In the Supreme Court of Bangladesh

High Court Division
(Criminal Revisional Jurisdiction)

Criminal Revision No. 556 of 2012

In the matter of:
An application under section 439 and read with section 435 of the Code of Criminal Procedure.

-And-

In the matter of:
Md. Anwar Hossain

..... Accused-Petitioner

-Versus-

The State

.....Opposite Party

Mr. Md. Ariful Islam, Advocate
.....for the Accused-Petitioner

Mr. Dr. Md. Bashir Ullah, D.A.G with
Mr. MMG Sarwar [Payel], A.A.G
.....for the State

Present:
Mr. Justice Jahangir Hossain
And
Mr. Justice Md. Badruzzaman

Heard on 04.02.2020, 11.02.2020 and 20.08.2020

Judgment delivered on 27.08.2020

Jahangir Hossain, J:

By order dated 13.05.2012 the Rule was issued against the opposite party in the following manner;

‘‘উভয়পক্ষের বিজ্ঞ কৌঁসুলীগণের বক্তব্য শ্রবণ করা গেল। নাটোরের দায়রা জজ আদালতে বিচারাধীন দন্ডবিধির ৩০২/৩৪ ধারার গুরুদাসপুর থানার ৩০.০৬.২০০৯ইং তারিখের ২৫নং মামলা তথা ১২১/২০০৯ জি, আর মামলা হইতে উদ্ভূত ৮২/২০১২ নং দায়রা

মামলায় দরখাস্তকারী-আসামী মো: আনোয়ার হোসেনের বিরুদ্ধে অপরাধ আমলে আনার ১৪-০২-২০১২ ইং তারিখে প্রদত্ত আদেশ কেন রদ-রহিত করা হইবে না তাহার কারণ দর্শানোর জন্য প্রতিপক্ষের প্রতি রুল জারি করা হউক। ”

At the time of issuance of the Rule, the accused-petitioner obtained on order of stay for a period of 6 months so far as it relates to him in the case and subsequently the ad-interim order of stay was further extended from time to time.

There is no necessity to elaborately state the facts of the FIR story in disposing the Rule. Because, only the law points are involved in the case as it has emerged from the application filed by the accused-petitioner under section 439 read with section 435 of the Code of Criminal Procedure[Cr.P.C]. However, FIR was lodged on 30.06.2009 which shows that the occurrence took place on 29.06.2009 at about 16:00 hours. The accused-petitioner was an order-giver as alleged in the FIR. At the instance of his order, other accused-persons with local weapons made attack on the person of the victim who eventually succumbed to his injuries on 30.06.2009 at about 12:30 O’clock at mid-night in Rajshahi Medicial College Hospital.

After conclusion of investigation, the investigator submitted police report being No. 106 dated 17.08.2009 against 10[ten]

accused-persons under sections 143/149/447/302/34 of the Penal Code while leaving out the accused-petitioner from the report [charge sheet]. The concerned Magistrate having accepted the police report took cognizance against ten accused-persons and discharged the accused-petitioner from the allegation leveled against him by order dated 03.01.2012.

Thereafter, the informant presented a fresh application before the learned Sessions Judge, Natore when the record of the case was transmitted to him and renumbered as Sessions Case No. 82 of 2012 for setting aside the order dated 03.01.2012 passed by the learned Magistrate.

Having considered the application of the informant, the learned Sessions Judge took cognizance against the accused-petitioner under the above mentioned sections as taken against the other accused-persons. Thus, the instant Rule has been brought into light and taken up for hearing as well as disposal by this Court.

The contention of the learned Advocate Mr. Md. Ariful Islam is that the learned Sessions Judge has no authority to directly take cognizance against the accused-petitioner as the enquiring Magistrate did not send him for trial. The impugned order dated 14.02.2012 of cognizance against the accused-petitioner passed by

the learned Sessions Judge is in violation of section 193(1) of the Cr.P.C. In support of the submissions Mr. Md. Ariful Islam has referred to the cases of Abdul Matin and others-Vs- The State and another, reported in 42 DLR (1990) 286, Abdur Razzaque-Vs- State and another, reported in 35 DLR (1983) 103, Jainal Abedin and others –Vs- The State, reported in 1983 BLD, 108 and Fazlul Haq Haider @ Mollah- Vs- The State, reported in 1983 BLD, 184.

On the contrary, Mr. Dr. Md. Bashir Ullah, learned Deputy Attorney General along with Mr. Md. MMG Sarwar, learned Assistant Attorney General appearing for the State submits that the accused-petitioner gave order to the other accused-persons to kill the victim. Accordingly, the accused-persons with deadly weapons made attack and dealt with fatal blows on the victim who died of his injuries in the hospital on the next day. Since the occurrence had taken place at the instance of the accused-petitioner, there is no scope to escape his criminal liability in the killing of the victim.

We have heard the contentions of the learned Advocates of both the parties, perused the application along with FIR, post mortem report, police report and impugned order annexed thereto, wherefrom it transpires that a murder incident took place 29.06.2009 at around 16:00 hours. The informant lodged an FIR on 30.06.2009

at the police station alleging that at the order of the accused-petitioner, other accused made attack and dealt blows with deadly weapons on different parts of body of the victim who lastly breathed out in the hospital following day of the incident. But during investigation the police found that on the date and time of the occurrence, the accused-petitioner was engaged in connection with yearly “Halkhata” in his business firm of Nazirpur Bazar around 7/8 K.M far from the place of occurrence until 12:00 O’clock at mid-night. Admittedly the informant did not file any Naraji Petition against police report. Although the learned Magistrate having considered the police report discharged the accused-petitioner but neither the informant nor the State approached the court of sessions against the order of the Magistrate invoking section 439A of the Cr.P.C.

It is to be noted here that though the merit of the case regarding involvement of the accused-petitioner is not so important in disposing the Rule but fact remains that he was allegedly an order-giver having no direct participation in the commission of murder. Now, only the question before us calls for consideration when the magistrate did not send the accused-petitioner to the court of Sessions, whether the Sessions Judge has got power to take cognizance against the accused-petitioner and the impugned order

passed by him suffers from any gross irregularity or illegality according to the provisions of law.

Section 193(1) of the Cr.P.C is very important in this regard which needs to stipulate as follows;

> **"193. (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been sent to it by a Magistrate duly empowered in that behalf."**

From a plain reading of this section it appears that the Court of Sessions has no jurisdiction to take cognizance of any offence as a court of original jurisdiction unless a Magistrate being empowered in its behalf, sends the accused to the court of Sessions.

This provision finds support from the case of Fazlul Huq Haider@ Mollah -Vs-the State, reported in 1983 BLD,184 where it was held that,

> **"In the present case the enquiring Magistrate discharged the accused-petitioner Mollah @ Fazlul Huq Haider under section 209 Cr.P.C. as he found that the prosecution had not been able to make out a prima facie case against him. The prosecution did**

> **not move the Sessions Judge under section 437 Cr.P.C.(since repealed) praying for committing the discharged accused Molla @ Fazlul Huq Haider to the Court of Sessions for trial. After the accused-petitioner has been discharged by the enquiring Magistrate, unless the accused-petitioner is committed for trial to the Court of Sessions after complying with the provisions of the repealed section 437 Cr.P.C., the accused-petitioner cannot be summoned to stand the trial in the Court of Sessions. The impugned order dated 01.08.79 is, therefore, palpably illegal and must be set aside."**

In the case of Haripada Biswas -Vs-the State, reported in 6 BSCR 83(AD), 34 DLR(AD)142 it has been held that Sessions Court cannot take cognizance of an offence as a court of original jurisdiction.

Identical view was also made by our Apex Court in the case of Bangladesh-Vs- Yakub Sarder and others, reported in 40 (DLR) 246=1988 BLD (AD) 180 that,

> **"Under the provision of sections 439 and 439A Cr.P.C. read with section 436 Cr.P.C. the Court of Session and the High Court Division can only**

direct further enquiry into a complaint or naraji petition even if certain accused persons have been discharged but can not ask the Magistrate to send certain accused persons for trial to the Court of Sessions. The Court of Sessions or the High Court Division thus has no jurisdiction to interfere with the discretion of the Magistrate even in the matter of taking cognizance of any offence irrespective of the fact whether the offence is triable by a Court of Sessions or not."

Having considered all the aspects and opinions as mentioned above, it is very much clear that initially a proceeding must be initiated in the Court of Magistrate under section 190 of the Cr.P.C. Then the Magistrate having taken cognizance of an offence issues process under section 204 of the Cr.P.C. Section 205C of the Cr.P.C also clearly suggests that when in a case started on the basis of police report or otherwise, the accused made appearance is produced before the Magistrate who finds that the offence is triable exclusively by the court of Sessions then he shall send the case to the court of Sessions. Thus the said section indicates that the court of Sessions is obviated from taking cognizance of an offence as a

court of original jurisdiction unless the magistrate is being empowered in that behalf, sends the accused to it.

In the present case in hand, admittedly, the accused-petitioner was not sent up in the charge sheet as no prima facie offence was found to have been committed by him. The Magistrate, on perusal of the police report, took cognizance against the other accused and discharged the accused-petitioner. As the case is exclusively triable by the court of Sessions, it was sent by him to it. The learned Sessions Judge, Natore on the basis of an application filed by the informant, took cognizance against the accused-petitioner along with other accused. But he, as a Sessions Judge, is not at all competent to take cognizance against the accused-petitioner as per section 193(1) of the Cr.P.C.

Considering the above legal aspects and discussion, we are constrained to hold that the impugned order of the learned Sessions Judge suffers from lack of jurisdiction which cannot be sustained in the eye of law.

Accordingly, we find merit in the Rule which should be made absolute.

Therefore, the Rule is made absolute. No order as to costs. The impugned order dated 14.02.2012 so far as it relates to the

accused-petitioner passed by the learned Sessions Judge, Natore in the aforesaid case, is hereby set aside. The order of stay, granted earlier by this Court shall stand vacated.

The trial court is directed to look into the case for expeditious disposal.

Let a copy of this judgment and order be communicated to the trial court at once.

Md. Badruzzaman,J

I agree

Liton/B.O