

Present:

Ms. Justice Naima Haider

and

Mr. Justice Md. Ruhul Quddus

Criminal Appeal No.1248 of 1996

Shamsu Miah

... Appellant

-Versus-

The State

... Respondent

No one appears for the appellant

Ms. Promila Biswas, D.A.G.

...for the respondent

Judgment on 19.4.2011

Md. Ruhul Quddus, J:

This appeal under section 410 of the Code of Criminal Procedure is directed against judgment and order dated 8.8.1996 passed by the Additional Sessions Judge, Second Court, Brahmanbaria in Session Case No.26 of 1994 convicting the appellant under section 315 of the Penal Code and sentencing him thereunder to suffer rigorous imprisonment for seven years with a fine of Taka one thousand in default to suffer rigorous imprisonment for further six months.

Facts relevant for disposal of the appeal, in brief, are that one Sufia Khatun (P.W.1), a widow lodged a complaint before the Thana Magistrate, Brahmanbaria on 29.3.1994 stating that she got married with one Ayat Ali 20/25 years back. Out of their wed-lock, two daughters were born. Thereafter the said Ayat Ali died leaving her in a helpless condition. At that stage, she was maintaining her livelihood by joining Road Maintenance Project (briefly R.M.P) under Araishidha Union Parishad. The appellant being a Member of the Union Prishad tried to allure her giving more wheat and proposed to marry her. Being

refused, he threatened to stop her work in R.M.P, for which she had to surrender to the appellant, who established sexual contact with her giving assurance of marriage. Because of their sexual relation, she conceived and pressed him for marriage, but he killed time on different plea. Ultimately she delivered a male baby on 22.3.1994. The appellant came to know about her delivery and apprehending damage to his reputation, he along with two accomplices being equipped with different lethal weapons came to her house at about 10 p.m on 23.3.1994 and snatched away the newborn baby from her lap. They had killed the baby by throttling and concealed the dead body.

On receipt of the said complaint, the Magistrate sent it to Ashuganj police station with a direction to do the needful. Accordingly the police recorded Ashuganj Police Station Case No.2 dated 6.4.1994 and after investigation submitted charge sheet on 18.7.1994 against three accused including the appellant under sections 448, 497, 313, 318, 346 and 109 of the Penal Code. The case after being ready for trial, was sent to the Sessions Judge, Brahmanbaria and was registered as Session Case No.26 of 1994. The learned Sessions Judge by his order dated 18.10.1994 framed charge against all the accused under sections 315, 201 and 109 of the Code, to which they pleaded not guilty and claimed to be tried. Thereafter the case was sent to the Second Court of Additional Sessions Judge, Brahmanbaria for hearing and disposal.

The prosecution examined twelve witnesses in support of its case. After closing the prosecution, the learned Additional Sessions Judge examined the accused including the appellant under section 342 of the Code of Criminal Procedure, to which they reiterated their innocence, but did not examine any witness in defense. The defense case as it transpires from the trend of cross-examination that the appellant was innocent and the informant herself did not lodge the case. It was fraudulently initiated at the instance of one Harun

Chairman, who was a rival to the appellant. Actually the informant had miscarriage of pregnancy as she took anti-helminthic drug.

After conclusion of trial, the learned Additional Sessions Judge found the appellant guilty of offence under section 315 of the Penal Code and accordingly pronounced his judgment and order of conviction and sentence on 8.8.1996 as stated above, while acquitted two others as the case was not proved against them. Challenging the said judgment and order of conviction and sentence, the appellant moved in this Court with the instant criminal appeal and subsequently obtained bail.

This appeal has been appearing in the cause list since 4.4.2011 i.e before six days of starting the vacation. Yesterday it was taken up for hearing, but no one appeared to press the appeal. In view of its long pendency for nearly fifteen years, we took it up for disposal even in absence of the appellant and allowed the Deputy Attorney General to make her submissions.

Ms. Promila Biswas, learned Deputy Attorney General appearing for the State submitted that the learned Additional Sessions Judge on assessment of each and every piece of evidence correctly and clearly found the appellant guilty of offence under section 315 of the Code and as such there is nothing to interfere with the judgment by this Court.

We have examined the evidence and other materials on records. P.W.1, the informant Sufia Khatun did not support the prosecution case and stated that before death, her husband had assigned their (informant and her daughters') responsibility upon the appellant. Later on he (appellant) gave her daughter in marriage and after six months he himself married her (informant). She further stated that actually there was a miscarriage of pregnancy as she took anti-

helminthic drug. The aforesaid Harun Chairman along with two others namely, Abu Sayed and Hossain had taken her signature on the pretext of filing an application to CARE for grant of relief in her favour, using which they initiated the present case. She herself did not file any case against the appellant. At that stage she (P.W.1) was declared hostile by the prosecution. In cross-examination she stated that earlier the said Harun Chairman, his henchmen Hossain Member and Abu Sayed were made accused in a criminal case for killing the appellant's cousin, wherein he (appellant) was made a witness. Beside that he was sided with the sitting Chairman Shafiulla, a rival of Harun Chairman. Her daughter (meaning P.W.2) being abandoned by her (daughter's) husband was residing at the house of Harun Chairman. On a previous occasion the appellant had rebuked her because of her questionable character that is why she (P.W.2) took position against him.

P.W.2 Parvin Akter, daughter of the informant stated that she was present beside her mother at the time of delivery. Before sun-rising on 9th Chaitra (meaning the date of occurrence) her mother had delivered a normal baby, which she (P.W.2) informed the local people. On the date of occurrence, the appellant and two others co-accused entered into her mother's house at about 10 a.m and took away the newborn baby wrapping him with a cloth. She further stated that after filing of the case, the appellant and his accomplices had also taken away her mother. She stated in cross-examination that she had come to Court from the house of Harun Chairman.

P.W.3 Alauddin stated that on 9th Chaitra at about 7 a.m he along with some others rushed to the house of occurrence hearing hue and cry raised by P.W.2. He entered straight into the house finding the door open and saw a baby lying beside the informant. He asked the informant about legitimacy of the baby, when she replied that he (baby) was born out of illicit sexual relation between

she and appellant. In cross-examination he stated that Harun Chairman was his brother. He further stated that during investigation he did not say anything to police as to whether the informant had stated him about the illegitimacy of the baby, or whether he was accompanied by some others while visiting the house of occurrence. He also stated that Harun Chairman was present in the Court room.

P.W.4 Abu Taher, a local witness stated that he had accompanied P.W.3 at the time of visiting the house of occurrence and saw a clot of blood, nothing else. At this stage he was declared hostile and cross-examined by the prosecution. He denied the prosecution's suggestion that he saw any baby.

P.W.5 Afia Khatun stated that the informant had delivered a male baby on 9th Chaitra. She heard cry of the newborn baby and came to learn that the appellant was responsible for the birth of the illegitimate baby. She stated in her cross-examination that at the time of delivery she was not present, but after delivery she was there before sun-rising. She alone had gone there. She further stated that Harun Chairman was present in the Court room.

P.W.6 Kala Chowkider was tendered by the prosecution and the defense declined to cross-examine him. P.W.7 Omar Ali was also tendered, but cross-examined by the defense. In cross-examination he stated that Afia Khatun (P.W.5) was his wife. He heard about solemnization of marriage between the informant and appellant. He did not see any baby and the informant had told her that she had miscarriage of pregnancy because of taking anti-helminthic drug.

P.W.8 Mohammad Hossain stated that he knew the informant as well as the accused. Two years back P.W.2 went to his house in one morning and told that her mother had delivered a male baby. Then he advised her to communicate

the villagers and proceed legally. In cross-examination he stated that Shafiullah and Harun had contested the immediate past Union Parishad election, wherein Harun was defeated. He further stated that Harun was present in the Court room.

P.Ws.9-10 Farida Begum and A. Rashid respectively were tendered by the prosecution and the defense declined to cross-examine them. P.W.11 Md. Anwarul Islam stated that at the relevant time he was a Magistrate in Brahmanbaria. The informant made statement on 3.7.1994 before him under section 164 of the Code of Criminal Procedure. He affirmed that the statement made before him was voluntary.

P.W.12 Bijoy Chaterjee, the Investigating Officer stated that after being assigned for investigation of the case, he visited the place of occurrence, prepared the sketch map with index and recorded statements of the witnesses under section 161 of the Code. In cross-examination he stated that he had not examined Harun Chairman. Alauddin was not made a witness in the complaint/*ejahar*. Parvin Akter (P.W.2) did not tell him whether the accused showed her any weapon. He did not arrange any medical examination of the informant. She told him that she was pregnant and stated before the Magistrate that she had miscarriage because of taking anti-helminthic drug.

It appears that the informant (P.W.1) in her statement under section 164 of the Code stated that she and the appellant got married and her pregnancy was terminated because of having anti-helminthic drug. The aforesaid Harun Chairman and two others took her signature on the pretext of filing an application to CARE for grant of relief. The said statement was proved by the Magistrate, who asserted it to be voluntary. In her deposition she (informant) affirmed what she had stated before the Magistrate and also denied lodgment of

the case by herself. The complaint/*ejahar* was filed with a delay of five days without offering any reasonable explanation and without mentioning the circumstance, which prevented her to approach the police station immediately after the occurrence. P.W.2, a vital witness stated in her evidence that on the date of occurrence the accused took away the newborn baby at 10 a.m, but in the complaint/*ejahar* time of the said occurrence has been mentioned as 10 p.m. From a close reading of the evidence of P.Ws.1 and 2, their relation appears to be hostile and as such presence of P.W.2 beside P.W.1 at the time of her delivery is not believable. P.Ws.1, 4, 7 and 11 did not support the prosecution case. P.Ws.2, 3 and 5 although supported the case, their evidence are contradictory and sometime inconsistent. Admittedly P.W.2 was sheltered by Harun Chairman, while P.W.3 was his brother and P.W.5 worked under him. In the facts and circumstances of the present case their evidence cannot form the basis of conviction against the appellant. The contradictory evidence of the prosecution witnesses also cast reasonable doubt over the prosecution case. We also find in the lower Court records a registered *Kabinnama* that was filed before the Sessions Judge by way of a *firisti* on 18.10.1994 showing the appellant's marriage with the informant on 7.10.1994 and a written permission dated 6.10.1994 from the first wife of the appellant for his second marriage. The learned Judge in passing the impugned judgment and order of conviction did not discuss the contradiction and inconsistencies in evidence of the prosecution witnesses and the said materials, which could be adduced in evidence by the defense.

It further appears that Harun Chairman and his henchmen were especially interested in this case. He was not a witness in the case, but still was present in the Court room on each and every day of trial. Some of the prosecution witnesses admitted his rivalry with the appellant. The facts and circumstances of

the present case strongly suggest that the witnesses who supported the prosecution case were under his influence.

In view of the evidence on records and discussions made above, the charge under section 315 of the Penal Code against the appellant cannot be said to have been proved beyond reasonable doubt and therefore, he is entitled to be acquitted on benefit of doubt.

In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence dated 8.8.1996 passed by the Additional Sessions Judge, Second Court, Brahmanbaria in Session Case No.26 of 1994 is hereby set aside. The appellant is acquitted of charge leveled against him. He is also released from his bail bond.

Send down the lower Court records.

Naima Haider, J:

I agree.