

Present:

Ms. Justice Naima Haider

and

Mr. Justice Md. Ruhul Quddus

Criminal Appeal No. 1938 of 1996

Md. Rafiqul Islam alias Rafique

...Appellant

-Versus-

The State

...Respondent

No one appears for the appellant

Ms. Rona Nahrin, A.A.G.

... for the respondent

Judgment on 13.4.2011

*Md. Ruhul Quddus, J:*

This appeal is directed against judgment and order dated 31.8.1995 passed by the Additional Sessions Judge, Narayangong in Session Case No.40 of 1994 convicting the appellant under section 302 of the Penal Code and sentencing him thereunder to suffer rigorous imprisonment for life with a fine of Taka 5000/= in default to suffer rigorous imprisonment for another six months.

Prosecution case, in short, is that the victim Md. Shona Mia accompanied by his wife Shonabhan went to the house of his neighbor Mohammad Ali, father of the appellant, on 22.9.1993 and asked him about the reason of not connecting Gas line to their house, following which an altercation took place between them. At one stage his (victim's) wife Shonabhan returned home. In course of the altercation, the appellant Rafiqul Islam had appeared there and inflicted a kick on his chest. On hearing noise, his (victim's) son Abdul Aziz

rushed to the house of occurrence and brought him back home. On the way, he disclosed to his son that the appellant had inflicted kick on his chest, and that he was feeling very bad because of high blood pressure. After an hour he died at about 11.00 p.m. On his death, Abdul Aziz recorded Unnatural Death Case No.19 of 1993 with Fatullah Police Station, Narayanganj. In response thereto, a Sub-Inspector of police named S. M. Shahidul Islam visited the area of occurrence, inquired into the allegation and sent the dead body to Narayanganj General Hospital Morgue for holding post-mortem. The police also arrested the appellant under section 54 of the Code of Criminal Procedure at midnight on 22.9.1993.

On receipt of the post-mortem report, the said S. M. Shahidul Islam lodged an *ejahar* against the appellant, which gave rise to Fatullah Police Station Case No.20(11)93 under section 302 of the Penal Code. The police, after investigation submitted charge sheet against the sole appellant on 29.4.1994 under the same penal section.

The case after being ready for trial, was sent to the Sessions Judge, Narayanganj, wherein it was registered as Session Case No.40 of 1994. Subsequently it was transferred to the Court of Additional Sessions Judge, Narayanganj for hearing and disposal. The learned Additional Sessions Judge, by his order dated 24.1.1995 framed charge against the appellant under section 302 of the Penal Code and proceeded with trial in absentia, as the appellant in the meantime was released on bail and thereafter did not turn up to face the trial.

In support of its case, the prosecution examined as many as eleven witnesses out of sixteen, who were cited as such in the charge sheet. The learned

Additional Sessions Judge after conclusion of trial, found the appellant guilty of charge framed against him, and accordingly pronounced his judgment and order of conviction and sentence in absentia on 31.8.1995, as stated above. The appellant surrendered before the trial Court on 9.1.1996 and preferred the instant criminal appeal against the said judgment and order with an application for condonation of delay, and subsequently obtained bail from this Court on 27.8.1998.

This appeal has been appearing in the cause list since 4.4.2011 i.e six days before starting of vacation. Yesterday it was taken up for hearing but no one appeared to press the appeal. In view of long pendency of the appeal, we took it up for disposal. However, Ms. Rona Nahrin, learned Assistant Attorney General appearing for the State submitted that the prosecution was able to prove its case beyond all reasonable doubt, and the learned Additional Sessions Judge rightly convicted and sentenced the appellant.

We have gone through the evidence on records and the impugned judgment and order. It appears that P.W.1 S. M. Shahidul Islam, the informant and a Sub-Inspector of police stated that on the date of occurrence the victim's son Abdul Aziz lodged an *ejahar* to the effect that his father went to the house of Mohammad Ali, where an altercation took place between them. On hearing hue and cry, he (Abdul Aziz) rushed to the house of occurrence and brought his father back at about 11 p.m. On the way, his father told him that he (father) was feeling bad. After coming back home, he was pouring water on his (father's) head, while he breathed last. Upon the said *ejahar*, Fatulla Police Station Case No.19 dated 22.9.1993 (indicating the unnatural death case) was started. P.W.1

further stated that he was assigned for investigation of the case, and after such assignment he visited the place of occurrence, prepared inquest report of the dead body, sent it to Naraynganj General Hospital Morgue, and arrested the appellant under section 54 of the Code of Criminal Procedure. In course of investigation he came to know that the appellant had inflicted kick and blow on the victim Shona Mia, to which he succumbed. On receipt of the post-mortem report, he (informant) lodged the *ejahar*. In cross examination he stated that in the *ejahar* of the unnatural death case, the informant did not suspect anybody. While preparing the inquest report, he thoroughly examined the dead body, but did not find any abrasion or injury thereon. He also stated, with reference to the victim's sons and daughters, that the victim was advised by his doctor to talk less.

P.W.2 Abdul Aziz, eldest son of victim Shona Mia stated that on hearing hue and cry, he rushed to the house of occurrence, and knew that his mother had gone to call his uncle. He saw Mohammad Ali was bringing his (P.W.2's) father towards their house. His father told him that the appellant had kicked on his chest. He (father) had asked for water and after having water, he died. In cross examination P.W.2 stated that his father had died before they could call the doctor. He (P.W.2) informed the occurrence to the local police station in his own hand writing. The appellant's father Mohammad Ali was cousin brother of his mother. P.W. 3 Shonabhan, widow of victim Shona Mia, who accompanied him up to the house of occurrence, stated that they gave money to Mohammad Ali for connection of gas line to their house. Since the gas line was not connected, they went to his house to inquire into the matter. When the altercation took

place, the appellant was present there. His (appellant's) body language was being shown rough, for which she went to call her eldest son Abdul Aziz. When she was coming out from the house of occurrence, her husband was telling that the appellant had kicked on his chest. Her son Abdul Aziz rapidly went there and saw that the victim Shona Mia was being taken out side of the house. He asked his father about the incident, when his father disclosed that the appellant had kicked him on his chest. She called a local Member, in who's presence, the victim Shona Mia disclosed the fact again. In cross-examination she stated that she herself did not see the occurrence. When she was going back to the house of occurrence, saw Mohammad Ali and his wife were bringing back her husband.

P.W.4 Abul Hossain, one of their neighbours stated that he could not remember the exact date, but it was nearly one and half year back. He was lying in his house at about 10 p.m, when the wife of victim Shona Mia called him. He opened the door and saw her talking with the father of Helu member. Shona Mia was telling him (father of Helu member) that someone had kicked him, although he could not remember the name. In cross examination he stated that he himself did not see any occurrence.

P.W.5 Abdur Rashid, youngest son of victim Shona Mia stated that he could not remember the exact date of occurrence. But on that date he returned home at 10/11 p.m and saw Mohammad Ali was bringing his father back to their house.

P.W.6, Dr. Tara Sankar Vawal stated that he held post-mortem of the dead body and found his lever ruptured caused by blow or kick on his upper

abdomen. In cross examination he stated that he did not find any sort of abrasion on the dead body. He further stated that because of blood pressure the victim's heart was enlarged and because of enlargement of heart, a man can die.

P.W.7 Anwara Akhter, daughter-in-law of victim Shona Mia stated that on the date of occurrence there was an altercation between her father-in-law and Mohammad Ali. Thereafter, the said Mohammad Ali and his wife brought her father-in-law to their house, when he (victim Shona Mia) pointed his chest and told that the appellant had kicked him.

P.W.8 Matiur Rahman, another neighbor stated that at the time occurrence he was lying in his house. Hearing hue and cry he rushed to the house of Shona Mia, and saw him sitting beside the boundary wall. Victim Shona Mia told that the appellant had kicked him, and requested to take him at home. In cross-examination P.W.8 stated that victim Shona Mia was quite okay, when he talked to him. But in course of talking, when the appellant's father denied the factum of inflicting kick on him by the appellant, he (victim Shona Mia) became too much excited and sick. This witness further stated that he did not see any injury on his chest. The victim's sons did not file any case or call for a doctor. At about 11 p.m, a Sub-Inspector of police came. The victim's family members were not willing to file the case, but the police mounted pressure upon them to do so.

P.W. 9 Md. Helal Uddin was tendered by the prosecution, while the defense declined to cross-examine him. P.W.10 Delwar Hossion, a police constable stated that he escorted the dead body to the Morgue. P.W. 11 Wajed

Ali, a Sub-Inspector of police stated that he had filled up the form of first information report as a Duty Officer.

From a close reading of the evidence, it appears that P. Ws.2,3,5 and 7 are family members of the victim Shona Mia, P.W. 4 and 8 are his neighbors, P.W.6 is the doctor who conducted post-mortem, while P.Ws.1, 10 and 11 were police personnel and formal witnesses. There is no eye witness in this case. The conviction and sentence has been passed on the basis of 'dying declaration' allegedly made by victim Shona Mia. The said dying declaration is not reduced in writing and the time, place and manner of making the dying declaration appears to be contradictory and inconsistent in the evidence of the P.Ws.2,3,4,7 and 8. Immediately after commission of the alleged occurrence on 22.9.1993 or thereafter no *ejaher* was lodged or complaint filed by the wife, sons or any other close relation of the victim Shona Mia. Although his eldest son Abdul Aziz recorded an unnatural death case with Fatullah police station, no allegation of inflicting kick was made in *ejahar* of the said unnatural death case, and there was no mention of any dying declaration. It was, rather, disclosed that the victim was a patient of high blood pressure and he may die of high blood pressure. In the *ejaher* of the present case as well there is no such statement that on the way of coming back home, the victim made any dying declaration. Therefore, the factum of dying declaration appears to be an after thought. The judgment and order of conviction and sentence passed only on the basis of such dying declaration is not safe. The Doctor's testimony did not exclude the possibility of death of the victim Shona Mia because of high blood pressure. According to him the fatal blow or kick was inflicted on the upper abdomen of the deceased

victim, but according to the alleged 'dying declaration' it was inflicted on his chest. There is a reasonable gap between the upper abdomen and chest of a human body. P.W.8, who appears to be an independent witness stated in cross-examination that after coming back from the house of occurrence victim Shona Mia was quite okay, but out of emotion and excitement he became sick. He also indicated that the police was interested to initiate the case. All these contradictions and inconsistency in the evidence of prosecution witnesses cast a deep shadow of doubt on the prosecution case. In such a case, we have no way but to give benefit of doubt to the appellant.

In view of the above, we are inclined to allow the appeal. Accordingly, the appeal is allowed. The impugned judgment and order dated 31.8.1995 passed by the Additional Sessions Judge, Narayanganj in Session Case No.40 of 1994 is hereby set aside. The appellant is released from his bail bond.

Send down the lower Court records.

Naima Haider, J:

I agree.