আমি অত্র মামলা investigation or inquiry করি নাই। অত্র মামলার তদন্ত কার্যক্রম সম্পর্কে আমার কোন জ্ঞান নাই।’

21. P.Ws. 3, 4, 8, 9 are the seizure witnesses they also appear as formal witnesses. P.W. 7 is a tendered witness and defence declined to cross examine him. P.Ws. 2 is the Principal-in-charge of Siddika Bilateral Kamil Madrasha, Gaibandha and P.Ws. 5 and 6 are also the teaching staff of Siddika Bilateral Kamil Madrasha, Gaibandha. P.W. 10 is the investigation officer. The evidence of P.Ws 5 and 6 apparently appears hearsay in nature.

22. P.W. 5 claims to hear the talk of the convict-appellant and the complaint P.W. 2 and P.W. 6 also claim to accompany P.W. 2 on 4.08.2007 in order to negotiate the demanding of bribe by the convict-appellant from P.W. 2, the complaint. In view of the above evidence it appears that he heard of the demand through the mobile of P.W. 2. P.W. 6 also claims to accompany P.W. 2 office of DUDK i.e. of the convict-appellant. He admitted in his examination-in-chief ‘এর পর আমি ও অধ্যক্ষ সাহেব একই রিক্সায় দুদক অফিসে যাই এবং আমি অফিসের পাশে একটি চায়ের দোকানে অবস্থান করি। অধ্যক্ষ সাহেব অফিসের ভিতর যান।’

23. It is needless to say that his evidence also appears hearsay in nature as to demanding bribe from P.W. 2 by the convict-appellant.

24. Admittedly, the prosecution claims that that the conversation between P.W. 2 and the convict-appellant was recorded in audio cassette and that audio cassette was seized vide seizure list exhibit-VI and audio cassette itself was produced before the Court and identified as materials exhibit-I. P.W. 6 is the seizure witness to that material article I and he himself produced it before the Court but in cross-examination he admitted ‘আমি ক্যাসেটটি শুনি নাই। জন্দকৃত ক্যাসেটে কি কথাবার্তা আছে তা শুনি নাই।’ P.W. 10 the investigation officer echoed the similar voice admitting in his cross-examination ‘দুদক হেড অফিস থেকে অডিও ক্যাসেট জন্দ করি। আমি অডিও ক্যাসেটের কথা টাইপ করি নাই। আসামী কর্তৃক ঘুষ গ্রহণ করা হয়েছে তা ক্যাসেটে নাই। তবে ঘুষ দাবীর কথা আছে।’

25. It is clear that there appears no hard copy of the audio cassette as to conversation of the convict-appellant with P.W. 2 as of demanding bribe as alleged. From 4 corners of the evidence it does not appear that audio cassette material exhibit-I ever displayed before the Court. It appears from the impugned judgment that the learned Judge took step of hearing the audio cassette in his chamber and he himself alone heard it behind the knowledge of the convict-appellant. No doubt, for securing justice the learned trial Judge rightly displayed it and heard it but he could also make arrangement to be heard it in open Court in presence of the convict-appellant under trial.

26. However, in order to proper scanning of the evidence this Court asked the learned lawyer for the A.C.C to produce the audio cassette before the Court but although the learned Advocate for the Anti-Corruption Commission took several adjournments for the purpose but ultimately failed to produce the audio-cassette, the only document for the alleged conversation in demanding bribe as alleged by the convict-appellant from P.W. 2. In absence of the audio cassette, the material article-I, it does not appear that the prosecution has any other substantive evidence to the charge against the convict-appellant.

27. It is also to be noted that the investigation officer being over interested produced the inquiry report before the Court making as exhibit-VIII series and the learned trial Court being misconceived also based on papers of the inquiry as to extra-judicial confession of the convict-appellant in proving the charge against the convict-appellant.

28. In no way, such extra-judicial confession, if any, can be based on and it can't be considered as evidence at all.

29. On above discussion, it appears that the learned trial Judge having failed to sift and weigh the evidence on record in view of the facts and circumstances of the case erroneously found the accused-appellant guilty of the offence as charged for and sentenced him arbitrarily and the impugned judgment and order of sentence thus warrants necessary interference.

30. The Appeal, thus, merits consideration.

31. In the result, the Appeal is allowed.

32. The impugned judgment and order of sentence is set aside. The convict-appellant is acquitted from the charge leveled against him.

33. The appellant is also released from his bail bonds.

34. Send down the L.C. record along with the copy of the judgment at once.