19 SCOB [2024] AD 148

APPELLATE DIVISION

Present:
Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Mr. Justice Md. Abu Zafor Siddique

CRIMINAL APPEAL NO.69 OF 2014
(From the judgment and order dated 02.11.2010 passed by the High Court Division in Criminal Appeal No.4582 of 2005 and Jail Appeal No.1302 of 2005 heard along with Death Reference No.162 of 2005)

Shahin	**:**	**. . . Appellant**
Vs.		
The State	**:**	**. . . Respondent**
For the Appellant	:	Mr. Moazzam Hossain, Senior Advocate instructed by Mr. Md. Helal Amin, Advocate–on-Record
For the Respondent	:	Mr. Md. Zahangir Alam, Deputy Attorney General instructed by Ms. Shirin Afroz, Advocate–on-Record
Date of hearing	:	28.03.2023 and 05.04.2023
Date of judgment	:	17.05.2023

Editors' Note:
In this case the trial Court found all the accused including the appellant guilty of the offence charged under sections 302/34 of the Penal Code and sentenced each of them including the appellant to death. The High Court Division, however, modified the sentence of the convict-appellant Shahin altering the death sentence to imprisonment for life. On the other hand, analyzing the evidence on record the Appellate Division found that the prosecution had failed to prove the allegations against the appellant beyond reasonable doubt and as such, allowing the appeal acquitted him.

Key Words:
Section 302/34 of the Penal Code; dying declaration; motive; physical and mental capacity to make dying declaration;

It is clear that the testimony of P.W.2 had not been corroborated by P.Ws.11 and 12. According to the statement of P.W.2 Kazimuddin (P.W.11) and Ziaur Rahman (P.W.12) had reached the place of occurrence before he reached there. He had seen both of them along with others were taking the victim in a *Van* to the Hospital.

Although it has come in the testimony of P.W.2 about the involvement of the accused along with the appellant in commission of the offence but P.W.11 in his deposition had in clear terms mentioned that "ঘটনাস্থলে আমি এসে দেখি বিপ্লব মৃত্যুশয্যায় তখন অঝোরে রক্ত ঝরছিল, আমি তাকে বেহুশের মতো হসপিটালে নিয়ে যাই এর কিছুক্ষণ পরেই মারা যায়" who in cross examination stated that "কিভাবে বিপ্লব মারা গেল তা সঠিক বলতে পারবো না।" and P.W.12 had stated in cross-examination that "বিপ্লবের ভ্যানে পিছনে পিছনে গেছি। সে কি কথা বলেছে তা শুনিনি বা জানিনা।" So, that definitely creates doubt on the physical capability of victim Biplob and as such the High Court Division though rightly came to a concrete finding that the prosecution in view of the facts and circumstances has totally failed to prove that the victim Biplob had the physical and mental capacity to make any statement such as dying declaration after receiving the serious bleeding injuries but it has committed illegality in not allowing the appeal of the convict-appellant which is contradictory to its own findings as stated above.
...(Para 18 & 19)

Only to prove the motive is not sufficient where the subsequent act relating to murder is doubtful relying on which the High Court Division has given the benefit of doubt to the other accused except the present appellant. The only reason that he took the money from the deceased cannot be the sole basis for his conviction in a murder case. According to the prosecution all the F.I.R. named accused had actively participated in the murder of the deceased Biplob and as many as eleven severe bleeding injuries were found on his body. So, only the appellant can't be held liable for committing the murder when the High Court Division has ignored the dying declaration taking into consideration the incapacity of the deceased at that moment and the contradictory statement of the vital PWs as well on the basis of which the trial Court had convicted and awarded death sentence to all of them. ...(Para 21)

The appellant's conduct in absconding was also relied upon by the High Court Division while rejecting his appeal. It has been previously held by this Division that absconding by itself is not an incriminating matter. ...(Para 22)

JUDGMENT

Md. Abu Zafor Siddique J:

1. This criminal appeal, by leave, is directed against the judgment and order dated 02.11.2010 passed by the High Court Division in Criminal Appeal No.4582 of 2005 upholding the judgment and order of conviction dated 27.10.2005 passed against the convict-appellant and modifying the sentence of death passed by the learned Additional Sessions Judge, Manikgonj in Sessions Case No.26 of 2004 arising out of G.R. No.197 of 2003 corresponding to Manikgonj Police Station Case No.4(6)03 dated 04.06.2003 convicting the accused under sections 302/34 of the Penal Code and sentencing the appellant to suffer death and also to pay a fine of Tk.10,000/- modifying the above sentence of death to a sentence of life imprisonment.

2. The prosecution case, in brief, is that deceased Md. Biplob Miah was the younger brother of P.W.1, Chunnu Miah who was the informant. Biplob used to do household works and their neighbours Al-Amin, Shahin and others F.I.R named accused were his friends. About 2 months before the date of occurrence the appellant, Shahin took Tk.1,00,000/- (one lac) from the father of deceased Biplob them in order to send him abroad. After taking the

money Shahin became reluctant to send Biplob abroad. P.W.1 asked Shahin about the progress when he informed that he would go abroad first, then he would take Biplob there. Regarding this issue conflict arose between them and victim Biplob insisted Shahin to return the money. As a result, at one stage Shahin threatened to kill Biplob. On 03.06.2003 at about 4.00 p.m. another co-accused Swapon took Biplob out of his house and at about 7.30 p.m. one Azizul informed P.W.1 that the physical condition of Biplob was very critical as his hands and legs were cut off from his body and he was lying on the paddy field near the bank of the river. After getting the said news, P.W.1 along with (P.W.2) Alamgir, Md. Elim (P.W.5) and many others rushed to the place of occurrence and after reaching there they saw Kader, Kazimuddin (P.W.11), Zia (P.W.12), Mithu and Abul were taking victim Biplob in a *Van* to admit him into the hospital. At that time, the informant, (P.W.1) and (P.W.2), Alamgir asked Biplob as to who assaulted him and in reply to that, Biplob told them that at about 7.00 p.m. Shahin, Al-Amin, Masud, Swapan and Appel about 5/6 persons took him at the south-east side of Hobi Matbor's house in the village-Dergram. Al-Amin inflicted a deadly blow on the upper part of his left arm by a sharp cutting weapon causing serious injury. Shahin and Masud by using sharp-cutting weapons cut down the veins near the ankles of his both legs. Appel and Swapan armed with hammer assaulted on his both legs down the knees breaking the bones. All of them assaulted him indiscriminately. Then, Biplob was taken to Sadar Hospital, Manikgonj where he succumbed to his injuries at about 10.00 p.m. on that day.

3. After receiving the *ejahar*, concerned Officer-in-Charge recorded the criminal case and gave the charge of investigation to S.I. Shamsul Hoque. He took up the charge of investigation of the case and recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure and completed all the other lawful duties in accordance with law. On conclusion of the investigation, the concerned Investigating Officer submitted charge-sheet against the 6 (six) accused including Lebu Miah along with the F.I.R named accused under sections 364/302/34 of the Penal Code.

4. Then after taking cognizance by the learned Magistrate the case record was transmitted to the Court of the learned Sessions Judge, Manikgonj, where it was registered as Sessions Case No.26 of 2004 and was transferred to the learned Additional Sessions Judge for trial. After receiving the case record, the learned Additional Sessions Judge, Manikgonj framed charge against all the accused under sections 302/34 of the Penal Code. In presence of the accused in the dock charge was read over to them and they pleaded not guilty and demanded trial.

5. The prosecution examined 21 witnesses in support of its case while the defence examined none.

6. After closing of the prosecution case, the accused in the dock were examined under section 342 of the Code of Criminal Procedure to which they pleaded not guilty and repeated their innocence. The defence did not however adduce any evidence.

7. The defence case as it could be gathered from the trend of cross-examination of the prosecution witnesses is of total denial, the accused had been falsely implicated in this case out of enmity inasmuch as they were not responsible or connected with the occurrence.

8. The learned Additional Sessions Judge, Manikgonj on the basis of the evidence on record found all the accused including the appellant guilty of the offence charged under sections 302/34 of the Penal Code and by his judgment and order dated 27.10.2005

sentenced each of them including the appellant to death by hanging and also to pay a fine of Tk.10,000/- each.

9. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death of the condemned-prisoner which was registered as Death Reference No.162 of 2005. The convict-appellant Shahin preferred Criminal Appeal No.4582 of 2005 and Jail Appeal No.1302 of 2005 before the High Court Division which were heard along with the death reference.

10. By the impugned judgment and order dated 02.11.2010 the High Court Division dismissed Criminal Appeal No.4582 of 2005 with modification of the sentence so far as it relates to the convict-appellant Shahin is concerned by altering the death sentence to imprisonment for life. Jail Appeal No.1302 of 2005 was also dismissed with modification of sentence. Hence, **the instant criminal appeal was filed by appellant Shahin before this Division**.

11. Mr. Moazzam Hossain, learned Senior Advocate appearing on behalf of the appellant submitted that the findings and decision of the High Court Division in drawing the inference of guilt on the alleged motive and as well as on abscondence of the appellant is against the well-settled principles of law and as such conviction and sentence of the appellant on such inference is liable to be set aside. He submitted that the High Court Division having held that the prosecution failed to prove that victim Biplob had the physical capacity to make a dying declaration after receiving such serious injury and also having held that the defence had been able to create a reasonable doubt about the veracity of the dying declaration, the conviction of the convict-appellant on the basis of that doubtful dying declaration is unsafe and hence the judgment and order of conviction and sentence passed by the High Court Division may kindly be set aside for securing ends of justice. He also submitted that the High Court Division having held that the alleged dying declaration of the victim was not free from doubt, rule of law and also prudence does not allow to convict a person relying upon a doubtful dying declaration and hence the judgment and order of conviction and sentence passed by High Court Division may kindly be set aside for securing ends of justice. He further submitted that the High Court Division failed to consider that mere acceptance of Tk.1,00,000/- from the victim to send him abroad (even if assumed to be true) does not indicate the involvement of the appellant in the alleged offence and hence the judgment and order of conviction and sentence passed by High Court Division may kindly be set aside. Then, he submitted that all the witnesses supporting the dying declaration are interested and partisan witnesses and moreover, their evidences have got no probative value and as such the impugned judgment and order of conviction and sentence based upon the said doubtful dying declaration is bad in law and liable to be set aside. He added that the High Court Division failed to consider that the injuries caused by the appellant as alleged by the prosecution did not cause death of the victim and the medical officer, PW-6 had admitted in his deposition that "**সাথে সাথে প্রপার ট্রিটমেন্ট পেলে ব্লাড দিতে পারলে হয়তো বাঁচতে পারতো।**' and as such, the order of conviction and sentence may kindly be set aside. He also stated that the High Court Division failed to appreciate that PWs.1 to 5 are not eye witnesses of the occurrence and they are not trustworthy and reliable and their depositions have not been corroborated by any independent witness and as such the impugned judgment and order of conviction and sentence may be set aside for securing ends of justice. He then submitted that the High Court Division having held that there was no circumstantial evidence supporting the alleged dying declaration based on which the co-accused, Lebu Miah, Masud, Swapan, Appel and Al-Amin were thus acquitted but the conviction of the convict-appellant, who stands on the same footing as of the co-accused, on the basis of the same doubtful dying declaration is unsafe and as such, the impugned judgment and order of conviction and sentence may be set aside for securing ends of justice. Finally, he submitted that the High Court Division failed to

appreciate that mere abscondence itself does not constitute the conclusive proof of the guilt of the appellant and therefore, the prosecution has not been able to prove the charges levelled against him beyond all reasonable doubt and as such the impugned judgment and order of conviction and sentence may be set aside for securing ends of justice.

12. Mr. Md. Zahangir Alam, learned Deputy Attorney General appearing on behalf of the respondent made submission in support of the impugned judgment and order of the High Court Division. He submitted that the PWs.1-5 categorically and consistently in their deposition stated that appellant Shahin took Tk.1,00,000/- (one lac) from the father of victim in order to send him abroad, but after that he did not take any step to send Biplob abroad and as a result severe enmity developed between Shahin and Biplob and when Biplob demanded to return back the money then Shahin told him "**বেশী ট্যাকা ট্যাকা করলে তোরে মাইরা ফেলামু**" and the defence extensively cross-examined them but nothing could be extracted to shake their credibility in any manner whatsoever, so the same are invulnerable to the credibility and as such appeal may kindly be dismissed. He also submitted that after killing of Biplob, appellant Shahin went on hiding. These are the strong circumstantial evidence against Shahin leading to the involvement of killing Biplob and as such the appeal may kindly be dismissed.

13. We have considered the submissions of the learned Advocate on behalf of the appellant and the learned Deputy Attorney General for the State, perused the impugned judgement and order of the High Court Division and other connected papers on record.

14. Having gone through the impugned judgment it appears that the High Court Division has rightly held that the trial Court came to a definite conclusion that victim Biplob had the capacity to make the statement treated as dying declaration after receiving as many as 11 serious bleeding injuries.

15. In the case of **Alais Miah vs State reported in 20 BLC (AD) 341** this Division held:
"while considering dying declaration the Court is required to see whether the victim had the physical capability of making such a declaration, whether witnesses who had heard the deceased making such statement heard it correctly. Whether they reproduced names of assailants correctly and whether the maker of the declaration had an opportunity to recognize the assailants."

16. It appears that the trial Court convicted the appellant along with others based on the evidence of P.Ws.1-5, 9 and 15 finding that the victim Biplob made dying declaration before the said P.Ws. implicating all the accused persons and as such finding no reason to disbelieve the said witnesses and the dying declaration made by the victim. The trial Court also found that the evidence of P.W.14 who saw the accused persons running away with blood stained weapons, is a piece of corroborative evidence with the dying declaration. It appears that the defence has challenged the said evidence of P.W.14 and put suggestion that he never went to the shop of Meher and waited there upto 7 p.m and did not see the accused persons running away. The testimony of P.W.14 that he disclosed about the occurrence before Bacchu's shop in presence of so many people was not corroborated by any other witnesses, particularly by Bacchu who was withheld by the prosecution. So the High Court Division rightly held that the trial Court committed error of law in holding that the statement of P.W.14 is corroborative evidence in committing the murder. It further appears from the deposition of P.Ws.1-5 that they categorically stated that at first they were informed by Azizul about the serious condition of deceased Biplob. But surprisingly, the prosecution neither examined the said Azizul nor cited him as a charge sheeted witness even and as such the evidence of P.Ws.1-5 are not corroborative evidence relying upon which the trial Court have awarded the punishment upon the accused including the present appellant. Now, in order to measure the weight of the alleged Dying Declaration, we need to go through the

evidence of P.W.2 who in his deposition stated that hearing the news about the incident from Azizul he along with Md. Elim, Jasim and Chunnu reached to the place of occurrence and saw that Kader, Zia, Kazimuddin and many other people were taking victim Biplob on a 'Van' in seriously injured condition and he asked Biplob 'what had happened'. In reply to that "তখন বিপ্লব বলল যে স্বপন তাকে ডেকে এনেছে। শাহিন, আল-আমিন, মাসুদ, স্বপন, আপেল তাকে বেদম মার ধোর করেছে। তারপর ভ্যান টেনে হসপিটালে আনি। আমি অর্ধেক চালাই। তারপর কাজিমুদ্দিন ভ্যান চালিয়ে হসপিটালে আনে। পরে রাত ১০.০০ টায় মরে যায়।"

17. P.W.2 also stated that Shahin took Tk.1,00,000/- to send Biplob abroad. In his cross-examination he denied the suggestion that Biplob was a terrorist and the previous Chairman of the Union Parisad handed over him to the Deputy Commissioner as the local people made complaint against Biplob to the Deputy Commissioner and Biplob paid a fine because of hijacking a motor-cycle. This witness also denied the suggestion to the effect that: "সত্য নয় যে, অসংখ্য জখমের কারণে বিপ্লবের কথা বলার মত সামর্থ্য ছিল না।" To test the veracity of P.W.2 we may compare it with the evidence of P.Ws.11 and 12. P.W.11 Kajimuddin in his deposition stated to the effect: "ঘটনাস্থলে আমি এসে দেখি বিপ্লব মৃত্যুশয্যায়। তখন অঝোরে রক্ত ঝরছে। আমি ভ্যানেই দেখি। আমি বেহুশের মতো হসপিটালে আনি। এর কিছুক্ষণ পরেই মারা যায়। দারোগার সাথে চুনুর বাড়ীতে কথা হয়েছে।" who in cross-examination had stated that "কিভাবে বিপ্লব মারা গেল তা সঠিক বলতে পারবো না।" PW.12 Md. Ziaur Rahman in his deposition stated to the effect: "রাস্তায় দেখি যে ভ্যান গাড়ির উপরে রক্তাক্ত জখম অবস্থায় বিপ্লবকে দেখি। আমি পিছনে পিছনে মানিকগঞ্জ হসপিটালে আসি। হাসপাতালে যাবার পর বিপ্লব মারা গেছে।" In his cross-examination he stated to the effect: "বিপ্লবের ভ্যানে পিছনে পিছনে গেছি। সে কি কথা বলেছে তা শুনিনি বা জানিনা।"

18. From the above discussion it is clear that the testimony of P.W.2 had not been corroborated by P.Ws.11 and 12. According to the statement of P.W.2 Kazimuddin (P.W.11) and Ziaur Rahman (P.W.12) had reached the place of occurrence before he reached there. He had seen both of them along with others were taking the victim in a *Van* to the Hospital. Although it has come in the testimony of P.W.2 about the involvement of the accused along with the appellant in commission of the offence but P.W.11 in his deposition had in clear terms mentioned that "ঘটনাস্থলে আমি এসে দেখি বিপ্লব মৃত্যুশয্যায় তখন অঝোরে রক্ত ঝরছিল, আমি তাকে বেহুশের মতো হসপিটালে নিয়ে যাই এর কিছুক্ষণ পরেই মারা যায়" who in cross examination stated that "কিভাবে বিপ্লব মারা গেল তা সঠিক বলতে পারবো না।" and P.W.12 had stated in cross-examination that "বিপ্লবের ভ্যানে পিছনে পিছনে গেছি। সে কি কথা বলেছে তা শুনিনি বা জানিনা।"

19. So, that definitely creates doubt on the physical capability of victim Biplob and as such the High Court Division though rightly came to a concrete finding that the prosecution in view of the facts and circumstances has totally failed to prove that the victim Biplob had the physical and mental capacity to make any statement such as dying declaration after receiving the serious bleeding injuries, but it has committed illegality in not allowing the appeal of the convict-appellant which is contradictory to it's own findings as stated above.

20. Moreover, the High court Division has also found that at the time of examining the appellant under section 342 of the Code of Criminal Procedure the learned trial Judge brought in his notice the most incriminating piece of evidence to the effect: "বিপ্লবকে বিদেশে পাঠানোর নাম করিয়া ১ লক্ষ টাকা আসামী শাহীন আত্মসাৎ করে। সেই টাকা ফেরত চাহিলে আসামী শাহিন বিপ্লবকে খুনের হুমকি দেয়। এই বিষয়টি সমর্থন করিয়া সাক্ষ্য দিয়াছে পিডব্লিউ-১ হইতে পিডব্লিউ-৪ নং সাক্ষী।"

21. In reply to that appellant Shahin did not say anything nor denied the said allegation. According to the High Court Division thus the prosecution has been able to prove the motive of murder so far appellant Shahin is concerned and has established the chain of events against him. But unfortunately we cannot agree with this finding of the High Court Division as this was the most incriminating piece of evidence against him because only to prove the motive is not sufficient where the subsequent act relating to murder is doubtful relying on

which the High Court Division has given the benefit of doubt to the other accused except the present appellant. The only reason that he took the money from the deceased cannot be the sole basis for his conviction in a murder case. According to the prosecution all the F.I.R. named accused had actively participated in the murder of the deceased Biplob and as many as eleven severe bleeding injuries were found on his body. So, only the appellant can't be held liable for committing the murder when the High Court Division has ignored the dying declaration taking into consideration the incapacity of the deceased at that moment and the contradictory statement of the vital PWs as well on the basis of which the trial Court had convicted and awarded death sentence to all of them.

22. The appellant's conduct in absconding was also relied upon by the High Court Division while rejecting his appeal. It has been previously held by this Division that absconding by itself is not an incriminating matter.

23. This was the view taken by Dua, J. in the case of **Matru V. State of U.P. reported in AIR (1971) SC 1050,** where it was held,

> "Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime; such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case."

24. The same principle was applied by this Division in the case of **State vs. Lalu Miah and another reported in 39 DLR (AD) 117,** where it was held,

> "Absconsion by itself is not an incriminating matter, for, even an innocent person, if implicated in the ejahar for a serious crime, sometimes absconds to avoid harassment during investigation by the police."

25. Although a contrary view was taken by this Division due to a different situation arose in the case of **Yasin Rahman @ Titu vs State reported in 19 BLC (AD) 08** which was referred by the learned D.A.G on behalf of the State; It was held in that case by a majority view that,

> "Abscondence by itself is not always an incriminating matter, for, even an innocent person sometimes absconds to avoid harassment by police. But in this present case the abscondence of this accused-appellant Yasin Rahman @ Titu, son of a very rich industrialist-immediate after the murder of Jibran Tayyabi and his remaining absconding for a long period of about 13 years do not support at all that he absconded and remained absconding for such a long period to avoid harassment by police."

26. But in the present case the appellant remained absconded for almost two years during the trial till he was arrested by the police. So, the case referred by learned D.A.G. Md. Zahangir Alam does not fit here with the case of the appellant but in this regard he is in the same footing with the other co-accused Appel, Lebu and Alamin. So, if any negative inference is to be drawn from remaining absconded then it should be equal for all otherwise it would be discriminatory.

27. However, according to the prosecution, regarding the active participation of the appellant in committing the murder of the deceased, he is in the same footing with the other accused. So, it will be a matter of outright injustice to the appellant if the same benefit of doubt is not granted to him. On a careful consideration of the evidence on record we are inclined to give benefit of doubt to the present appellant.

28. In the result the appeal is allowed. The sentence of the convict-appellant is acquitted of the charge levelled against him and his conviction and sentence is set aside.