

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 670 of 2008

Bhupati Biswas

-Vs-

The State of West Bengal

For the Appellant : Mr. Sujay Sarkar
Mr. Musharaff Alam Sk
Ms. Susmita Ghorai

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 08.06.2023, 13.09.2023, 06.12.2023

Judgment on : 07.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 28.05.08 and 29.05.08 passed by the Learned Additional Sessions Judge, 3rd Fast Track Court, Malda, in Sessions Case No. 297/2007/Sessions Trial No. 2(10)/2007 thereby convicting the appellant on the charges framed for the commission of offence punishable under Section 14C of the Foreigners Act and sentencing him to suffer rigorous imprisonment for 4 years and to pay a fine of Rs.10,000/- in default to suffer rigorous imprisonment for another 3

months and further convicting the other two accused Md. Mahidul and Mozzmmal for the commission of offence punishable under Section 14 (A)(b) of the Foreigners Act.

2. The prosecution case as levelled against the appellants and other two accused persons shorn of unnecessary details was to the effect that on 26.12.2006 at about 12:30 hrs. the B.S.F. Patrolling Party got secret information from some villagers of Jagjibanpore to the effect that two Bangladeshi Nationals took shelter at Village – Jagjibanpore with some Cattles and as such Commanding Officer along with other B.S.F. Officials raided the village and apprehended two Bangladeshi Nationals along with two Cattles, worth of Rs.8000/- with the help of Upa-Pradhan Baidyapore Grampanchyat of the village and the distance from the place of apprehension and border was 4.5 km.
3. On the basis of the aforesaid allegations Habibpur P.S. Case No. 172/2006 dated 26.12.2006 under Section 14C of the Indian Foreigners Act, was registered for investigation against the appellant and other co-accused persons.
4. Upon completion of investigation, the Investigating Agency submitted its report in the final form being charge-sheet for the commission of offence under Sections 414/34 of the Indian Penal Code read with Section 14 A(b) of the Foreigners Act against Md. Mahikul and Mozzmmal punishable under Act against the present appellants under Section 14C of the Foreigners Act

before the Court of the Learned Chief Judicial Magistrate, Malda and the Learned Magistrate was pleased to take cognizance of the same.

5. Thereafter upon completion of statutory formalities the case was committed to the Court of Sessions and the Learned Sessions Judge was pleased to transfer the same to the rank and file of the Learned Additional Sessions Judge, 3rd Fast Track Court, Malda, in Sessions Case No. 297/2007/Sessions Trial No. 2(10)/2007 for trial and disposal.
6. The Learned Judge upon perusal of the materials placed before him was pleased to frame charges for the commission of offences punishable under Sections 14C of the Foreigners Act against the appellant and other two co-accused persons Md. Mahikul and Mozzmmal had been convicted for the commission of offence punishable under Section 14 A(b) of the Foreigners Act since they had pleaded guilty by saying “Amra Dosi” and the appellant pleaded not guilty to the charge and claimed to be tried.
7. Prosecution in order to establish the said charges examined 6 witnesses and also relied upon documentary evidence which included the F.I.R., Seizure List, Jimmanama.
8. Learned Advocate for the appellant submitted that –
 - i. The Learned Judge ought to have drawn an adverse presumption under Section 114(g) of the Evidence Act against the prosecution in as much as prosecution it was the obligation on the part of the prosecution to establish the case and since the defence did not put the specific denial to the prosecution witness it does not give authority to believe the

witness wholly and no reliance should have been placed on the same by the Learned Judge.

- ii. No information was given or no assistance was taken by the local police station and the entire incident took place under the supervision of the B.S.F. Officials who have narrated the incident in their way and nothing could be seized from the house of the appellant and appellant has never committed an offence under Section 14C of the Foreigners Act.
- iii. The seizure made by the B.S.F. Official was not in accordance with the law and that had purported to have been seized in the house of the appellant but no evidence has come forward that two other accused persons left the Cattle at the house of the appellant.
- iv. The Cows were seized at the house of the appellant but the Jimmanama has been executed far away from the place of the seizure this shows that the incident was a mere piece of paper work of the B.S.F. Official with the help of the local police.
- v. There were omissions and contradictions in the evidence of the witnesses produced by the prosecution regarding commission of the offence by the appellant and also with regard to the presence and involvement in the offence.
- vi. The prosecution failed to prove the intention of present appellant to provide shelter to the Bangladeshi's in his house. The prosecution could not adduce any evidence to prove that the present appellant used his abode to harbor Bangladeshi Nationals to pursue smuggling of cows.

The investigating organization did not conduct any investigation that the Bangladeshi Nationals are staying in the house of present appellant. In absence of charge being framed under Sections 7/ 14C of the Foreigner Act cannot be sustained. The prosecution failed to prove the appellant to have abetted the smuggling of cows.

9. Learned Advocate for the appellant further submitted as follows:-

- i. After completion of the examination of the witnesses, it came to the light that the instant case was based on the circumstantial evidence or indirect evidence and the prosecution was failed to prove the chain of circumstance beyond any shadow of doubt, the circumstances and/or facts were as follows:-
 - a. On 26.12.2006 at about 12:30 hours, informant got information from certain villagers that two Bangladeshi Nationals came to their village. At about 02:30 hours, they went to the village and apprehended two Bangladeshi Nationals with the help of Upa-Pradhan namely Robin Marandi. Thereafter, they were interrogated by the PW-5 and they confessed that they came to India 3 days ago and they took shelter at the house of the appellant.
 - b. As per the first information report the Upa-Pradhan namely Robin Marandi's statement was not recorded by the police officer. At the time of raiding, he was the active member of the said raiding team.
 - c. As per the evidence of the prosecution, no rough sketch map had been drawn and none of the persons had been examined from the

said village to substantiate the presence of the Bangladeshi Nationals in the house of the appellant.

- d. As per the evidence of the prosecution that two Bangladeshi Nationals were arrested from the house of the appellant and also recovered two cows from his house. However, the seizure list stated the place of seizure was Agra B.O.P.
- e. As per the evidence of the PW-1 to 3 and 5 they were seized the cow but PW-4 said that he received a bullock.
- f. PW-5 admitted that place of seizure was depicted in the seizure list as Agra B.O.P.
- g. The prosecution had miserably failed to prove the place of occurrence. On that ground, appellants pray for acquittal.
- h. The Learned Court below had failed to frame the charge against the appellant without framing the charge under Section 7 of the Foreigners Act which vitiated the entire trial.
- i. The prosecution from the very beginning tried to establish that the appellant had given shelter to the two Bangladeshi National in his house but prosecution failed to examine the villagers or the Upa-Pradhan namely Robin Marandi.
- j. The Investigating Officer did not conduct any investigations whether the said two Bangladeshi Nationals were staying in the house of the appellant or not or whether they came to India 3 days ago or not.

- k. The Learned Trial Judge failed to consider the ingredients of the Section 14C of the Foreigners Act. In the case of *Abinash Dixit Versus State of Madhya Pradesh*, Apex Court has been pleased to interpret the word 'abet' is an essential ingredient of Section 14C, and has received judicial interpretation. 'Abet' means to aid to encourage or countenance. An abetment of the offence occurs when a person is in doing that thing. Mere passivity and insouciance will not tantamount to offence of abetment.
- l. The appellant further states that the non-examination of Investigating Officer, one Upa-Pradhan namely Robin Marandi and others witnesses by the prosecution and though the prosecution held the best evidence not producing them creates an adverse inference. As per Section 114(G) of the Evidence Act if a party in possession of the best evidence which will throw light in controversy withholds, the Court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. Drawing of presumption under Section 114(G) of the Evidence Act depend upon the nature and fact required to be proved and its importance in the controversy, the usual mode of proving it, the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, of which have to be taken into account. It is only when all these

matters are duly considered that an adverse inference can be drawn against the party.

10. The Learned Advocate for the State submitted that both the Bangladeshi Nationals were arrested from the house of present appellant who pleaded guilty and had been convicted. The provisions of Section 7 of the aforesaid act are not applicable to the context of the instant case and the prosecution had been successful in providing its case.

11. A circumspection of the prosecution witnesses revealed as follows:

- i. PW-1 in his deposition stated that on 26.12.2006 he was posted at B.O.P. at Agra under Dist. Malda. On the very date at about 02:30 p.m., two Bangladeshi Nationals were in the house of Bhupati Biswas and they got information secretly and his company commandant Rana Sahab along with himself and other 4/5 forces went in the house of Bhupati Biswas but he fled away from his house. Thereafter they apprehended two Bangladeshi Nationals and along with the two cows at Jagjibanpur village in the house of Bhupati Biswas and thereafter they brought them Agra B.O.P. and thereafter they brought them at Habibput P.S. and they handed over the seized over two cows to the custom. He was also interrogated by the police.
- ii. In his cross-examination PW-1 stated that the distance between Agra B.O.P. and Jagjibanpur village was about 4½ kms. There were near about 300/400 villagers were residing at the village Jagjibanpur village. He did not know particularly any villager's house at the village

Jagjibanpur. He could not say the name of the next door neighbours of the accused Bhupati Biswas surrounding four boundaries direction. He could not say the name of “Mahalla” wherein the accused Bhupati Biswas was residing.

- iii. PW-2 in his deposition stated that he recited the evidence of PW-1 being a part of a raiding party had inter dictated to Bangladeshi Nationals along with two cows. The present appellant was deposed to have a escaped from his house during the search of his house. Subsequently, the aforesaid Bangladeshi Nationals along with both the cows worked were taken to B.O.P. Agra of Malda Districts. PW-2 had interrogated by the police. The seized cows were hand over to the custom authority. PW-2 further expressed the present appellant used to provide shelter to Bangladeshi Nationals involved in smuggling of cows.
- iv. During his cross-examination PW-2 stated that he could not say the names of next door neighbourers of accused Bhupati Biswas along with the boundaries and also could not say the name of Mahalla wherein Bhupati lives. He did not know each and every villagers of village Jagjibanpur. Bengali police did not accompany with them at the time of causing search of the house of Bhupati Biswas. They did not take permission from Bengal police to raid to accused Bhupati Biswas.
- v. The evidence of PW-3 conformed to the evidence of PW-1 and PW-2.

- vi. During his cross-examination PW-3 stated that the distance between Agra B.O.P. and village Jagjibanpur was about 8 k.m. away. They left after B.O.P. for holding a raid in the house of Bhupati Biswas by means of a jeep. He could not say at what time they had departed from Agra B.O.P. for Jagjibanpur. He also could not say the registration no. of the said jeep. They had stayed at Jagjibanpur near about 30 minutes. Seizure list and other formalities had been prepared at Agra B.O.P. It was difficult for him to say exactly at what time they had returned from Jagjibanpur to their B.O.P.
- vii. He had been in Habibpur P.S. at about 11:00 a.m. They did not take permission from the local P.S. for causing raid, the two Bangladeshi Nationals from the house of Bhupati Biswas and two cattle from the house of Bhupati Biswas through there was no need. He could not say the names of the next door neighbours and boundaries of the house of Bhupati and he could not say the Mouza, Dag No. of the land of Bhupati Biswas. He could not see the seized the cows in the court room or court compound.
- viii. PW-4 received the Zimmanama of two cows/bullocks on 26.12.2006. The Zimmanama and the signature on the same was marked as exbt.-1 and 1/1. PW-4 stated bullocks to be under his possession.
- ix. PW-5 had lodged the written complaint bearing his signature marked as exbt.-2 and 2/1 respectively. He stated that while they were on petrol duty and the villagers of Jagjibanpur reported that some

Bangladeshi Nationals came to purchase cows and thereafter he and a constables and with the assistance of some villagers. They further noticed two Bangladeshi were sleeping in the house of the accused Bhupati Biswas and when his members of petrol party attempted to know their identity and the said two Bangladeshi attempted to run away. Thereafter they apprehended both o the said Bangladeshi and they also got two cattle by the said of the house of Bhupati Biswas and on further they disclosed that they had come to India to purchase cattle and they seized two cattle small size under a seizure list. That was the original seizure list of two cattle and it bears his signature and marked as exbt.-3 and 3/1 respectively. The accused Bhupati Biswas also took to his heels from his house and the villagers reported him that accused Bhupati Biswas also fled away from his house and they returned to their B.O.P. along with the arrested Bangladeshi and two cattle. Thereafter they went to Habibpur P.S. and they lodged the F.I.R. handed over the arrested persons and cattle. He did not know anything more. The Bangladeshi two accused also told to them that they had come to the house of accused Bhupati Biswas without Visa and Passport and Bhupati Biswas helping them from smuggling cattle from India to Bangladesh.

- x. In his cross-examination PW-5 stated that they had apprehended two Bangladeshi with the help of Upa-Pradhan of Baidyapur G.P., Rabin Marandi. It was a fact that he did not depict in the written F.I.R., place

of arrest of two Bangladeshi. He did not depict in the written F.I.R., that he had apprehended two Bangladeshi from the house of accused Bhupati Biswas. He did not depict in the written F.I.R., that on seeing them accused Bhupati Biswas fled away. He was interrogated by the police in that case connection. The Upa-pradhan Rabin Marandi did not put signature on the seizure list of cattle. Place of seizure was depicted in the seizure list as Agra B.O.P. They had authority to cause search within the area of 8 kms of the B.O.P.

xi. PW-6 identified his signature on seizure list and marked as exbt.-3/2.

12. Section 7 of the Foreigners Act states as follows:

“7. Obligation of hotel keepers and others to furnish particulars.—

(1)It shall be the duty of the keeper of any premises whether furnished or unfurnished where lodging or sleeping accommodation is provided for reward, to submit to such person and in such manner such information in respect of foreigners accommodated in such premises, as may be prescribed.

Explanation.—The information referred to in this sub-section may relate to all or any of the foreigners accommodated at such premises and may be required to be submitted periodically or at any specific time or occasion.

(2)Every person accommodated in any such premises shall furnish to the keeper thereof a statement containing such

particulars as may be required by the keeper for the purpose of furnishing the information referred to in sub-section (1).

(3)The keeper of every such premises shall maintain a record of the information furnished by him under sub-section (1) and of the information obtained by him under sub-section (2) and such record shall be maintained in such manner and preserved for such period as may be prescribed, and shall at all times be open to inspection by any police officer or by a person authorised in this behalf by the District Magistrate.

(4)If in any area prescribed in this behalf the prescribed authority by notice published in such manner as may in the opinion of the authority be best adapted for informing the persons concerned so directs, it shall be the duty of every person occupying or having under his control any residential premises to submit to such person and in such manner such information in respect of foreigners accommodated in such premises as may be specified; and the provisions of sub-section (2) shall apply to every person accommodated in any such premises.]”

13. In the instant case the provision enumerated in Section 7 of the Foreigners Act is not applicable since the same are concerned with the obligation of hotel keepers.

14. Section 14 of the Foreigners Act states as follows:

**“14A. Penalty for entry in restricted areas, etc. —
Whoever. —**

(a) enters into any area in India, which is restricted for his entry under any order made under this Act, or any direction given in pursuance thereof, without obtaining a permit from the authority, notified by the Central Government in the Official Gazette, for this purpose or remains in such area beyond the period specified in such permit for his stay; or

(b) enters into or stays in any area in India without the valid documents required for such entry or for such stay, as the case may be, under the provisions of any order made under this Act or any direction given in pursuance thereof,

shall be punished with imprisonment for a term which shall not be less than two years, but may extend to eight years and shall also be liable to fine which shall not be less than ten thousand rupees; and if he has entered into a bond in pursuance of clause (f) of sub-section (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting court why such penalty should not be paid by him.

14B. Penalty for using forged passport.—

Whoever knowingly uses a forged passport for entering into India or remains therein without the authority of law for the time being in force shall be punishable with imprisonment for

a term which shall not be less than two years, but may extend to eight years and shall also be liable to fine which shall not be less than ten thousand rupees but may extend to fifty thousand rupees.”

15. In **Ravichandra Rabindrakumar Sinha vs. State of Gujarat**,¹ the Hon’ble High Court of Gujarat held as follows:

“16. Let me, for the time being, proceed on the footing that the two Korean Nationals committed an offence under section 14(b)(c) of the Act, 1946. Even, in such circumstances, could it be said that the three applicants herein abetted the commission of the offence so as to R/CR.MA/4808/2018 ORDER make them liable for the offence under section 14C of the Act, 1946. Section 14C of the Act makes it clear that the expression abetment shall have the same meaning as assigned to it under section 107 of the Indian Penal Code. Section 107 of the IPC reads as under

107. Abetment of a thing- A person abets the doing of a thing, who-

*First- Instigate any person to do that thing; or
Secondly: -Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*

¹ R/Criminal Misc. Application No. 4808 of 2018

Thirdly Intentionally aids, by any act or illegal omission, the doing of that thing, .

Explanation1:- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, willfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C. Explanation 2: - Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

17. It is difficult for me to take the view that the three applicants herein, serving with the Larsen & Toubro Ltd. aided, instigated or entered into a conspiracy to commit an offence.”

16. In **Abinash Dixit vs. The State of Madhya Pradesh**², the Hon’ble Supreme Court held as follows:

² CRIMINAL APPEAL NO. 267 OF 2022 (SLP (Crl.) No. 2266/2020)

“The word ‘abet’ is an essential ingredient of Section 14-C, and has received judicial interpretation. ‘Abet’ means to aid, to encourage or countenance. An abetment of the offence occurs when a 3 person instigates any person to do that offence or engages with another person(s) in doing that thing. Mere passivity and insouciance will not tantamount to offence of abetment.”

17. In the instant case the prosecution failed to prove that the present appellant abetted aforesaid Bangladeshi Nationals to have remained in any area in India for a exceeding period for which Visa was issued to them or have abetted to smuggle the cows in violation of the conditions of a valid Visa or to have abetted the entry of the Bangladeshi Nationals as aforesaid into the country without a valid permit or a Visa or have abetted to the stay of the Bangladeshi Nationals on the basis of a forge passport for entering in India.

18. Section 15 of the Foreigners Act states as follows:

“15. Protection to persons acting under this Act.—

No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.”

19. The investigation authority did not endeavour to find out whether the present appellant had knowledge of the identity and intention of the Bangladeshi Nationals to have sought refuge in his house at all. The investigating authority further could not prove that the appellant abetted the

procurement of the cows either in illegal or legal manner from a specific source involving the knowledge and reasonable motive of the present appellant to abet the commission of smuggling for wrongful gain. The prosecution failed to prove an act of abetment on the part of the appellant in respect of the offences dictated under the provision of 14, 14A and 14B of the Foreigners Act.

20. In view of the above discussion, the prosecution has failed to establish its case beyond reasonable doubt and as such the instant criminal appeal is allowed.

21. Accordingly, the criminal appeal being CRA 670 of 2008 stands disposed of.

22. There is no order as to cost.

23. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

24. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)