

11 SCOB [2019] HCD 4**HIGH COURT DIVISION**

JAIL APPEAL NO.44 OF 2010.

Md. Joynal.

.....Appellant.

Vs.**The State.**

.....Respondent.

Mr. Md. Khabir Uddin Bhuiyan.

.....For the appellant.

Ms. Rona Naharin, D.A.G. with

Ms. Monzu Naznin, A,A,G, and

Mr. Md. Sarwardhi,A.A.G.

.....For the respondent.

Heard on 5th November, 2015 andJudgment on 9th November, 2015.**PRESENT:****MS. JUSTICE SALMA MASUD CHOWDHURY****AND****MR. JUSTICE F.R.M. NAZMUL AHASAN**

Admittedly there is no eye witnesses of the occurrence and the appellant is a nephew of the deceased having some enmity with him. Although it has been alleged that before death Shafiqul narrated the incident to some of the witnesses but that cannot be treated as dying declaration as it was not properly recorded. The witnesses to whom it has been alleged that the deceased mentioned the name of the appellant are all closely related to the deceased. In the present case we do not find any dying declaration of the deceased and it is evident from record that the deceased told about the occurrence by the appellant committed on him in the operation theater, which is not free from all doubt. Most of the witnesses deposed that they have heard from P.W.5 Md. Javed but P.W.5 is not an eye witness and in his deposition he did not make any such statement as to connect the appellant directly. ... (Para 27)

JUDGMENT**SALMA MASUD CHOWDHURY, J:**

1. This Jail Appeal is directed against the judgment and order of conviction and sentence dated 6.11.2008 passed by the Additional Sessions Judge, Natore in Sessions Case No.6 of 2001 convicting the appellant under section 302 of the Penal Code and sentencing him to suffer imprisonment for life and also to pay a fine of Tk.10,000/- in default to suffer rigorous imprisonment for one year more.

2. The prosecution case in short is that the informant lodged the first information report bringing in allegation that on 17.9.2000 at around 7.30 to 7.40 P.M. her husband, the deceased, went to a nearby bazaar for buying medicine, after which he went to the shop of Abdul Majid and was talking to him and in the meantime, Joynal, the nephew of the victim, came to the place of occurrence and took him towards his house and on the way near a sugarcane field, accused appellant Joynal with a hashua in his hand gave a blow on the right side of the head near the ear of the deceased as a result of which there was severe bleeding and deceased Shafiqul Islam came running to the shop of Abdul Majid and appellant Joynal

fled away and subsequently the deceased was taken to Natore Sadar Hospital from where he was referred to Rajshahi Medical College Hospital and the informant along with others took him there by an ambulance where deceased Shafiqul Islam died and hence the present case.

3. The police investigated the case and submitted charge sheet against the appellant under section 302 of the Penal Code.

4. The case record was transmitted to the Court of the Sessions Judge, Natore who transferred it to the Court of the Additional Sessions Judge, Natore who framed charge against the accused persons under section 302 of the Penal Code which was read over to him who pleaded not guilty of the charge and prayed to be tried.

5. Prosecution examined as many as 13 witnesses and the defence examined none.

6. The defence case is that the accused appellant is innocent and he has been falsely implicated in the case.

7. On conclusion of the trial, the trial Court convicted the appellant under section 302 of the Penal Code and sentenced him to suffer imprisonment for life and also to pay a fine of Tk.10,000/- in default to suffer rigorous imprisonment for one year more.

8. Being aggrieved thereby, the appellant preferred the present Jail Appeal which was admitted and is before us for disposal.

9. Mr. Khabir Uddin Bhuiyan, the learned Advocate appearing on behalf of the appellant submits that the appellant is innocent and he has been falsely implicated in the case. He next submits that the appellant was convicted without any basis as there is no eye witness of the alleged occurrence. He also submits that the prosecution could not prove the allegation against the appellant beyond reasonable doubt for which he may kindly be acquitted of the charges levelled against him.

10. Ms. Rona Naharin, the learned Deputy Attorney General appearing on behalf of the State supports the impugned judgment and order of conviction and sentence passed by the trial Court.

11. We have heard the learned Advocate for the appellant and the learned Deputy Attorney General representing the State and perused the materials on record.

12. It appears that the wife of the deceased, the informant lodged the first information report bringing in allegation against the appellant that he caused hashua blow on the right side near the ear of the deceased as a result of which some bleeding injury was caused and the deceased died.

13. Prosecution examined as many as 13 witnesses.

14. P.W.1, Mosammat Salema Begum is the informant and she deposed that the appellant demanded a sum of Tk.10,000/- from the deceased and he caused the injuries the deceased by taking him to a nearby sugarcane field and the deceased went to the shop of Abdul Majid and got a bandage and subsequently he was taken to the Sadar Hospital Natore from where he was referred to Rajshahi Medical College Hospital and he died early in the morning.

15. P.W.2, Md. Haider Ali deposed that witness Javed came to him and informed him that accused Joynal caused injuries on the deceased by a hashua blow.

16. P.W.3, Md. Shahin deposed that he got the information of the injury caused on the deceased from one Javed.

17. P.W.4, Md. Ala Uddin deposed that while he was in a shop he saw Shafiqul going to the medical store of Abdul Majid and he was told by the deceased to call his other nephews after which this witness asked Javed to call all the nephews of the deceased and the deceased was treated in a local health complex after which he was referred to Rajshahi Medical College Hospital where he died.

18. P.W.5, Md. Javed Ali deposed that he was in a shop and when the deceased Shafiqul went to the shop of Abdul Majid, he went there and saw him in bleeding condition and he was told by the deceased to call all of his nephews after which the deceased was taken to Sadar Hospital Natore.

19. P.W.6, Md. Abdul Majid deposed that Shafiqul came to his shop in bleeding condition.

20. P.W.7, Md. Mudar Ali deposed that he heard that accused Joynal caused injuries upon deceased Shafiqul and he was treated in Rajshahi Medical College Hospital. He deposed that Shafiqul was in his sense and he said to Javed, Haider, Pintu and others present that Joynal caused injuries upon him.

21. P.W.8, Md. Mizanur Rahman deposed that he was in Dhaka at the time of occurrence and on receiving telephone call he got information that Shafiqul died.

22. P.W.9, Md. Azahar Ali deposed that he took the dead body to the morgue for postmortem.

23. P.W.10, Md. Abul Hossain deposed that Shafiqul Islam came to the shop of Abdul Majid and after some time he went away and after that the deceased caused injury upon him.

24. P.W.11 deposed that he investigated into the case.

25. P.W.12, Md. Abu Sayed Hossain deposed that he recorded the first information report lodged by the informant, the wife of the deceased.

26. P.W.13, Md. Matiur Rahman deposed that he investigated into the case and submitted charge sheet.

27. It appears from the depositions of the witnesses that the deceased told P.W.2, P.W.3, P.W.4, P.W.6, P.W.7 and P.W.10 that his nephew appellant Joynal gave him a hashua blow. P.W.5, P.W.8, P.W.11, P.W.12 and P.W.13 deposed that they heard about the incident from other witnesses. Admittedly there is no eye witnesses of the occurrence and the appellant is a nephew of the deceased having some enmity with him. Although it has been alleged that before death Shafiqul narrated the incident to some of the witnesses but that cannot be treated as dying declaration as it was not properly recorded. The witnesses to whom it has been

alleged that the deceased mentioned the name of the appellant are all closely related to the deceased. In the present case we do not find any dying declaration of the deceased and it is evident from record that the deceased told about the occurrence by the appellant committed on him in the operation theater, which is not free from all doubt. Most of the witnesses deposed that they have heard from P.W.5 Md. Jabed but P.W.5 is not an eye witness and in his deposition he did not make any such statement as to connect the appellant directly.

28. Considering the facts and circumstances of the case, we are of the view that the prosecution could not prove the allegation against the appellant beyond reasonable doubt.

29. In the result, the appeal is allowed. The judgment and order of conviction and sentence dated 6.11.2008 passed by the Additional Sessions Judge, Natore in Sessions Case No.6 of 2001 are hereby set aside. The appellant is acquitted of the charges levelled against him.

30. Let the appellant be set at liberty at once if he is not wanted in connection with any other case.

31. Send down the lower Court records and a copy of the judgment and order to the Court concerned.