

Present

Mr. Justice Obaidul Hassan

And

Mr. Justice Gobinda Chandra Tagore

**Criminal Appeal No. 427 of 1996**

Md. Sharifullah

..... Appellant.

.... Versus....

The State

..... Respondent.

Mr. Mr. Md. Khairul Alam

..... For the Appellant.

Mr. Biswajit Deb Nath, D.A.G. with

Mr. Nizamul Hoque Nizam, A.A.G and

Mr. Shaikat Basu, A.A.G

..... For the State.

Heard and Judgment on: 26.04.2011.

Obaidul Hassan, J.

This appeal has been preferred by the appellant against the Judgment and Order of conviction and sentence dated 18.4.1996 passed by the learned Additional Sessions Judge, 7<sup>th</sup> Court, Dhaka in Sessions Case No. 251 of 1993 convicting the appellant under section 302 of the Penal Code and sentencing him to suffer imprisonment for

life and to pay a fine of Tk. 5,000/-, in default to suffer simple imprisonment for a further period of 1 (one) year.

The prosecution case, in brief, is that the informant had dispute regarding land property with his cousins (চাচাতো ভাই). That cousin used to threaten the informant with dire consequence. In this regard a G.D. was lodged with Mirpur Police Station being G.D.E. No. 2761 dated 27.7.1992. On 11.8.1992 at 10:30 a.m., while, Masum, brother of the informant was going to Gulisthan via Mirpur Section No. 1, Sharifullah, cousin of the informant resisted the *Mishuk* (three wheeler) at Mirpur Technical turning point and pulled down Masum (deceased) from the *Mishuk* and hit him with an iron rod, hokey-stick etc. which caused bleeding injuries on different parts of his body. The accused snatched away a SEIKO Five wrist watch from Masum. While, he raised alarm the neighbouring people came to the place of occurrence and took him to the Suhrawardy Hospital. Thereafter, he was taken to the Chest Diseases Hospital. Since the ribs of

Masum were broken, he was under treatment in that hospital. After receiving the information from the hospital the informant lodged a First Information Report with Mirpur Police Station, which gave rise to Mirpur P.S. Case No. 47 dated 11.8.1992 under sections 323/ 325/ 371 of the Penal code. On 13.08.1992 Masum succumbed to the injuries.

The Investigating Officer after investigation of the case submitted charge sheet against the accused under section 302 of the Penal Code.

Thereafter, the case record was transmitted to the Court of learned Sessions Judge, Dhaka. Then the case was sent to the 7<sup>th</sup> Court of Additional Sessions Judge, Dhaka for disposal. The learned Additional Sessions Judge, framed charge against the appellant under section 302/102 of the Penal Code. While, he charge was read over to the appellant, he pleaded not guilty and claimed to be tried.

In order to substantiate the allegation against the appellants, the prosecution in all examined 9 witnesses.

After completion of taking evidence the convict appellant was examined under section 342 of the Code of Criminal Procedure. During this examination he again expressed his innocence and refused to examine any witness in his favour.

After conclusion of the trial the learned Additional Sessions Judge by the impugned judgment and order convicted the appellant under section 302 of the Penal Code and sentenced him to suffer imprisonment for life and to pay a fine of Tk. 5,000/-, in default to suffer simple imprisonment for a further period of 1 (one) year.

Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence the appellant preferred the instant appeal.

The defence case as it transpires from the trend of cross-examination of the witnesses is that the victim died due to street accident and the appellant has been implicated in the case out of previous enmity. He did never commit the offence as alleged.

Mr. Md. Khairul Alam learned Advocate appearing on behalf of the appellant submits that the occurrence took place on 11.8.1992 at 10:30 a.m. and FIR was lodged on the same day at 23:45 p.m. The victim died on 13.8.1992 at 7:00 a.m. and inquest report was prepared on the same date at 12 noon. He submits that the prosecution totally failed to prove the case beyond reasonable doubt particularly in respect of place, time and manner of occurrence. He further submits that admittedly, the place of occurrence was the Technical turning point at Mirpur, but no one from that area came to the Court to depose in support of the prosecution case. He pointed out that the I.O. without any proper investigation submitted charge sheet as he himself stated before the court that he could not identify the place of occurrence. He further submits that prosecution tried to prove the case against the appellant by a number witnesses who were highly interested. P.W. 2 admitted that he had a very good relation with the victim and his mother, brothers and sister, which proves that he

was an interested witness. He further submits that in the whole case not a single witness was examined other than the close relations of the victim. Even father, wife and step-brothers of the victim were not examined. In this case four Investigating Officers investigated the case part by part, but only one I.O. was examined. The I.O. Abed Ali, Abdul Mabud and Nurul Hossain did not come to the Court to depose in favour of the prosecution case. He further submits that I.O. (PW-9). in his deposition stated that he examined the witnesses after 6 (six) months from the date of occurrence. The other witnesses also admitted that they were examined by the I.O. after 6 (six) months of the date of occurrence. In this regard he submits that since they were examined after a long delay of date of occurrence the learned Additional Sessions Judge should not have put reliance upon their testimony. The investigation of the case can be said to have been done with a flaw. Finally, he submits about the dying declaration on the basis of which the judgment has been passed. Mr. Khairul Alam submits

that the dying declaration was alleged to have been made on 8:00 p.m. on 11.8.1992, thereafter, the FIR was lodged. From the time of making of the dying declaration till filing of FIR it took 3 hours and 45 minutes, but the informant did not mention anything regarding the alleged dying declaration in the F.I.R. Even subsequently, when the witnesses were examined by the I.O. after 6 (six) months of the occurrence, they had the opportunity to say about the dying declaration to the I.O. but they did not say anything in this regard, which creates a great doubt about the dying declaration itself. He further submits that other than this unauthenticated and uncorroborated dying declaration there is nothing to show from the evidence of the witnesses that the charge has been proved against the appellant. He further submits that in the post mortem report doctor opined that death was due to street accident. Subsequently, when this post mortem report was reassessed by the experts they also stated that the death was caused due to "Haemopneumothorax" লিখা আছে এর অর্থ

বাতাস মিশ্রিত রক্ত due to R.T.A. ” which usually causes due to street accident. He further submits that for the argument sake if we accept that the dying declaration was made by the victim at the hospital but we find that none from the hospital particularly the nurse who attended the victim and in who’s presence the alleged declaration was made, was not examined, which creates a great doubt about the truthfulness of the dying declaration itself. Mr. Khairul Alam in support of his submission referred the case of Kala Mia and others -Vs- State reported in **6 BLC, 335 and** the case of State -Vs- Liton @ Abdul Matin and others reported in **7 BLC, 622.**

Last of all, he submits that since the victim died for the cause of street accident according to the medical expert’s report and since the dying declaration allegedly made by the victim was not at all truthful, the judgment passed by the learned Additional Sessions Judge is not sustainable in law and the same is liable to be set-aside.

Mr. Biswajit Deb Nath, learned Deputy Attorney



General appearing on behalf of the State candidly submits that the judgment and order of conviction and sentence was based mainly on the dying declaration. The dying declaration was made by the victim before his death, holding his mother's hand saying that “ মাগো শরীফউল্লা আমাকে মাইরা ফালাইছে।” Learned D.A.G. submits that before death a man can never lie. He expressed to his mother actually what happened, which was corroborated by all other witnesses who were present there and since this dying declaration has been corroborated by the other witnesses, the conviction and sentence based on this dying declaration is justified. He further submits that even a sole dying declaration is enough to convict any person if it is not at all corroborated by other evidence but of course it is to be true. He further submits that since Sharifullah had a previous enmity with the victim, he might have done the heinous offence and since the victim made a dying declaration clearly making an allegation against Sharifullah that he pulled him down from the *Mishuk* and hit with the

rod and hockey-stick on his body, this dying declaration should not be disbelieved and the learned Judge believing this dying declaration has rightly convicted the appellant and awarded the sentence to him. In this regard the learned D.A.G refers to the decisions made **in the case of Milon @ Shahabuddin Ahmed vs State 53 DLR, 464 and another case of Mustafa (Md.) -Vs- State reported in 1 BLC, 82 and a case of Nurjahan Berum Vs. the state reported in 42 DLR (AD) 130.** Learned D.A.G. was asked by this Court why the witnesses did not say anything regarding the dying declaration in the FIR and also before the I.O. In reply the learned D.A.G. submits that even if it is not disclosed by the witnesses to the I.O. it can be cured under section 537 of the Code of Criminal Procedure and their statement before the Court is the legal evidence and it should be accepted as true. Learned D.A.G. further submits that the number of witnesses are not important to prove a case, the point is whether the witnesses were trustworthy? In this case mother, brother

and sister were the witnesses and at the instruction of the mother, FIR was lodged. He further submits that when the unfortunate mother heard a hard reality from his son who was lying in a death bed, there is no reason to disbelieve the testimony of this innocent mother of the victim. With this few words learned D.A.G. concludes his argument and supporting the judgment submits that the appeal should be dismissed.

Now, let us see whether what the P.Ws said in their deposition.

P.W. 1 Md. Masud the brother of the deceased and the informant of the case deposed before the Court stating that on 13.8.1992 his brother died at 7:00 a.m. while he was under treatment at Chest Diseases Hospital. On 11.8.1992 at about 5:00 p.m. when he came to his house he found that his sister in law (Mamun's wife) and his aunt (মাম্মী) came to his house. On his query his sister-in-law said that his mother had gone to the Chest Diseases Hospital to see her injured son. Thereafter, he along with his aunt went to that

hospital and on query he came to know that his brother was brought to this hospital from Suhrawardi Hospital having injury of broken ribs and he has been kept in the emergency ward. Thereafter, he went there and found that his mother, aunt (khala), younger sister Sahnaz Pervin and another younger brother Abu Musa Ahmed were there. Thereafter, the neighbour Jasim came to that place. When he asked his mother about the condition of his injured brother at about 8:00 p.m., nurse came to that place and said that Masum regained his sense. At that moment the informant along with others entered into the room of Masum, he (Masum) holding the hand of his mother said to the effect that “মা শরিফউল্লা আমাকে মাইরা ফালাইছে ” . This witness further stated that on his query Masum said that while he was going from Mirpur Section-1 to Gulisthan by a *Mishuk* and while he reached at the turning point of Technical, Sharifullah along with 3/4 persons stopped his *Mishuk* and pulled down him and hit him with an iron rod, hockey stick etc. While, he raised alarm saying “ বাঁচাও বাঁচাও “

the neighbouring people came to the place of occurrence, subsequently Masum lost his sense. Sharifullah snatched away a SEIKO Five wrist watch from Masum. At that time the nurse came to that place and asked them not to speak with the patient. Thereafter, this witness went to the Mirpur Police Station and lodged the FIR. He proved the FIR as Ext. 1 and his signature in it as Ext. 1/1. He identified accused Sharifullah in the dock. Before this incident the mother of this witness lodged two G.Ds.. One was with Mirpur Police Station and another with Tajgaon Police Station. The Sub-Inspector (S.I.) of police Abed Ali prepared the inquest of the dead body on 13.8.1992 at 12:00 noon. At that time he was present there and he put his signature in it. He identified the inquest report as Ext. 2 and his signature in it as Ext. 2/1. He further stated that Sahid and Nahar both put their signature in the inquest report. Nahar is his step-brother. He further stated that he knew the signature of his step-brother and he identified the signatures of Sahid and Nahar as Ext. 2/2 and 2/3. He

further stated that he saw marks of scratch injury and marks of rod blow on the body of the deceased. Since the investigation was not going in a proper way he filed an application before the Inspector General of Police (I.G.P.) raising his objection. This application was proved by him as Ext. 3 and his signature in it as Ext. 3/1. Thereafter, on 22.11.1992 he filed another application before the I.G.P. He proved his application dated 22.11.1992 as Ext. 4 and his signature in it as Ext. 4/1. In cross-examination this witness stated that the FIR was not written by him, one clerk wrote the FIR. The person, who recorded the case, did not write the FIR, another clerk wrote the same. The contents of the FIR were of his own. After hearing about the incident from his brother he lodged this FIR. He stated that he did not write in the FIR that he found his sister-in-law (ভাবী) and aunt (মামী) in his house. He further stated that he did not write in the FIR that he asked his bhabi about the whereabouts of his mother. He further stated that he did not write in the FIR that Bhabi said that "his mother

was in the Chest Diseases Hospital.” He further stated that he did not write in the FIR that after hearing from his sister-in-law about the serious condition of his brother he went to the hospital. He further stated that he did not write in the FIR that along with his “mami” he went to the hospital. He further stated that he did not write in the FIR that he found his mother, aunt (খালা) Amena, sister Sahnaz and younger brother Abu Musa in the hospital. He further stated that he did not mention in the FIR that he heard from them that his brother (victim) was in the emergency ward of the hospital. He further stated to the effect that:

“আমরা ইমারজেন্সী ঘরের ভিতরে গেলে ভাই মাছুম আমার মা এর হাত ধরিয়ে বলে “মা শরিফ উল্লা আমাকে মাইরা ফালাইছে” এই কথা এজাহারে বলি নাই। তবে শরিফ উল্লা আমার ভাইকে মারিয়াছ এই মর্মে এজাহারে বলি.যাছি । আমার ভাই “ বাঁচাও বাঁচাও” বলে এই মর্মে এজাহারে বলি নাই তবে চিৎকার করিলে লোকজন আসে এই কথা এজাহারে বলিয়াছি। আমরা কথা বলার পরে নার্স আসিয়া বলেন “ আর কথা বলিবেন না “ এই মর্মে এজাহারে বলি নাই। He further stated that the nurse came to attend the patient when Masum said to them that Sharifullah beat him. He further stated that while they

were talking with Masum no person of the hospital was present there. He further stated that the nurse after asking them to come to Masum's room she went away. He further stated that he had mentioned in the FIR that there was a dispute regarding land between them and their uncle and cousin. He denied the suggestion that Asadullah, the younger brother of the accused was attacked by Masum with a sharp cutting weapon. He stated that Tejgaon Police Station case No. 39 (7) 92 under section 326 was lodged in this regard. He denied the suggestion that on 16.7.1992 Masum attacked Asadullah. He further denied the suggestion that since Tejgaon Police Station case No. 39 (7) 92 was lodged against them, they falsely implicated Sharifullah with the present case. He further stated to the effect that: " সোহরাওয়ার্দি হাসপাতালে আনোয়ারা বেগম নামে কোন নার্স আমার নানী নাই। আনোয়ারা বেগম নামে নানী নাই। এমন নামে কেহ স্টেটমেন্ট করেন কিনা জানি না। ". He further stated that he helped the D.B. Inspector in investigating the case. Shah Alam gave him information after arresting the accused and, thereafter, he



identified the accused. He further stated that on 11.8.1992, 12.8.1992 and 13.8.1992 he met his brother Masum. Then he said that on 13.8.1992 the victim died. He further stated that on 12.8. 1992 he did not talk with the victim. He denied the suggestion that since 11.8.1992 to 13.8.1992 the victim Masum was unconscious. He further denied the suggestion that since his brother was admitted to the hospital till his death, he could not say anything.

P.W. 2, Md. Jasim Uddin, a neighbour, deposed in the Court stating that in the emergency ward he saw Masum's mother, brother Masud, Abu Musa Majnu, sister Sahnaz Pervin, Masum's two aunts (মামী এবং খালা). He further stated that when he asked them about the condition of Masum, Masum's mother told him that after operation Masum was taken to a room but till then Masum was unconscious. He further stated that opening the door of the room of the Hospital he saw Masum was lying on the bed in an unconscious condition and a saline was pushed in his vein. At 8:00 p.m. one nurse came to them while he was

standing with the family members of Masum. The nurse asked whether there was any member of the family of Masum, then the mother of Masum replied in affirmative, she (nurse) asked her to go to Masum as Masum has regained his sense. Thereafter, Masum's mother and others present there went nearer to the Masum's bed. At that time Masum holding his mother's hand said that " মা শরিফ উল্লা আমাকে মাইরা ফালাইছে". Thereafter the informant asked Masum how and where the incident took place. In reply Masum said while he was coming by a *Mishuk* from Mirpur Section-1 to go to Gulisthan he was resisted by Sharifullah and 3 /4 others at the Technical turning point and he was pulled down from the *Mishuk*. Sharifullah hit him with iron rod and hockey stick as a result he lost his sense. At that time Masum's brother and sister started crying and the nurse asked them not to make any noise there and asked them to go out. He further stated that he himself and other relations of Masum, heard Masum' statement. He further stated that on the basis of this statement Masud

being informant lodged an FIR. On 13.8.1992 at 7:00 p.m. Masum died. He further stated that in the month of February, 1993 he was examined by D.B. Inspector Shah Alam. On 20.2.1993 the I.O. seized a pant and a shirt and prepared a seizure list and he put his signature in it. He proved the seizure list as Ext. 5 and his signature in it as Ext. 5/1. In cross-examination he stated that he knew Masum's wife, parents and his brothers and sisters. He further stated that he had intimacy with the family members of Masum. He heard from Sadik and Rahim that Masum was sent to the Chest Diseases Hospital. In presence of Sadik, Rahim and 3 /4 persons he heard about the incident and, thereafter, he went to the Chest Diseases Hospital. He further stated that in the hospital he found mother, brother and sister of Masum and some doctors and nurse. He denied the suggestion that he used to go to Masum's house frequently. He had a close relationship with them. He stated that he had normal relationship with the family members of Masum. He further stated to the

effect that “ মাছুমের মা বলে অপারেশনের পরে মাছুমের জ্ঞান ফিরে নাই।” He further stated that at 8:00 p.m. nurse came to Masum’s mother and informed them that Masum has regained his sense. This witness stated that he did not say to the I.O. that the nurse came to Masum’s mother and said about regarding the statement of nurse regarding the regaining the sense of Masum. He further stated that he said to I.O. that “ দরজা ফাঁক করিয়া আমি মাছুমকে দেখিয়াছি “ “ আমি গিয়া দেখি মাছুম বেহুশ অবস্থায় পোস্ট অপারেশন রুমে পড়িয়া আছে। ”

P.W. 3, Abu Musa Ahmed (Majnu), brother of the victim and informant, in his deposition stated that at about 3:00 p.m. he went to his house and came to know that Masum was admitted to Chest Diseases Hospital being seriously injured. He further stated that he, his sister Pervin and his aunt (খালা) Amena Begum went to the Chest Diseases Hospital by a Baby-Taxi. He also stated that he found his mother was standing in the veranda of the hospital. At that time Masum was unconscious. He entered into the room and found his brother in an unconscious

condition. Thereafter, he waited in the veranda of the hospital. At 8:00 p.m. the nurse came to them and said Masum has regained his sense and asked them to go to him. He further stated that, they all entered into the room and went nearer to Masum's bed. At that time Masum holding his mother's hand said that " মা শরিফউল্লা আমাকে মাইরা ফালাইছে". At that time his another brother Masud asked him how and where the incident took place, in reply Masum said while he was coming from Mirpur Section-1 with a *Mishuk* and was proceeding towards Gulisthan, at the Technical turning point he was resisted by Sharifullah and 3 /4 other persons and he was hit by Sharifullah with iron rod and hockey stick. In cross-examination he further stated that he never went to the place of occurrence. He further stated that he did not know whether anyone went to the place of occurrence. He further stated that he did not know whether the neighbouring people of the place of occurrence came to their house. He further stated that he did not go to ask the shop owners situated at the place of

occurrence to know how his brother was injured. He also stated that D.B. Inspector examined him six months after the occurrence took place. He further stated that D.B. Inspector examined his mother, sister, brothers and P.W. 2 Jasim. He denied the suggestion that they were examined by three Investigating Officers other than Abed Ali. He further stated to the effect that: “ আমার মা নার্সকে জিজ্ঞাসাবাদে বলেন আমি মাছুমের মা, এই মর্মে আমি পুলিশের কাছে বলিয়াছি। আমি মা, বোন, খালা, ভাই মাছুম, মামী, জসিম সবাই মাছুমের ঐ রুমে ঢুকি এই কথা পুলিশকে বলিয়াছি।” মাছুম বলে বাঁচাও বাঁচাও বলিলে মনে হয় কিছু লোক আসে” এই কথা পুলিশকে বলিয়াছি। আমার মা বোন ঘটনা শুনিয়া কান্নাকাটি করে এই মর্মে পুলিশের কাছে বলিয়াছি” নার্স বলে রক্ত লাগবে, মা শ্লিপ দিয়া রক্ত আনার কথা বলিলে মাছুম একজনকে সহ রক্ত যোগাড় করিতে যায়” এই কথা পুলিশের কাছে বলিয়াছি।” He denied the suggestion that Masum did not regain his sense while he was in the Chest Diseases Hospital. He further denied the suggestion that out of previous enmity they lodged a false case against the accused.

P.W. 4, Sahnaz Pervin is the sister of the informant and the victim, in her deposition she stated that at 3:00

p.m. on 11.8.1992 while she was sewing embroidery on a cloth, one unknown person came to their house and asked her whether it was the house of Masum when she replied in affirmative. The unknown person told her that Masum was admitted to Chest Diseases Hospital being injured seriously. At that time she informed her mother. When they came to the gate they found that the person came to their house went away. She further stated that by a Baby-taxi she went to the Chest Diseases Hospital at about 4:00 p.m. along with her aunt (khala). At about 8:00 p.m. nurse came to them and said that Masum has regained his sense and asked them to go to him. At that time they all went to the place of Masum who holding his mother's hand said to the effect that " মা শরিফউল্লা আমারে মাইরা ফালাইছে". On query by his another brother, Masum said while he was coming from Mirpur Section-1 to Gulisthan, Sharifullah resisted him at Technical turning point and other 3 /4 persons went there and hit him with iron rod and hockey sticks. At that time the neighbouring people were coming to the

place of occurrence. Hearing this statement from Masum her mother and she started crying. She further stated that nurse came to them and asked them to go out and not to make any noise at that place. The nurse also said blood would be required for Masum. She further stated that her mother was saying that “ আমি দুইটি জি,ডি, করার পরও আমার ছেলেকে শরিফ মারিল।” She further stated that her mother asked Masud to go to the Police Station to file a case. Masud along with Jasim went to Mirpur Police Station and filed this case. In cross-examination this witness stated that she lived with her husband at her father’s house. He further stated that six months after the occurrence took place, police came to their house. She further stated that she was examined by the police after six months of the occurrence. She further stated to the effect that “ মিরপুর থানার দারোগার কাছে বলি নাই যে, “ নার্স বলে মাছুমের জ্ঞান ফিরিয়াছে আপনারা আসেন” আমি, মা, মাসুদ, খালা আমেনা, রিতা, মজনু একসাথে মাছুমের কাছে যাই এমন কথা মিরপুর থানার দারোগার কাছে বলি নাই। মাছুম মায়ের হাত ধরিয়া বলে শরিফউল্লা আমাকে মারিয়া ফেলিয়াছে, এই মর্মে মিরপুর থানার দারোগার কাছে বলি নাই। মাসুদ জিজ্ঞাসা করিলে মাছুম বলে ১ নং মিরপুর হইতে



মিণ্ডক নিয়া গুলিস্থান যাওয়ার পথে টেকনিক্যালের মোড়ে শরিফ আরো ৩/৪ জন হকিস্টিক দিয়া আমাকে মারে, বাঁচাও বাঁচাও বলিয়া চিৎকার করিলে মনে হইল কিছু লোক আগাইয়া আসিয়াছে এই মর্মে কোন কথা মিরপুর থানার দারোগার কাছে বলি নাই।“

She further stated that her husband was not a witness of the case.

P.W. 5, Ambia Khatun is the mother of the victim, In her deposition she stated that on 11.8.1992 at about 3:00 p.m. her daughter Sahnaz informed her that her son Masum was admitted into Chest Diseases Hospital having grievous injuries on his body. At that time she asked her daughter, from where she got this information? In reply she said an unknown person came to their house and gave this information. Thereafter, she went to the hospital. She further stated that after reaching there she saw her son was lying there, blood was coming out from his mouth. At that time nurse came to her and gave a piece of paper to her to put her signature in it, because her son was needed to be operated at that time. Accordingly, she put her signature. It was a consent letter to operate her son making him

unconscious. She proved this consent letter as Ext. 6 and her signature in it as Ext. 6/1. She further stated that at about 8:00 p.m. the nurse came to her and said Masum has regained his sense and asked her to go to him. She further stated that when she went to her son her son told her that “মাগো শরীফুল্লা আমারে মাইরা ফ্যালাইয়াছে” তখন মাসুদ জিজ্ঞাসা করে ভাই আপনারে ক্যামনে ও কোন জায়গায় মেরেছে। তখন মাসুদ বলে “ আমি ১ নং মিরপুর থেকে মিশুক দিয়ে গুলিস্থানে যাচ্ছিলাম টেকনিক্যালের মোড়ের সামনে যাইতেই আমার মিশুক আসামী শরীফুল্লা ও ৩/৪ জন অপরিচিত লোক থামায় ও শরীফ আমাকে মিশুক থেকে টেনে নামায় ও শরীফ নিজে ও ৩/৪ জন অপরিচিত লোক আমাকে লোহার রড ও হকিস্টিক দ্বারা মারতে থাকে। তখন আমি বাঁচাও বাঁচাও বলে চিৎকার মারিতে থাকি ও মনে হলো কিছু লোকজন আসছে এরপর আর কিছু বলতে পারি না ” While they started crying, the nurse asked them to go out and not to make any noise there. She further stated that at that time she asked her another son Masud to go to Mirpur Police Station and to lodge an FIR. She also asked Jasim to go with her son. She further stated that she and her sister spent the night at the veranda of the hospital. On 13.8.1992 at 7:00 a.m. her son died. She further stated that regarding collection of rent of a house the accused Sharifullah

threatened the victim with dire consequence. She further stated that Masum told her that Sharifullah said him if he goes to Tejgaon to collect rent he would be killed. On the basis of this incident she filed a G.D. being G.D.E. No. 850 with Tejgaon Police Station. She proved the copy of G.D. as Ext. 'X'. In cross-examination she denied the suggestion that she did not say anything because she did not give statement to the Investigating Officer Abed Ali. She denied the suggestion that on 11.8.1992 Anowara, one of her distant relations took Masum to the Chest Diseases Hospital from Suhrawardy Hospital. He denied the suggestion that she told the I. O. that Anowara informed her that she took Masum to the Chest Diseases Hospital from Suhrawardy Hospital. She further stated that she only gave her statement to the I.O. of D.B. She further stated that her husband Hasan Ali Matbar, his friend Salim and Jalil went to the hospital on that night. She further stated that she did not say to I.O. (Shahrum Khan) that on 12.8.1992 at 3:00 p.m. her husband went to see her son. She

further denied the suggestion that on that night her husband and her step son Monu went to see her son Masum, and he (Masum) told Manu that “মনু ভাই যা হবার হয়ে গেছে আপনি আমার মা ও ভাইকে দেখেন”. She denied the suggestion that she did not say anything to the I.O. that Sharifullah threatened Masum with dire consequence regarding collection of rent of a house.

P.W. 6, Amena Begum in her deposition stated that on query she came to know that her sister (mother of the victim) went to the hospital at about 1:00 p.m.. Thereafter, she along with her niece went to the hospital and found her sister Ambia Begum was standing out side of the room. At about 8:00 p.m. a nurse of the hospital came to the mother of the victim and said that her son regained his sense and asked them to go to her son and then this witness along with her sister and others went to the victim and found him lying in the bed of the hospital and he (victim) talked to them. At that time the victim told his mother that “ মাগো “ শরীফ আমারে মাইরা ফ্যালাইছে।” At that time his

brother Masud asked him how and where he was beaten. In reply the victim said that while he was coming from Mirpur Section No. 1 and was proceeding towards Gulistan he was resisted by Sharif at the Technical turning point. He was pulled down from the *Mishuk* and was hit by iron rod and hockey-stick. In cross-examination this witness stated that Masum's father was alive at the time of occurrence. She could not say whether he came to see his injured son. She further stated that the name of Masum's wife was Mishti.

P.W. 7 is the Doctor, who held post mortem on the dead body of the victim. In his deposition stated that he found the following injuries on the body of the deceased:

“১) বাম পায়ের উরুর সম্মুখ বাহির দিকে ৩" X ৩"

২) বাম হাতের forearm এ ২" X ১"

৩) বুকের বাম নিম্নাংশে ছাল যাওয়া জখম--grasing ৪" X ৩"

৪) শরীরের অন্যান্য জায়গায় ছোট ছোট অনেক গুলি ছলে যাওয়া জখম

(multiple abrasion)

৫) বুকের ডান দিকে anterior axillary line বরাবর 5th inter costel

space বরাবর শৈল্য সেনাইকৃত জখম যাহা  $\frac{3}{2}$ ” লম্বা।

শবব্যবচ্ছেদঃ

- ১। উল্লেখিত জখমের স্থান সমূহে মৃতপূর্ব সংকটের চিহ্ন বিদ্যমান।
- ২। উদর গহবরে সকল ujera ও বিল্লী বীজানু সম্বলিত।
- ৩। Intentine একের সাথে অন্যটি লাগানো (matal)
- ৪। উদর গহবরে Sero Sanguinous বিদ্যমান।
- ৪-ক) ক্ষুদ্রান্তে এক স্থানে ফুটা ছোট (৫) বুকের বাম পাজরের হাড়
- ৫-১০ সবগুলি
- ভাংগা (৬) ডান পাজরের হাড় ৩-৫ ভাংগা (৭) বাম ফুসফুস (Lungs) কুচকানো (Collapsed) (৮) উভয় ফুসফুস আঘাত প্রাপ্ত, (৯) বক্ষগহবরে Sero Sanguinous বিদ্যমান। ”

In his opinion he stated that:

“মৃত্যু আমার মতে উল্লেখিত জখমসমূহ হইতে উদ্ভূত জটিলতায় সম্পন্ন যাহা মৃত্যু পূর্ব ও দুর্ঘটনা জনিত। যাহা হাসপাতালে মৃতের প্রমান পত্রের সহিত সামঞ্জস্যপূর্ণ কিন্ত সুরতহাল বর্ণিত মারপিটের জখমের সহিত সংগতিপূর্ণ নয়। ”

He proved the post mortem report as Ext. 7 and his signature in it as Ext. 7/1. This witness was declared hostile by the prosecution and was cross-examined. In cross-examination he stated that “it is true that in the inquest report the cause of death was mentioned as “indiscriminate beating”. He denied the suggestion that

the opinion portion of the post mortem report was given by him being influenced by the relations of the accused. In cross-examination done by the defence he stated that the post mortem report was correct and the opinion was not biased. The death certificate was attached with the post mortem report. He further stated that in his opinion death was due to street accident which was ante-mortem. He further stated to the effect that: ডেইথ সার্টিফিকেটে “ Haemopneumothorx ” লিখা আছে এর অর্থ বাতাস মিশ্রিত রক্ত due to R.T.A. মানেই রাস্তায় দুর্ঘটনা জনিত। পরবর্তীতে এটা মেডিকেল বোর্ডে যায় কিনা তা জানা নেই। ”

P.W. 8, Rawshan Ali was an Assistant Sub-Inspector of police at the relevant time, he filled up the FIR form which was proved by him as Ext. 8 and his signature in it as Ext. 8/1. He further proved his signature given in the margin of the FIR as Ext. 1/2. In cross-examination he stated that the FIR was not written by him. It was lodged at 23 : 45 hours.

P.W. 9, Md. Shahrums Khan, a police Inspector, who was the I.O. of the case. During investigation he visited the place of occurrence, seized *alamots*, prepared a seizure list. He proved the same as Ext. 5 and his signature in it as Ext. 5/2. He further stated that he seized all the relevant papers of treatment given to the victim sitting in the room of the Registrar of Chest Diseases Hospital, Dr. Md. Safayet Karim. He prepared another seizure list and proved the same as Ext. 9 and his signature in it as Ext. 9/1. He recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure. After investigation since prima-facie was found against the accused he submitted charge sheet against him under section 302/201 and 203 of the Penal Code. He identified the shirt of the victim as material Ext. 1 and a pant as material Ext. 2. In cross-examination this witness stated that he could not identify the place of occurrence. He further stated that there is nothing in the C.D. regarding seizing the articles. He further stated that he himself also did not do this. He



further stated that he did not know when the victim was admitted to Suhrawardy Hospital. He further stated that he mentioned in the charge sheet that some people brought the victim to the Suhrawardy Hospital and managed to admit him concealing their identity. In a similar way the victim was admitted to the Chest Diseases Hospital which was mentioned in the charge sheet. . He further stated that the previous I.O. while preparing inquest report mentioned that the death was caused due to indiscriminate beating but in post mortem report it was mentioned that the death was caused due to street accident which was ante-mortem. . He further stated in the charge sheet he mentioned that “ মহাখালী বক্ষ ব্যাধি হাসপাতালের ডাক্তার মৃত্যু প্রমাণ পত্রে উল্লেখ করেন যে, সড়ক দুর্ঘটনায় বক্ষ গহ্বরে রক্ত ক্ষরণে তাহার মৃত্যু ঘটিয়াছে। ” . He further stated that S.I. Abed recorded the statement of the mother of the victim under section 161 of the Code of Criminal Procedure, in that statement she did not mention the name of the accused. . He further stated that S.I. Abed Ali recorded the statements of Doctor Sayeda, Medical

Officer of Shaheed Suhrawardi Hospital, Hasan Matbar the father of the victim, Monowar Ali-step brother of the victim and Anowara Begum wife of Abdul Mojid. He further stated that Ambia Khatun was examined under section 161 of the Code of Criminal Procedure on 20.2.1993. She was also examined by another I.O. on 25.10.1992. . He further stated that Ambia Khatun in her statement under section 161 of the Code of Criminal Procedure (recorded by Abed Ali) stated to the effect that “১১-০৮-৯২ ইং আমার দূর সম্পর্কের আত্মীয়া আনোয়ারা আমার ছেলে মাসুমকে সোহরাওয়ার্দী হাসপাতাল হইতে সকাল ১০.০০/১০.৩০ মিনিটে আমার বাসায় বেবী ট্যাক্সিতে করিয়া লইয়া আসে।” He further stated that : “ সাক্ষী আশ্বিয়া উজ্জ দারোগার নিকট আরো বলেন যে, ছেলে তাহার বুকে খুব ব্যাথা বলিয়া জানায়। সাক্ষী আশ্বিয়া উজ্জ দারোগার নিকট আরো বলিয়াছিলেন যে, তখন ঐ বেবীতে করিয়া তিনি তাহার ছেলে মাসুমকে বক্ষ ব্যাধি হাসপাতালে লইয়া ভর্তি করান। ” This witness also stated that P.W. 2 Jasim Uddin , P.W. 3 Abu Musa, P.W. 4 Sahnaz Pervin did not say anything to him regarding the declaration made by the victim before them at the relevant time. He further stated that P.W. 6 told him that on 12.8.1992 she and her

niece went away from the hospital. He further stated that P.W. 6 did not say to him that “ নার্স আসিয়া মাসুমের লোকজনের খোঁজ করে। মাসুমের মা বলে তিনি মাসুমের মা। নার্স বলে মাসুমের জ্ঞান ফিরিয়াছে।”

We have gone through the impugned judgment, evidence adduced by the prosecution witnesses and other materials on record particularly the medical certificates, post mortem report, inquest report and re-assessment certificate about the post mortem report given by the medical experts. We have also considered the submissions of the learned advocates and other attending circumstances. The whole judgment is based on the dying declaration alone. Admittedly there was no any eye witness of the incident. No one came to the Court to support the prosecution story from the neighbouring area of the place of occurrence. It is not available in the record who brought the victim to the Suhrawardy Hospital thus the person who brought the victim to Suhrawardy Hospital was not examined. We find a name of one Anowara Begum who brought the victim to the Chest

Diseases Hospital. But neither of the prosecution witnesses said that Anowara brought the victim to the Chest Diseases Hospital, the defence suggestion was that Anowara was a relation of the informant and she took the victim to the Chest Diseases Hospital, but this Anowara was not examined. The man, who went to the house of the informant to inform the victim's relations about the incident was also not examined. It is also not clear whether the victim was driving the *Mishuk* (three wheelers) or he was carried by the said *Mishuk*. If he was carried by the *Mishuk* there was a driver of the same, who did not come to the Court to support the prosecution case. From the discharge certificate of the Chest Diseases Hospital it appears that the profession of the victim was mentioned as driver, so presumption can be drawn that he himself was driving the *Mishuk*. But the I.O. did not seize the *Mishuk* as he could not identify the place of occurrence even. The P.Ws 1, 3 to 6 are the brother, mother, sister and aunt of the victim, P.W. 2 is a neighbour, who was very close to the

family members of the victim, they in their deposition stated that in their presence the victim made a declaration that while he was coming from section 1 of Mirpur and was proceeding towards Gulistan, Sharifullah resisted him at Technical turning point and hit him with iron rod and hockey-sticks. These prosecution witnesses for the first time disclosed about the dying declaration before the Court. According to them this declaration was made by the victim at 8:00 p.m. of 11.8.1992. The FIR was lodged at 23.45 p.m. of the same date. In point of time the FIR was the earliest information to the law enforcing agency regarding the incident. In that FIR the informant did not mention about the declaration claimed to be made by his brother at the death bed. All the witnesses stated that they were examined by the I.O. after 6 months of the date of occurrence. During examination by the I.O. they also did not say anything regarding the dying declaration made by the victim on 11.8.1992, which creates a great doubt whether any dying declaration was at all made by the

victim. In this regard a decision reported in PLR 1965, Peshawar, 11 is pertinent. In this decision it has been held that:

*“If in the FIR there is nothing about dying declaration it should not be relied upon.”*

In the discharge certificate Ext. 12, it has been mentioned that the patient expired on 13.8.1992 at 7:15 a.m. due to Haemopneumothorx due to R.T.A. In the post mortem report cause of death was mentioned as below:

“মৃত্যু আমার মতে উল্লেখিত যখম সমূহ হইতে উদ্ভূত জটিলতায় সম্পন্ন যাহা মৃত্যু পূর্ব ও দুর্ঘটনা জনিত, যাহা হাসপাতালের প্রমানপত্রের সহিত সামঞ্জস্যপূর্ণ কিন্তু সুরতহালে বর্ণিত মারপিটের জখমের সহিত সামঞ্জস্য পূর্ণ নয়।”

It appears from the record that after giving this p.m. report the prosecution side filed an application before the Chief Metropolitan Magistrate, Dhaka for re-examination of the post mortem report by a Board of Experts. On the basis of this application a re-examination/ reassessment report was prepared by a Medical Board. The report of the

medical board was exhibited as Ext. 'Ka' in which it was mentioned that:

সংযুক্ত ময়না তদন্ত প্রতিবেদনটি পুনঃ পর্যালোচনাতে উক্ত মেডিকেল বোর্ড এই মর্মে সর্বসম্মতিএনে নিম্ন সিদ্ধান্তে উপনীত হয় যে,

১। মৃত দেহের উপর যে সকল যখমসমূহ ও মন্তব্য সমূহ উল্লিখিত হয়েছে মৃত্যুর কারণ সম্পর্কে মতামতের প্রথমাংশ - “মৃত্যু আমার মতে উল্লিখিত যখম সমূহ হইতে উদ্ভূত জটিলতায় সম্পন্ন যাহা মৃত্যু পূর্ব ও দুর্ঘটনা জনিত” - এর সহিত সঙ্গতিপূর্ণ ও সঠিক।

২। মতামতের পরবর্তী অংশ - “যাহা হাসপাতালের মৃত্যুর প্রমানপত্রের সহিত সামঞ্জস্যপূর্ণ, কিন্তু সুরৎহাল বর্ণিত মারপিটের যখমের সহিত সামঞ্জস্যপূর্ণ নয়” - বক্তব্যটুকু বাড়তি ও অপ্রয়োজনীয়।

৩। বাদীপক্ষের কৌশলীর মন্তব্য-- “নাথি পর্যালোচনায় দেখা যায় যে, মামলার এই মৃত্যু দুর্ঘটনাজনিত এমন কোন তথ্য বা এ ধরণের কোন সম্ভাবনার কথা এই মামলার কোথাও নাই” - এই বক্তব্য সম্পূর্ণ অসত্য।

১১-৮-৯২ ইং তারিখ ইহতে ১৩-৮-৯২ ইং তারিখ পর্যন্ত তিন দিন অবস্থান ও মৃত্যবরণের পর বক্ষব্যাদি হাসপাতাল প্রদত্ত মৃত্যুর প্রমানপত্রে সুস্পষ্টভাবে উল্লেখ করা হয়েছে যে, তাহার মৃত্যুর কারণ “Haemopneumothorax due to RTA.” অর্থাৎ সড়ক দুর্ঘটনায় বক্ষ গহব্বরে রক্তক্ষরণে তাহার মৃত্যু ঘটিয়াছে। এই প্রমানপত্র পাওয়ার পর এই হাসপাতালের প্রাক্সনে সুরৎহল তৈরীর সময় তদন্তকারী অফিসারের “পিটাইয়া হত্যার” মন্তব্যটির সত্যতা তদন্ত সাপেক্ষে।

From the medical evidence it appears to us that victim died due to street accident. From the trend of cross-examination by the defence it appears that the prosecution witnesses were given suggestion that the patient was not in a condition to speak anything as because he was unconscious since 11.8.1992 to 13.8.1992 till his death. Although it was denied by the prosecution but from the report of the Doctors' it appears to us that having such a grievous injury on the body of the victim possibly it was not possible for him to say anything. Admittedly having grievous injuries with number of broken ribs the patient was undergone for an operation and this type of operation must be a very major operation, where large number of ribs were broken and as per medical report Haemopneumothorax was caused. At this condition whether the patient could speak it is a vital question.

We have already mentioned that the defence categorically gave suggestion to the prosecution that the victim was not in a condition to speak. From the attending



circumstances and considering the medical report we are also of the opinion that the victim was not in a condition to speak anything. The so called dying declaration is not at all believable to us because (I) in the earliest point of time the informant and other P.Ws did not say anything regarding the dying declaration to the law enforcing agencies and the Investigating Officer (II) No independent witness from the hospital particularly the nurse, who was nursing the patient did not come to the Court to say that the patient made a dying declaration before the witnesses. (III) The condition of the patient (the victim) as mentioned in the medical reports was so measurable that he was not in a position to speak anything.

For the above reasons it appears to us that the statements made by the P.Ws. 1 to 6 before the Court was a subsequent development and is an embellishment of the real fact. In the case of Sk. Shamsur Rahman @ Shamsu Vs. The State reported in 42 DLR (Ad) 200 it has been held by their lordships that:

*“The conviction can be based on the dying declaration alone if it is true and corroborated by the attending circumstances.”*

In the decisions cited by the learned D.A.G. their lordships also expressed the same view that the cause of death of the victim narrated by him before death can be accepted as substantive evidence if it is found true and reliable.

In this particular case we do not see that the alleged dying declaration was corroborated by the other circumstances, particularly by the medical evidence. Thus we do not find that the alleged dying declaration was true, as such no reliance can be put on the said declaration.

It is also surprising why the father, wife and step brothers of the victim did not come to the court to support the prosecution story. The absence of these closest persons of the victim creates the prosecution case doubtful.

Therefore, with the above, we are of the view that the prosecution totally failed to prove the case against the

appellant beyond reasonable doubt, particularly in respect of time, place and manner of occurrence. They also failed to establish that the dying declaration was made by the victim and, as such, the impugned judgment and order of conviction and sentence calls for interference. The appeal succeeds.

Accordingly, the appeal is allowed.

The judgment and order of conviction and sentence dated 18.4.1996 passed by the learned Additional Sessions Judge, 7<sup>th</sup> Court, Dhaka in Sessions Case No. 251 of 1993 convicting the appellant under section 302 of the Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Tk. 5,000/-, in default to suffer simple imprisonment for a further period of 1 (one) year is hereby set-aside.

Let the appellant be acquitted of the charge levelled against him under section 302 of the Penal Code.

Since the appellant was enlarged on bail by this Court on 05.06.1997, let him be discharged from the bail bond.

Send down the lower Court records with a copy of  
this judgment immediately.

Gobinda Chandra Tagore, J.  
I agree.

Bilki