

16 SCOB [2022] AD 17**APPELLATE DIVISION****PRESENT:**

Mr. Justice Syed Mahmud Hossain,
Chief Justice
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

CRIMINAL APPEAL NO.21 OF 2014.

(From the judgment and order dated 07.05.2013 and 13.05.2013 passed by the High Court Division in Death Reference No. 101 of 2007 with Criminal Appeal No.6843 of 2007 with Jail Appeal Nos.51 and 52 of 2008)

Md. Mehedi Hasan alias Rajib and another**...Appellants****=Versus=****The State****...Respondent**

For the Appellants : Mr. Md. Munsurul Haque Chowdhury, Senior Advocate instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.

For the Respondent : Mr. Bashir Ahmed, Deputy Attorney General (with the leave of the Court).

Date of hearing and judgment : 15.11.2021

Editors' Note

Two appellants were convicted for commission of offence punishable under sections 302/34 of the Penal Code and they were sentenced to death by the trial Court. The High Court Division confirmed the conviction and sentence awarded by the trial Court. There was a dying declaration made by the victim and recorded by the I/O of the case. The Appellate Division found that both the dying declaration and its contents have been proved by 4 PWs and the testimonies of PW-1 and PW-2 to be corroborative to the dying declaration. The Appellate Division held that the learned Courts below upon proper consideration of the testimonies of the witnesses and dying declaration of the victim found the appellants guilty of the charge levelled against them. However, considering that the appellants are in death cell for about 14 years, it commuted the sentence of the appellants from death to one of imprisonment for life with fine.

Key Words

Dying declaration; Section 162 (2) of the Code of Criminal Procedure;

Evidence Act 1872, section 32(1) read with section 162(2) of Code of Criminal Procedure, 1898**Whether a dying declaration recorded by an Investigating Officer is admissible in evidence:**

In view of the testimonies of the PW-16 S.I. Moazzem Hossain and P.Ws. 4, 5 and 18 we do not find any reason to disbelieve the dying declaration of the victim (exhibit-4). It is

true that when a police-officer in course of investigation examines any person supposed to be acquainted with the facts and circumstances of the case, the substance of that examination falls under the category of statement recorded under section 161 of the Code of Criminal Procedure and that statement is not admissible in evidence. But in view of the section 162 (2) of the Code of Criminal Procedure a dying declaration recorded by an Investigating Officer does not lose its special evidentiary value and can be sole basis for awarding conviction. Unlike recording of a confessional statement law does not require that a dying declaration shall be recorded by certain prescribed persons for the very reason that a dying man may not have sufficient time in his hand for his declaration to be recorded by a prescribed person. ... (Para 14)

JUDGMENT

Hasan Foez Siddique, J:

1. These two appellants, namely, Md. Mehedi Hasan alias Rajib and Md. Shafiqul Islam alias Pappu were convicted for commission of offence punishable under sections 302/34 of the Penal Code and they were sentenced to death by Druto Bichar Tribunal, Rajshahi in Druto Bichar Tribunal Case No.22 of 2007 arising out of G.R. No.631 of 2006 corresponding to Rangpur Kotwali P.S. Case No.18 dated 07.08.2006.

2. Prosecution case as it appears from the testimony of P.W.1 Md. Rabiul Islam, in short, is that the occurrence took place on 06.08.2006 at about 23.15 hours in front of the rented house of the victim Zakir Hossain at Kerani Para, Rangpur. The appellant Mehedi Hasan Rajib had affair with Lovely, younger sister of PW-1. She was given in marriage with him. After marriage, they started their conjugal life. During their conjugal life Mehedi Hasan Rajib used to torture Lovely both mentally and physically. He was drug addicted. On 17.07.2006, Rajib entered his house and scolded Lovely. He also tore off a curtain of the house and smashed few things. Lovely informed this matter to her mother and elder brother Babar. Babar went Kerani Para and finding Rajib there asked about the cause of his such irrational behavior. At this, Rajib got enraged and started speaking abusive language towards him. At that time, victim Md. Zakir Hossain, elder brother of the informant, reached there and slapped Rajib twice. Rajib then threatened victim Zakir of severe consequences. On 06.08.2006, at about 23.15 hours, when Zakir Hossain reached in front of his house by a rickshaw after closing his shop and paid fare of rickshaw, Rajib called him saying that he wanted to talk. When victim Zakir was about to enter into the veranda of his house, Rajib stabbed him from behind. Zakir tried to prevent the attack with his right hand for which his right thumb was severely injured. One unidentified associate of Rajib stabbed Zakir in his chest causing serious cut injury. Then appellant Pappu fired a pistol at the upper side of the left rib of Zakir. At that time Zakir screamed seeking help. PW-1 hearing the scream, rushed to the spot and saw appellants Rajib and Pappu and another unidentified accomplice of them who were fleeing away. Hearing the sound of firing Apel, Babu, Jewel, Azad and many other people immediately rushed to the spot. Victim Zakir then narrated the facts to them and the names of the two appellants, but could not identify the third perpetrator. Victim Zakir was then taken to Rangpur Medical College Hospital by an ambulance. He received primary treatment there but as his condition was deteriorating, doctors referred him to Dhaka Medical College Hospital for better treatment. While he was on the move for Dhaka Medical College Hospital, he succumbed to his injuries. However, victim Zakir gave a dying declaration before his death and that was recorded by Sub-Inspector Moazzem Hossain of Rangpur Kotowali Thana.

3. PW-1 informant Md. Rabiul Islam lodged the FIR at about 04.35 hours on 07.08.2006. Police holding investigation submitted charge sheet against the appellants for commission of offence punishable under sections 302/34 of the Penal Code. The case was ultimately tried by the Druto Bichar Tribunal, Rajshahi.

4. The prosecution examined 19 witnesses in support of its case and defence examined none.

5. From the trend of cross-examination of the prosecution witnesses, it appears that the defence case was of innocence and that the appellants had been implicated in the case falsely.

6. The Tribunal after examining the prosecution witnesses and recording the statements of the appellants under section 342 of the Code of Criminal Procedure and hearing the parties, found the appellants guilty under sections 302/34 of the Penal Code and sentenced them as aforesaid. Against which, the appellants preferred Criminal Appeal No.6843 of 2007 and Jail Appeal Nos.51 and 52 of 2008. The Tribunal sent the case record to the High Court Division for confirmation of sentence of death which was registered as Death Reference No. 101 of 2007.

7. The High Court Division by the impugned judgment and order accepted the death reference and dismissed the criminal appeal and jail appeals. Thus, the appellants have preferred this criminal appeal.

8. Mr. Munsurul Haque Chowdhury, learned Senior Counsel appearing for the appellants, submits that in this case there is no eyewitness of the occurrence and the learned Courts below, mainly relying upon the dying declaration of the victim, convicted and sentenced the appellants. He submits that the order of conviction and sentence as awarded by the learned courts below relying upon the dying declaration is highly inappropriate and that the appellants are entitled to get benefit of doubt. He further submits that the sentence awarded by the trial Court and affirmed by the High Court Division is at any rate too severe. The High Court Division, considering the facts and circumstances of the case, ought to have commuted the sentence of the appellants from death to one of imprisonment for life.

9. On the other hand, Mr. Bashir Ahmed, learned Deputy Attorney General appearing for the State, submits that the instant killing was a pre-planned and pre-concerted murder of an unfortunate victim and before his death the victim vividly described the names of the killers in his dying declaration and P.W.2 wife of the victim in her testimony also stated that she could identify the appellants at the time of occurrence. In such view of the matter, the learned courts below rightly convicted and sentenced the appellants.

10. We have heard the learned Counsel of the appellants and learned Deputy Attorney General on behalf of the respondent and perused the impugned judgment and other materials on record.

11. In the instant case, it appears that the occurrence took place at about 11.25 p.m. on 06/08/2006. Before his death victim Zakir made a dying declaration which was recorded by S.I. Md. Moazzem. The contents of the said dying declaration run as follows:

“১১। ভিকটিমের মৃত্যুকালীন জবানবন্দীঃ

সূত্রঃ- কোতয়ালী থানার জি,ডি নং-৩৫৫ তাং-০৬/০৮/২০০৬ সংক্রান্ত মোঃ জাকির হোসেন ওরফে জামিল পিতা- মুঃ আব্দুল মজিদ ওরফে মনু, সাং-কেরানীপাড়া, কোতয়ালী, রংপুর। পরে কোতয়ালী থানার মামলা নং-১৮ তাং-০৭/০৮/০৬ ধারা-৩০২/৩৪ দঃবিঃ

আমি ০৬/০৮/০৬ তাং রাত ১১.২৫ সময় বাড়ীতে ফিরছিলাম। এমন সময় রাজীব ডাক দেয়। পাশ থেকে পাশ্ব বাহির হয়ে ফায়ার করে ছোট পিস্তল দিয়ে। রাজীব লম্বা ছোরা দ্বারা চোট মারে। আমার চিংকার শুনে আমার স্ত্রী গেট খুলে বের হয় এবং দেখে।

উপস্থিত স্বাক্ষরী

১। মোঃ শহিদুল ইসলাম মিজু
পিঃ আঃ মতিন সরকার
কলেজ রোড, হাবিব নগর
রংপুর

২। মোঃ সুলতান আলম বুলবুল
পিতা-মরহুম ইউসুফ উদ্দিন
জেলরোড-রংপুর।

লিপিবদ্ধকারী

মোঃ মোয়াজ্জেম হোসেন
এস,আই
০৭/০৮/০৬
০০.৫০মিঃ

আমার সম্মুখে উপরোক্ত জবানবন্দী লিপিবদ্ধ করা হইল।”

12. In his testimony PW-16 S.I. Md. Moazzem Hossain, who was the Investigating Officer of the case, stated that on 07.08.2006 he recorded the dying declaration of victim Zakir in presence of Dr. A. Mannan and other witnesses. He proved the said dying declaration (exhibit-4) and his signature on it (exhibit-4/3). P.W.4 Shahidul Islam Mizu was present at the time of recording the dying declaration of the victim. In his testimony PW-4 stated that the police recorded the dying declaration of the victim in which Zakir alias Jamil stated that when he was returning his house and reached in front of it, Rajib called him. Accordingly, he stopped. Rajib then inflicted a 'knife' blow upon him. He tried to prevent this blow with his right hand and in consequence his right thumb was severely cut. At that time, Pappu shot him with a pistol. Jamil raised alarm and his wife rushed to the place of occurrence and found the appellants fleeing away. PW-4 proved his signature in the dying declaration which was marked as exhibit 4/1. P.W.5 Md. Sultan Alam is also a witness in the dying declaration. He said in his testimony that he was present at the time of recording of dying declaration of victim Zakir Hossain alias Jamil. In his testimony he gave identical statement that victim Jamil said that while he was returning home Rajib stopped him in front of his house and inflicted a 'knife' blow on his person. He tried to prevent it for which his right thumb was cut. At that time Pappu shot him. This witness proved his signature in the said dying declaration which was marked as exhibit-4/2.

13. P.W.18 Dr. Khandker A. Mannan, in his testimony stated that at the time of recording dying declaration of the victim, he was present and hearing the declaration as recorded by the S.I. Moazzem Hossain he put his signature on it (exhibit-4/4).

14. In view of the testimonies of the PW-16 S.I. Moazzem Hossain and P.Ws.4, 5 and 18 we do not find any reason to disbelieve the dying declaration of the victim (exhibit-4). It is true that when a police-officer in course of investigation examines any person supposed to be acquainted with the facts and circumstances of the case, the substance of that examination falls under the category of statement recorded under section 161 of the Code of Criminal Procedure and that statement is not admissible in evidence. But in view of the section 162 (2) of the Code of Criminal Procedure a dying declaration recorded by an Investigating Officer does not lose its special evidentiary value and can be sole basis for awarding conviction. Unlike recording of a confessional statement law does not require that a dying declaration shall be recorded by certain prescribed persons for the very reason that a dying man may not have sufficient time in his hand for his declaration to be recorded by a prescribed person.

15. This Court in the case of **Nurjahan Begum vs. The State** reported in **42 DLR (AD) 130** held that the statement of a person about the cause of his death or circumstances leading to his death is substantive evidence under section 32 (1) of the Evidence Act, and if by careful examination it is found to be reliable, then it may by itself be the basis for conviction even without corroboration.

16. In the instant case, both the dying declaration and its contents have been proved by PWs.4, 5, 16 and 18. Furthermore, it appears from the testimonies of PW-1 informant Md. Rabiul Islam and P.W.2 Most. Ishrat Jahan, wife of the victim, that hearing outcry both of them rushed to the place of occurrence and found the appellants fleeing away. Testimonies of these two witnesses corroborated the dying declaration. We do not see any reason to disbelieve the testimonies of these witnesses. The learned Courts below upon proper consideration of the testimonies of PWs. 1, 2, 4, 5, 16 and 18 and dying declaration of the victim Zakir found the appellants guilty of the charge levelled against them.

17. Mr. Munusurul Haque Chowdhury, learned Senior Counsel, lastly submits that considering the facts and circumstances of the case and that the appellants are in death cell for about 14 years the sentence awarded to them may be commuted to imprisonment for life. We find force in the submissions made by Mr. Chowdhury.

18. Accordingly, the appeal is dismissed. The judgment and order of conviction awarded by the trial Court and affirmed by the High Court Division is hereby maintained. However, the sentence of the appellants is commuted from death to one of imprisonment for life and they are ordered to pay a fine of Tk.50,000/- each, in default, to suffer rigorous imprisonment for 1 (one) year more. The appellants shall get benefit of section 35A of the Code of Criminal Procedure in calculation of their sentence and other remissions as admissible under the Jail Code.

19. The Jail Authority is directed to shift the condemned prisoners from death cell to normal cell for serving out rest of their sentence.