
(2024) 04 GAU CK 0061
In the Gauhati High Court
Case No : Criminal Appeal No. 230 Of 2023

Kalam Ali

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 25-04-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 161(1), 162, 162(1), 313, 374(2)
Foreigners Act, 1946 — Section 14, 14A(b)li>Indian Penal Code, 1860 — Section
120B, 489A, 489B, 489C
Passport Act, 1967 — Section 6, 6A, 10, 12(1)(c)
Evidence Act, 1872 — Section 145

Citation : (2024) 04 GAU CK 0061

Hon'ble Judges : Robin Phukan, J

Bench : Single Bench

Advocate : S. Das, B. Sarma

Final Decision : Allowed

Judgement

1. Heard Mr. S. Das, learned counsel for the appellant and also heard Mr. B. Sarma, learned Additional Public Prosecutor, Assam, appearing for the State respondent.

2. This appeal, under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against the judgment and order dated 3.06.2023, passed by the learned Sessions Judge, Dhubri, in Sessions Case No.52/2021. It is to be noted here that vide impugned judgment and order dated 03.06.2023, the learned Court below has convicted the appellant under Section 14-A(b) of the Foreigners Act, 1946 and sentenced him to suffer rigorous imprisonment for 3 years and also to pay a fine of Rs.10,000/- with default stipulation and also convicted him under Section 489C IPC and sentenced him to suffer rigorous imprisonment for 2 years and also to pay a fine of Rs.5,000/- with default stipulation and further directed that sentence on both count shall run concurrently.

3. The background facts, leading to filing of the present criminal appeal, are

briefly stated as under:-

"On 26.06.2021, at around 2100 hours, Commander of "A" Coy 67 BN BSF Bop-Tistarpar, acting on a tip off, along with other staff including ASI Abadus Sabor, I/C, Solmari Patrol Post and two others Assam police personnel apprehended one person, namely, Kalam Ali, who hails from Bangladesh side, near BPN0-1030/3S, near the IB and found Fake Indian Currency Notes (FICN) of Rs.49,500/-, of Rs.500/- denomination and seized the same preparing seizure list. Thereafter, the Constable (BSF) Dilip Kumar had lodged one FIR to that effect with the Officer-in-Charge, Dhubri P.S., upon which the Officer-in-Charge, Dhubri P.S. registered a case, being Dhubri P.S. Case No.1024/2021, dated 27.06.2021, under Sections 120B/489A/489B/489C IPC, read with Section 6/10 of the Passport Act and Section 14 of the Foreigners Act and endorsed S.I. Mahidul Zaman to investigate the case. The I.O. then visited the place of occurrence, examined the witnesses and prepared sketch map of the place of occurrence and seized the fake Indian currency notes of Rs.49,500/- by preparing seizure list and thereafter, forwarded the same to the Director, FSL for examination and thereafter, collected the report. Then on completion of investigation, the I.O. laid charge-sheet, being Charge-Sheet No.1024/2021, dated 27.06.2021 against the appellant Kalam Ali to stand trial in the Court under Sections 120B/489A/489B/489C IPC, read with Section 14 of the Foreigners Act and Section 6(A) of the Passport Act.

On commitment of the case, to the Court of learned Sessions Judge, Dhubri the learned Sessions Judge, after hearing learned Advocates of both the parties, had framed charges against the appellant under Section 489A/489B/489C IPC, read with Section 14-A(b) of the Foreigners Act and Section 12(1)(c) of the Passport Act and on being read and explain over the same to the appellant, he pleaded not guilty and claimed to be tried.

Thereafter, the learned Court below had examined as many as 7 witnesses and also exhibited 6 documents and thereafter, closing the prosecution evidence the learned Court below had examined the appellant under Section 313 Cr.P.C. and thereafter, hearing learned Advocates of both the parties, convicted and sentenced the appellant as aforesaid."

4. Being highly aggrieved, the appellant has approached this Court by filing this criminal appeal for setting aside the impugned judgment and order on the following grounds:-

(i) That, the learned Court below has committed grave error of law as well as of facts in convicting the appellant and sentencing him vide impugned judgment and order dated 03.06.2023.

(ii) That, the learned Court below, without scrutinizing the entire materials on record, proceeded to convict and sentence the appellant.

(iii) That, no ingredients of the offence under Section 14-A(b) of the Foreigners

Act, 1946 is established here in this case and as such, conviction of the appellant under the said Section is not sustainable.

(iv) That, there is no evidence that the appellant entered into the Indian Territory.

(v) That, the contradiction, brought in the evidence of PW-5, has not been proved through the Investigating Officer.

(vi) That, the learned Court below had relied upon the sketch map, exhibited by the prosecution side and the said sketch map was prepared on the basis of hearsay evidence and is hit by Section 162 Cr.P.C. and as such, the same ought not to have been relied upon by the learned Court below.

(vii) That, the prosecution side has failed to prove that the appellant entered into the Indian territory and that there is no material to show that Fake Indian Currency Notes, amounting Rs.49,500/- were recovered and seized from the possession of the present appellant.

(viii) That, the learned Court below had failed to scrutinize the evidence in its proper perspective and arrived at an erroneous finding.

Therefore, it is contended to allow this appeal.

5. Mr. Das, learned counsel for the appellant, besides reiterating the grounds mentioned herein above, submits that the conviction of the appellant under Section 489C IPC and Section 14-A(b) of the Foreigners Act, is not sustainable as because he was picked up from Bangladesh. Mr. Das further pointed out that the learned Court below has relied upon the sketch map prepared by the I.O., but the same is being prepared on the basis of statement of witnesses and as such, it is hit by Section 162 of the Cr.P.C. Further, Mr. Das submits that PW-5 and PW-6 have not supported the prosecution version. Mr. Das also submits that admittedly, the appellant is a Bangladeshi national, but, there is no material to establish that he enters into the territory of India and that the conviction of the appellant is not based on materials available on the record and therefore, Mr. Das contended to allow this appeal by setting aside the impugned judgment and order of conviction.

6. Mr. Das has also referred following three case laws, in support of his submissions:-

(i) State of Rajasthan v. Bhawani & Anr. reported in (2003) 7 SCC 291;

(ii) V.K. Mishra & Anr. v. State of Uttarakhand & Anr. reported in (2015) 9 SCC 588; and

(iii) The State v. Md. Misir Ali & Ors. reported in 1963 SCC OnLine Gau 3.

7. Whereas, Mr. B. Sarma, learned Additional Public Prosecutor, Assam, has supported the impugned judgment and order of conviction so passed by the learned Court below. Mr. Sarma further submits that all the prosecution witnesses are consistent in their evidence and nothing tangible could be elicited

in their cross-examination to discredit their versions and as such, no fault can be found with the impugned judgment and order and therefore, it is contended to dismiss the appeal.

8. Having heard the submission of learned Advocates of both sides, I have carefully gone through the impugned judgment and order and the memo of appeal and the documents placed on record and also perused the record received from the learned Court below.

9. It appears that the learned Court below had framed charge against the appellant, under Section 489A/489B/489C IPC and Section 14-A(b) of the Foreigners Act and under Section 12(1)(c) of the Passport Act and after hearing learned Advocates of both sides and considering the evidence so recorded, arrived at the finding that the prosecution side had succeeded in bringing home the charge against the appellant, under Section 14-A(b) of the Foreigners Act, 1946 and Section 489C IPC and convicted and sentenced him as aforesaid.

10. It is evident from the evidence on the record and also not in dispute that the investigating officer (P.W.4), had seized a sum of Rs.49,500/- FICN, on 27.06.2021, at about 3.30 P.M. vide seizure list (Exhibit-1) at Dhubri P.S. on being produced by complainant Dilip Kumar. The evidence of the I.O.(P.W.4) also reveals that having seized the FICN, he had sealed the FICN and thereafter, he had sent the seized FICN to FSL for examination and subsequently collected the report (Exhibit-P-4) and thereafter, submitted charge-sheet against the accused.

11. The said FICN were examined by PW-7, the Scientific Officer, DFS, Kahilipara, Guwahati, namely, Shri Israphil Mosahari, who after examination of the 99 numbers of FICN, in connection with Dhubri P.S. Case No.1024/2021, under Section 120B/489A/489B/489C IPC, read with Section 6/10 of the Passport Act, had found the notes as under:-

(i) Defective watermarks of the portrait of Mahatma Gandhi, RBI and figures of denomination.

(ii) Absence of window security thread which is alternately visible in the obverse but totally embedded in the reverse.

(iii) Absence of multiple coloured scattered fluorescent fibers.

(iv) Absence of intaglio printing process.

(v) Absence of optically variable ink (OVI) viz. a colour shift feature from green to blue at numeral 500; etc.

And upon cumulative consideration of the absence of security features lead him to the opinion that the currency notes of denomination of Rs.500/- stamped and marked as Q1 to Q99, are fake notes and Exhibit-P-4 is the report and he put his signature thereon. It is elicited in his cross-examination that he has not mentioned the density of the notes in his report. It is to be noted here that the report (Exhibit-P-4), is not disputed by the appellant side.

12. Now, what left to be seen is, in whose possession the seized FICN were found. In this context, the evidence of the complainant (P.W.5) Dilip Kumar and P.W.6 - Siddharth Singh are relevant. In fact they are the star witnesses of the prosecution side.

13. The evidence of PW-5 reveals that on 26.06.2021, he was posted at Panbari BSF Camp, Dhubri as Constable and on that day, he was on duty at Tistarpar BOP. His evidence also reveals that he does not know the accused and though he lodged the FIR, he had no knowledge about the facts of this case. Then the prosecution side declared him hostile and cross-examined him and brought on record his statement u/s 161 Cr.P.C., wherein, he denied having stated before the police that "on 26.06.2021 at about 11:00 p.m., he received an information from intelligence BSF HQ that one unknown Bangladeshi National had entered into India with fake currency. Accordingly, he, with Deputy Commandant, Sh. Wong Kiyang, Assistant Commandant Sh. N.L. Baite, Inspector, Sub-Inspector, Asstt. Sub-Inspector and six Constable (BSF) led an ambush at Border area and at that time three Bangladeshi nationals entered into India, and out of whom, they could be able to apprehend one Bangladeshi national. However, the other two Bangladeshi nationals had managed to escape. Then on being searched, they recovered Rs.49,000/- fake Indian currency notes from the apprehended person. Then the Asstt. Commandant Sh. N.L. Baite seized the said recovered FICN and he put his signature in the seizure list and thereafter, he lodged the FIR". However, he confirmed Exhibit-P-2, the ejahar and his signature thereon and also the seizure list Exhibit-P-6 and his signature thereon. It is elicited in his cross-examination by the appellant side that he does not know who wrote the ejahar and also do not know the contents thereof and also do not know the contents of the seizure list, Exhibit-P-6.

14. It is to be noted here that though the prosecution side has declared this witness hostile and brought on record the statement given by him before the I.O., but it has failed to confirm the same through the I.O. Now the question is whether any evidentiary value could be attributed to the evidence of P.W.5. In the case of V.K. Mishra (supra), so referred by Mr. Das, learned counsel for the appellant, Hon^{ble} Supreme Court has dealt with the issue as under:-

15. Section 161 CrPC titled "Examination of witnesses by police" provides for oral examination of a person by any investigating officer when such person is supposed to be acquainted with the facts and circumstances of the case. The purpose for and the manner in which the police statement recorded under Section 161 CrPC can be used at any trial are indicated in Section 162 CrPC. Section 162 CrPC reads as under:

"162.Statements to police not to be signed: Use of statements in evidence.—(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for

any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.

Explanation.—An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.”

16. Section 162 CrPC bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) CrPC can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) CrPC. The statements under Section 161 CrPC recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of contradicting such witness by an accused under Section 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness if necessary.

17. The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 CrPC “if duly proved” clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act that is by drawing attention to the parts intended for contradiction.

18. Section 145 of the Evidence Act reads as under:

“145. Cross-examination as to previous statements in writing.—A witness may be

cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction.

15. Same proposition of law was echoed by a Division bench of this court long back, in the case of Md. Misir Ali & Ors.(supra). In the instant case, while the prosecution side has cross-examined P.W.5 and drawn his attention to the statement made by him, under section 161 Cr.P.C. before the police, yet, he had denied having made any such statement before police. But, the prosecution side had, during examination of the investigating officer, failed to confirm that P.W.5, in fact, had made such statement before him. Thus, the procedure, which is required to be followed in the case of hostile witnesses, as held by Hon’ble Supreme Court in the case of V.K. Mishra (supra), and Md. Misir Ali (supra) having not been followed here in this case, no evidentiary value could be attributed to the evidence of PW-5. It is worth mentioning in this context that before examination of P.W.5, the prosecution side had examined the I.O. as P.W.4 and after examination of the PW-5, neither the prosecution nor the learned Court below had made any endeavour to recall and re-examine the I.O. of this case.

16. Whereas, the evidence of PW-6, CT-15100243 Siddharth Singh reveals that he does not know the accused and on 26.06.2021 he was posted at Tistarpar BOP as Constable and on that day, he along with BSF personnel were on Naka duty at Tistarpar Border area and at about 11:00 p.m., they have apprehended one Bangladeshi national, along with Fake Indian Currency Notes and seized the same preparing seizure list and Exhibit-P-6 is the seizure list and he put his signature thereon. It is elicited in his cross-examination that he does not know the contents of the seizure list, Exhibit-P-6 and also he do not know where he had put his signature.

17. Thus, it appears that this witness (PW-6) also failed to identify the accused in the Court, though he had testified having apprehended one Bangladeshi national with FICN. So, it is apparent that the star witnesses of the prosecution i.e. the P.W.5 and P.W.6 have failed to identify the accused in the court.

18. Rest of the witnesses have not seen the occurrence. PW-1, UBC Moslem Uddin is the witness of seizure of Fake Indian Currency Note of Rs.49,500/-. His evidence reveals that on 26.06.2021, while he was on duty at Dhubri P.S., then at about 2:30/3:00 p.m., one BSF party had brought the accused person to the Dhubri P.S. and at that time, S.I. Mahidul Zaman, I/C, Dharmasala Out Post was also present there and he took his signature over the seizure list, by which he seized FICN of Rs.49,500/- in Rs.500/- denomination from the possession of the accused and Exhibit-1 is the said seizure list and Exhibit-1(1) is his signature. It is elicited in the cross-examination that he could not say from whom the BSF personnel have recovered FICN.

19. The prosecution side had also examined two persons of the locality as P.W.2 and 3. The evidence of PW-2- Jamal Uddin and PW -3 Monowar Hussain, reveals that they have not seen the occurrence. They do not know the accused persons and on one day they were called to the Tistarpar BSF camp and they were asked whether they are acquainted with the accused persons or not and then they replied in negative. It is elicited in their cross-examination that there is no fencing in the Indo-Bangladesh border at Tistarpar and the river Brahmaputra enters into the Bangladesh through Tistarpar.

20. The prosecution side has examined the I.O.- S.I. -Mohidul Zaman, as PW-4. His evidence reveals that during investigation he had approached the complainant and re-seized the Fake Indian Currency Notes of Rs.49,500/- from the complainant, vide seizure list (Exhibit-P-1) and examined the witnesses and arrested the accused and interrogated him and forwarded him to the Court and also he sealed the FICN. Further, his evidence reveals that during interrogation the accused could not produce any document to show that he is an Indian citizen. Rather he admitted that he is a Bangladeshi national. Thereafter, he had visited the place of occurrence and examined the witnesses and prepared sketch map (Exhibit-P-3) and thereafter, he had sent the seized notes to the FSL for examination and subsequently, collected the report (Exhibit-P-4) and thereafter, submitted charge-sheet (Exhibit-P-5) against the accused.

21. It is elicited in his cross-examination that at Tistarpar, where the occurrence took place, there is no fencing between India and Bangladesh border, however, there are some pillars in some places and that as per sketch map, there is no demarcation of international border and some places are in open condition, and no straight boundary is there in the place of occurrence, which is a riverine area. And admittedly, he had not ascertained from the Deputy Commissioner, Dhubri as to whether the place, from where the accused was arrested, belongs to Bangladesh or India.

22. Thus, what is transpired from the evidence discussed above is that the prosecution side has failed to establish beyond all reasonable doubt, the identity of the appellant in the Court and that the FICN were seized from the possession of the present accused. Besides, the prosecution side has also failed to establish beyond reasonable doubt that the place, from where the accused was apprehended, belongs to Indian Territory. Admittedly, there is no fencing between India and Bangladesh border, at Tistarpar, where the incident took place. As per evidence of the I.O. except some pillars in some places, there is no demarcation of international border. The evidence of the I.O. indicates that there is no straight boundary at the place of occurrence also, which is a riverine and open area. And admittedly, he had not ascertained as to whether the place, from where the accused was arrested, belongs to Bangladesh or India.

23. In the view of the given facts and circumstances on the record and also in view of the above discussion and finding, this court is of the considered opinion that the prosecution side has failed to bring home the charges under Section 14-A(b) of the Foreigners Act, 1946 and also under Section 489C IPC against the accused/appellant beyond all reasonable doubt. There is no credible evidence to show that the accused/appellant is a Bangladeshi national and he was apprehended inside the Indian territory, except however, the admission made by the accused/appellant himself in his statement under section 313 Cr.P.C., wherein, he had categorically denied having entered into the territory of India.

24. And in view of absence of any convincing evidence, this Court is of the view that the accused is entitled to be acquitted on benefit of doubt. Thus, having considered the facts and circumstances on the record and in view of above discussion and finding, this court is unable to agree with the finding of guilt of accused/appellant, so recorded by the learned court below. The learned court below has placed much reliance upon the sketch map (Exhibit-P-3), but the same was prepared on the basis of statement of witnesses recorded under section 161 Cr.P.C. and is hit by Section 162 Cr.P.C. and as such, the same ought not to have been relied upon to arrive at a finding. Mr. Das, the learned counsel for the appellant has rightly pointed this out during hearing and I find substance in the same and the case law - Bhawani & Another (supra) also strengthened his submission.

25. In the result, I find sufficient merit in this appeal and accordingly, the same stands allowed. Conviction and sentence of the appellant of under Section 14-

A(b) of the Foreigners Act, 1946 and under Section 489(C) IPC stands set aside and quashed. The appellant shall be released from the jail hazot, if not warranted in any other case, with intimation to the District Magistrate, Dhubri. Send down the record of the learned court below with a copy of this judgment and order. The parties have to bear their own cost.