

GAHC010287832019



2024:GAU-AS:12596

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P./503/2019

SHAH NAWAZ HUSSAIN
S/O MUSHAID ALI, VILL-MORI MUSLIM GAON, WARD NO. 11, P.O. AND
P.S.-MORIGAON, ASSAM, PIN-782105

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:JYOTIMOY DUTTA
S.I. OF POLICE
S/O LATE TULAN CH. DUTTA
R/O DHAKUAKHANA
P.S.-DHAKUAKHANA
DIST-LAKHIMPUR
ASSAM
PIN-78700

Advocate for the Petitioner : MR H R A CHOUDHURY, MR. I A HAZARIKA, MR. I U
CHOWDHURY, MR. A M AHMED

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

JUDGMENT

Date : 05-12-2024

1. Heard Mr. I.A Hazarika, learned counsel for the petitioner. Also

heard Mr. P Borthakur, learned Addl. PP, Assam.

2. The present application is filed under section 397/401 Cr.P.C assailing the judgment and order dated 05.06.2018, passed by the learned Addl. Chief Judicial Magistrate, Morigaon in GR Case No.1728/2016, whereby the petitioner was convicted under section 14 of the Assam Game & Betting Act, 1970 (hereinafter referred to as 'Act, 1970') and was sentenced to undergo RI for six months and to pay a fine of Rs.10,000/- in default, RI for another one month.

3. Being aggrieved, the petitioner preferred an appeal before the learned Sessions Judge, Morigaon in CrI. A No.15/2018, however, the learned Sessions Judge under its judgment and order dated 07.11.2019, dismissed such appeal and upheld the judgment and conviction dated 05.06.2018.

4. Being aggrieved, the petitioner preferred the present revision petition.

5. The prosecution story in brief is that on 13.07.2016 at about 6.00 PM, on a secret information SI Sri Jyotirmoy Dutta went to the shop of Md. Mushaid Ali, who is the father of the petitioner and found the accused petitioner Md. Shah Nawaz Hussain in the acts of selling illegal gambling tickets of 'teer' and one illegal book of 'teer' and Rs. 1,200/- was seized. Accordingly on the same date FIR was lodged which was registered as Morigaon PS Case No.240/2016, corresponding to GR Case No.1728/2016.

6. After completion of the investigation, the investigating authority submitted charge sheet against the petitioner under section 14 of the Act 1970. Thereafter, the learned court framed charges under section 14 of the Act, 1970 in writing, which was read over and explained to the accused persons, to which the accused pleaded not guilty and accordingly, trial

commenced.

7. To bring home the charges, the prosecution examined three witnesses and recorded the statement of the accused under section 313 Cr.P.C. The defence side, however, declined to adduce any evidence and thereafter the impugned judgment was passed.

8. Referring to the evidence of PW-1, PW-2 and PW-3, Mr. Hazarika, learned counsel for the petitioner argues that the proceeding itself was an irregular proceeding, being violative of the provision of the Act, 1970, inasmuch as the evidence of PW-1 did not disclose that he had taken prior authorities by a warrant from the District Magistrate or higher police officer as prescribed, prior to the search, seizure and custody of the petitioner. It is further contended by Mr. Hazarika that the whole prosecution case is based on the evidence of PW-1, who is the investigating officer and the informant and therefore, without there being any corroborative evidence, the learned trial court ought not to have solely relied upon this witness to convict the petitioner. According to Mr. Hazarika, learned counsel for the petitioner, the two independent witnesses i.e., PW-2 & PW-3 did not support the case of the prosecution and therefore, the decision of the learned court is perverse, more particularly for the undue reliance placed upon the evidence of PW-1 whose testimony do not disclose commission of any offence under section 14 of the Act.

9. Per contra, Mr. P Borthakur, learned Addl. PP submits that there is no irregularity in the investigation of the seizure inasmuch as, the investigation was carried out by a higher officer i.e., the Officer-In-Charge of the concerned police station. Mr. Borthakur, learned Addl. PP further submits that the evidence of PW-1 remained unshaken and therefore, the learned courts below has rightly not discarded such evidence. According to them, in all circumstances, an evidence of the IO cannot be discarded only

for the reason that he is an official witness and I/O.

10. I have given anxious considerations to the arguments advanced by the learned counsel for the parties and also perused the material available on record.

11. In the backdrop of argument of Mr. Hazarika, more particularly as regards perversity in the decisions, let this court first look into the evidence of the prosecution witnesses.

12. PW-1 SI, Sri Jyotirmoy Dutta who is the informant of this case is the star witness of the prosecution. He testified that on the date of the occurrence he was working as Sub-Inspector of police at Morigaon PS. He got a secret information that one Md. Shah Nawaz Hussain (the petitioner) was selling tickets of "Teer" in the shop of Md. Mushaid Ali. Accordingly, General Diary Entry (GDE) No.364 dated 13.07.2015 was made at Morigaon PS and accordingly, he investigated the case and apprehended Md. Shah Nawaz Hussain with one illegal "Teer" book and cash of Rs.1,200. He further testified that the accused was selling "Teer" tickets from the shop of his father, Mushaid Ali. He proved the GDE No.364 dated 13.07.2015 as exhibit – 1 and the signature of O.C Prakash Ch. Hazarika as Exhibit-1(1). Exhibit-2 is the seizure list and Ex.2(1) is his signature. PW-1 in his cross examination testified that he did not find any physical arrow. He further deposed that the accused handed over Rs.1,200/- from his pocket and told that the money was obtained by selling teer tickets.

13. PW-2 Md. Rahud Dewan alias Abdul Manann, a nearby shop owner deposed that father of the accused persons owns a shop near his shop. Several people and police had gathered in the shop of the father of the accused and thereafter police came to his shop and obtained his signature in a paper without telling anything about the occurrence. In his cross examination, PW-2 deposed that the accused person was undergoing

training to become a Mandal at the time of the occurrence.

14. PW-3 Md. Muku Rahman testified that he had a shop near the Pan shop of the father of the accused person. He further deposed that police took the accused from his father's shop and thereafter, police obtained PW-3's signature for releasing the accused person on bail. This witness in his cross examination testified that the accused was undergoing training of Mandal at the time of the occurrence. He further deposed that he never saw the accused person selling teer.

15. From the evidence of PW-1 i.e., the I/O, if it is accepted to be correct, what is discernible is that teer tickets were recovered from the shop of one Mushaid Ali i.e., the father of the accused. He further deposed that he got secret information as regards selling of teer tickets in the shop of Mushaid Ali and accordingly, General Diary entry was made vide GDE No.364 dated 13.07.2015 at Morigaon PS and Officer-in-Charge sent him to the place of occurrence for investigation and he seized teer tickets from the shop belonging to the father of the accused and arrested the accused, interrogated him and thereafter, the case was investigated by the Officer-In-Charge and submitted charge sheet. However, the Officer-in-Charge who investigated the case was not examined by the prosecution and this PW-1 had also not submitted the charge sheet and the charge sheet was filed by the Officer-in-Charge. During cross-examination, the PW-1 admitted that two persons were present at the time of seizure and he forgot as to whether other persons were there or not.

16. PW-2 and PW-3 are the seizure witness. These witnesses did not support the case of the prosecution and these witnesses were even not declared hostile or cross examined by the prosecution. PW-2 deposed that police came to his shop and obtained signature in a paper and police obtained his signature without telling anything about the occurrence and

he knows nothing about the occurrence and such testimony being un rebutted a serious doubt has been created as regards actual seizure of teer or the money from the possession of the accused.

17. PW-3 the other independent seizure witness deposed that at the time of arrest of the accused, he was busy with his customer in his nearby shop and the police obtained his signature in a paper for release of the accused on bail and he said that he heard that the accused persons were apprehended by police for his involvement in the game of teer. Thus, this witness also did support the prosecution case. During cross examination he affirmed that he never saw the accused persons in the act of selling teer tickets. From the evidence of this witness who was having the nearby shop a doubt has been created as regards seizure of the teer tickets from the paan shop of father of the accused except the fact that he signed a paper without knowing what is written in the same and thereafter, the accused was released on bail.

18. Section 14 of the Act, 1970 prescribes punishment of rigorous imprisonment for not less than 6 months but not exceeding three years and a fine of rupees one thousand but not exceeding rupees two thousand etc when a person bets or invites betting or possesses any instrument of betting or records of betting or accepts betting. Section 2A defines betting as follows:

(a) "bet" with all its grammatical variations means any money or a valuable security or thing staked by a person on behalf of himself or on behalf of any other person, by himself or through any agent or any person procured or employed or acting for or on his behalf, to be lost or won on the happening or determination of an unascertained thing, event or contingency of, or in relation to a game or sport and shall include acceptance of a bet.

It shall further include wager, wagering contract, totalisator and pool transaction in relation to any game or sport but shall not include a lottery or betting on a horse race when such betting takes place-

- (i) on the day on which the race has been fixed to run,
- (ii) in an enclosure which the racing club or the stewards thereof controlling such race have with the permission of the State Government set apart for the purpose, and
- (iii) with a licensed book-maker for horse racing or by means of a totalisator as defined in Section 14 of the [Assam Amusements and Betting Tax Act, 1939](#) (Assam Act 6 of 1939).

19. In the case in hand, on a conjoint reading of section 14 and section 2(a), it is clear that to punish a person under section 14 of the Act, the prosecution is required to prove that the accused :-

- a. Bets or invites betting;
- or
- b. Possesses any instrument of betting; or
- c. Records of betting;
- Or
- d. Accepts betting.

20. In the case in hand, from the materials available on record the case of the prosecution is possession of records of betting or inviting to betting inasmuch as, it is the allegation that from the possession of the accused teer tickets were allegedly recovered and such teer tickets can either be termed as an instrument or records of betting or at best, it may involve an offence of invitation to betting. However, the prosecution has not been able to prove that the accused possessed any instrument of

betting or records of betting, in absence of any proof of recovery of the teer tickets from the possession of the accused as recorded herein above. There is also no evidence even to suggest that the accused was involved in betting or he invited somebody to vetting rather the prosecution witness affirmed that they have never seen the accused being involved in such kind of activities.

21. It is true that section 18 of the Act 1970 prescribes an presumption in respect of instrument of betting and taking part in betting and burden is upon the accused to prove the contrary and there shall be a presumption in favour of the prosecution when instrument, coupon token and counter foil and other things are found from the custody of the accused and the learned court below taking note of such presumption convicted the accused persons. However, it is equally well settled that before such presumption under section 18 could be raised, the prosecution is obliged to establish based on the principle of preponderance of probability that the accused was in possession of any instrument, coupon, token or counterfoil of Teer in order to sustain conviction under section 14 of the Act, 1970.

22. From the perusal of section 18, it is clear that the presumption could operate in the trial of the accused only when the foundational fact of commission of the offence is established, in the case in hand the prosecution has failed to establish the factum of possession of teer tickets by the accused. Therefore, the initial burden existed upon the prosecution to discharge being not satisfied, the legal burden would not shift to the accused to prove the contrary as prescribed under section 18 of the act, 1970. The prosecution has failed to lay the foundational fact that the teer tickets were recovered from the possession of the accused.

23. That being the position and in the considered opinion of this

court, the learned courts below have committed a patent error of law by shifting the entire burden upon the accused without there being any foundation to prosecute or frame charges against the accused person.

24. Accordingly, the present revision petition stands allowed by setting aside and quashing the impugned judgment and order(s) dated 07.11.2019 passed by learned Sessions Judge, Morigaon and 05.06.2018 passed by learned Additional Chief Judicial Magistrate, Morigaon and the accused, namely, ***Shah Nawaz Hussain*** is acquitted from all the charges honorably for the reason of want of any material evidence.

JUDGE

Comparing Assistant