

8 SCOB [2016] HCD 140**HIGH COURT DIVISION
(Criminal Appellate Jurisdiction)**

Criminal Appeal No. 7403 of 2009
With Criminal Appeal No. 8820 of 2009

Mr. Md. Tajul Islam, Advocate
...For the Appellants

Md. Tasli alias Taslim & Another
...Convict-Appellants

Mr. Nazibur Rahman, D.A.G with
Mr. Md. Matiur Rahman, A.A.G.
...For the state, respondent

Versus

The State

...Respondent

Heard on: 02.09.2015
Judgment on: 08.09.2015

Present:

**Mr. Justice Md. Abu Tariq
And
Mr. Justice Amir Hossain**

Natural and competent witness:

Although the P.W.2 is the mother of the deceased but she is a natural and competent witness. Her evidence cannot be discarded only because of her relation with the deceased. ... (Para 31)

Evidence Act, 1872**Section 8:**

It is gathered from the evidence of P.W.2 that out of enmity the accused Alfazuddin and Tasli @ Taslim being armed with deadly weapon like dagger "Dao" etc. came at the P.O. house and dealt indiscriminate dagger and dao blows on the person of the victim. Such facts clearly speak about their very motive and intention to kill the victim Aziron. Immediately after the occurrence, the Convict-Appellant Alfaz Uddin and Tasli @ Taslim disappeared from the locality, which indicates their guilt and that is relevant under section 8 of the Evidence Act. ... (Para 36)

Judgment**Amir Hossain, J.**

1. These two Criminal Appeals are taken up together for hearing and disposal by a single Judgment.

2. These two appeals at the instance of convict appellants Tasli @ Taslim and Alfazuddin are directed against the judgment and order of conviction and sentence dated 22.04.2008 passed by the learned Sessions Judge, Jamalpur in Sessions Case No. 162 of 2007 arising out of Dewangonj P.S. Case No. 14, dated 23.11.2004 corresponding to G.R. Case No. 40(2)/04 convicting the appellants under section 302/34 of the Penal Code and sentencing them

thereunder to suffer rigorous imprisonment for life and to pay a fine of Tk. 20,000/= (twenty thousands) each, in default to suffer imprisonment for further 6(six) months more.

3. The prosecution case, in short, is that one Zariful Begum wife of Md. Azizul Hoque (Now dead) of south Vatkhwah P.S. Dewangonj, District-Jamalpur lodged a F.I.R to the effect that her second son Abdur Rahman got married with Rasheda Khatun, daughter of Tasli@ Taslim of the same Village. Her son being poor went to Dhaka and had been staying there to pull Rickshaw. However, taking his absence said Rasheda Khatun fell herself in immoral relation with Pakkir of the same village, the matter was circulated in the locality. At that her son sent Rasheda to her parents house. On that enmity between two families and other family of Pakkir, the matter became very serious. Many cases and counter cases amongst them. Before this occurrence, brother of said Rasheda namely Alfaz and other came to the house of Zariful Begum and tortured her husband Azizul and also searched her and her daughter deceased Aziron. Later on, at about 7:00 P.M. in the evening on 22.11.2004 said Alfaz and Taslim and others armed with deadly sharp cutting weapon like “Dagger” Ramdao” etc. entering in their home and attacked on her daughter Aziron and on her and her husband Azizul. The accused Alfaz could hold the hair bundle of Aziron and pointed dagger blow in her right side of neck. At that Aziron came out from the house with shouting and fell on the ground on the courtyard, at that the accused Alfaz started blow of Ramdao hap-hazardly. Informant Zariful Begum along with her husband came forward to save Aziron but inflicted blows hap-hazardly by accused Alfazuddin with Ramdao with an intention to kill them and other accused persons surrounded Aziron. At that she (informant) and her husband Azizul were injured. At their shouting neighbour Asia Begum came forward to the spot who tried to save Aziron pouring water in her head but in vain. Aziron died on the spot.

4. Stating the facts that F.I.R was lodged against the eight persons which was record as Dewangonj P.S. Case No. 14, dated 23.11.2004. At first the Sub-Inspector Hashem Ali Mridah then sub inspector S.M.Fazlul Hoque attached in the police station was entrusted to investigate the case who after getting the charge of investigation, visited the place of occurrence, prepared the sketch map of the place of occurrence and recorded the statement of witnesses under section 161 of the Code of Criminal Procedure and having found prima-facie case against both the accused 1. Md. Alfaz Uddin and 2. Md. Tasli (Taslim) submitted charge sheet No.40, dated 25.04.2005 under section 448, 323, 324, 326, 307, 302/114 of the Penal Code and did not send up the rest.

5. The case record was transmitted in the Court of Sessions Judge and same got registered as Sessions Case No. 162 of 2007.

6. At the commencement of the trial of the case a charge was framed under section 302/34 of the Penal Code against both the accused persons namely 1. Md. Alfaz Uddin and 2. Md. Tasli (Toslim). Since both the accused persons were absconding from the beginning, the charge could not be read over to them.

7. At the time of trial, the prosecution examined as many as 08(eight) witnesses and defence examined none. After recording the statements of the P.Ws the learned Sessions Judge could not examine the accused persons under section 342 of the Code of Criminal Procedure as they were absconding.

8. The defence case as it appears from the trend of cross-examination by the state defence both the accused persons have been falsely implicated in the case.

9. After conclusion of all formalities and considering the evidence on record the learned Sessions Judge, Jamalpur found the accused Alfazuddin and Tosli @ Taslim as guilty of the charge under section 302/34 of the Penal Code and convicted and sentenced them as stated above.

10. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence, the convict-appellants have filed instant two Criminal Appeals separately.

11. Mr. Md. Tajul Islam, the learned Advocate appears for the convict-appellants submits that most vital eye witness Asia Begum was not examined by the prosecution and no explanation was given from the prosecution side as to why she was not examined. He further submits as per Zariful Begum (P.W.2) and Amena Begum (P.W.7) are the eye witnesses but here P.W.7 did not see the alleged occurrence. Learned Advocate submits that except the informant two other persons namely Shuku and Tajimul Islam came to the place of occurrence but they were not produced before the Court without any plausible reasons or explanation and as such in the absence of any *mens rea* or intention of killing the punishment under section 302 of the Penal Code cannot be sustained.

12. The learned Deputy Attorney General appearing on behalf of the State submits that the evidence on record and the other material facts and circumstances are sufficient to justify the conviction and sentence and as such the appeal should be dismissed.

13. Now let us discuss the evidence of the prosecution witnesses:

P.W.1 Dr. Abdullah Al Amin, stated in his deposition that on 24.11.2004 he held the Post-mortem examination upon the dead body of Aziron a woman of 20 years old and found the following injuries:

1. One penetrating injury 3" x 1" x chest cavity over lower part of right side of front of the neck passing obliquely in the right side of chest cavity.

II. One incised wound on each wrist 2" x 1/4" x skin each.

III. One incised wound 3" x 1" x 1/2" over left leg below knee.

14. According to P.W's opinion the death of Aziron was caused due to shock and haemorrhage as the result of above stated injuries which were ante-mortem and homicidal in nature.

15. State defence has declined to cross examine the witness.

16. P.W.2 Jariful Begum has stated that she is the informant of the case and her daughter Aziron was murdered at her home, in her presence out of enmity by the accused Alfaz, Taslim and others. P.W.2 further deposed that accused Alfaz pierced her daughter by a dagger and accused Taslim chopped her by a Ramdao right and left and at that point of time her husband Md. Azizul (now dead) also saw the incident. P.W.2 states that witnesses namely Asia Begum (Now dead) and Amena Begum also saw the incident. P.W.2 discloses that the accused Alfaz is the brother and accused Taslim is the father of her daughter in-law Rasheda. P.W.2 also disclosed that the original problem started between deceased Aziron and his daughter in law Rasheda.

17. P.W.2 in cross-examination has stated that there were two other cases against the accused.

18. In her cross-examination P.W.2 has denied the defence suggestion that she did not see the incident of assault inflicted upon her daughter Aziron by the accused persons.

19. P.W.3 Jahurul Islam, brother of the deceased Aziron stated in his examination in chief that the deceased Aziron was murdered more than three years back at their paternal home by the accused Alfaz and Taslim and others. According to this witness he has heard that incident from his mother and he was not present at home at the time of occurrence. In cross-examination, P.W.3 has denied the suggestion that he did not hear the name of accused from his mother.

20. P.W.4 Jainal Abedin, stated in his examination-in-chief that he is a rickshaw puller and Aziron was his sister and he heard the incident of murder from his mother that the accused Alfaz and Taslim and other accused murdered his sister at his paternal home.

21. In cross-examination, P.W.4 has denied the suggestion that he did not hear the name of accused from his mother.

22. P.W.5 Rabijul Hoque, Village doctor was tendered by the prosecution and the state defence declined to cross-examine him.

23. P.W.6 Ful Mia, in his examination-in-chief stated that on 22.11.2004 at about 7:00 P.M. the victim Aziron was killed in her paternal home by the accused Alfaz, Taslim and other. He heard the incident from the informant. He proved the seizure list as Ext. I, his signature Ext. 1/1 and platemat as material Ext. I, lungi mat Ext. II and bamboo stick Ext. III and blood strain mat Ext.IV respectively.

24. The defence declined to cross-examine him.

25. P.W.7 Amena Begum stated in her examination in chief that about three years back accused Alfaz and Taslim and others killed the victim Aziron at her paternal home. She said that hearing hue and cry she ran to the place of occurrence and saw the accused during retreat with "dao" and dagger. In her cross-examination she (P.W.7) denied the suggestion that she did not see the accused running with arms after assaulting the victim Aziron.

26. P.W.8 S.M. Fazlul Haque, the S.I. of Police and I.O. of the case, stated in his examination in chief that, S.I. Hashem Mirdha has investigated the case before him. Then he took over the investigation of case and adopted the investigation held by Hashem Mirdha. He stated that during his investigation he examined 8 witnesses and submitted the charge sheet against the accused persons. He proved the F.I.R marked as Ext.2 and the signature of O.C. Abul Fazal as Ext. 2/1, Sketch map marked as Ext.3 and Index Ext.4, Inquest report Ext.5.

27. In cross-examination, P.W.8 denied the suggestion that he did the investigation perfunctorily and the Charge Sheet submitted by him has no basis.

28. We have heard the learned Advocate for the convict-appellants and the learned Deputy Attorney General, perused memo of appeals, FIR, charge sheet, statement of the

P.Ws and other materials on record. Also perused the findings of the Sessions Judge in the impugned judgment.

29. On scrutiny it appears that the prosecution has examined as many as eight witnesses, of whom P.W.2, the mother of the deceased, who is the informant, saw the alleged occurrence of causing death of her daughter Aziron by the convict-appellants. So, P.W.2 is an eye witness of the occurrence. Another vital witness is P.W.7 Amena, who rushed to the place of occurrence hearing the hue and cry and it is P.W.7 who has clearly stated that she saw the accused persons fleeing away with deadly weapon like “dao” and “dagger” in their hands. They are the two vital witnesses, who are the star witnesses of the case. The doctor witness P.W.1 Dr. Abdullah Al Amin held post-mortem on the body of the deceased and disclosed the reason of death of Aziron, which was caused due to injuries by a sharp cutting weapon. According to P.W.1, the death was ante-mortem and homicidal in nature. It is found that the Post-Mortem Report lends a clear support to the prosecution story of causing the death of Aziron. P.W.2, the mother of the deceased being an eye witness narrated the occurrence stating that she herself saw the convict-appellants’ participation in killing her daughter. Another eye witness P.W.7Amena Begum also saw the accused persons fleeing away immediately after the occurrence with lethal weapons in their hands. It is noted that two other charge sheet named vital witnesses namely Md. Azizul Hoqueand Asia Begum have died by this time. So, the prosecution could not produce them during the trial. In this case except P.W.2 Zariful Begum, no other witness saw the alleged occurrence. It is important to mention here that the occurrence took place in an evening at a village and at that time the deceased was at the kitchen of the dwelling hut and her mother and father were also there. In front of them the appellants attacked their daughter Aziron. The victim Aziron cried out to be saved from the attack of the appellants and she fellon courtyard but in vain. Aziron died on the spot. The occurrence took place on 22.11.2004 at about 7:00 P.M. There prevails silence at that time in the village area and that time is considered as night. Other brothers of the deceased were not then present at the house during the occurrence. So, the provable witness of the alleged occurrence were the deceased’s mother and father. Since, the father has alreadydied, so it was not possible for prosecution to adduce the deceased’s father. However, her mother P.W.2 Zariful Begum has deposed as an eye witness and corroborated the alleged involvement of the convict appellants with the occurrence. We do not find any reason to disbelieve the evidence given by P.W.1, P.W.2 and P.W.7.

30. In the case of Abdul Hai Sikder and other Vs State reported in 43 DLR (AD) 1991 at page-95, their lordships of the Appellate Division observed as follows: “conviction of the appellants can safely be based on the solitary evidence of the eye witness P.W.1. His evidence is full, complete and self contained. It may not have received corroboration from other witnesses, but it stands fully corroborated by the circumstances of the case and the medical evidence on record. Its fullness and completeness are enough to justify the conviction.”

31. Although the P.W.2 is the mother of the deceased but she is a natural and competent witness. Her evidence cannot be discarded only because of her relation with the deceased. In the case of Sadat Ali and another Vs State reported in 44 DLR, 1992 at page-217 High Court held that” PWs though relations they are natural and competent witnesses. Their evidence cannot be discarded only because they are relations.” Similar principle of law has also been approved by our Apex Court in the case of Badsha Mia (Md) Vs State reported in 2 BLC(AD) 1997 at page-179. From the evidence of P.W.2, it is observed that her evidence is wholly trustworthy and during her cross-examination the defence could not shake her

credibility. We do not find any reason to disbelieve the evidence given by the P.W.1, the Doctor witness, the P.W.2 Zarful Begum and P.W.7 Amena Begum.

32. Mr. Md. Tajul Islam, the learned Advocate contends that non-examination of the witnesses gives rise to an adverse presumption under section 114(g) of the Evidence Act and the prosecution has failed to examine a vital charge sheet named witness that will lessen the credibility of the prosecution.

33. In reply, the learned D.A.G submits that the prosecution has kept no stone unturned to produce the available witnesses and for that end exhausted all the processes to secure the attendance of the witnesses. He submits that some of the witnesses have died during the trial and some of them could not be produced in the trial Court even after taking all legal steps. The learned D.A.G contends that non-production of some witnesses cannot by itself be taken as a plea for raising any adverse presumption regarding the charge made against the accused persons, we find strong force in the submission made by the learned D.A.G. Moreover, in the evidence of P.W.1, P.W.2 and P.W.7 have, so far we find sufficiently substantiated the prosecution case and to attract its credibility.

34. Having regard to what we have discussed above and attending facts and circumstances, we do not find any reason to disbelieve the charge made against the convict-appellants or interfere with the findings and decision taken by the learned Trial Court.

35. The Trial Court, as it appears, on scanning the incriminating materials on record and considering the evidence given by P.Ws along with relevant papers has rightly come across to record its decision finding the accused guilty of the charge under section 302/34 of the Penal Code and in doing so, the Trial Court has not done any mistake on any question of fact or law.

36. It is gathered from the evidence of P.W.2 that out of enmity the accused Alfazuddin and Tasli @ Taslim being armed with deadly weapon like dagger "Dao" etc. came at the P.O. house and dealt indiscriminate dagger and dao blows on the person of the victim. Such facts clearly speak about their very motive and intention to kill the victim Aziron. Immediately after the occurrence, the Convict-Appellant Alfaz Uddin and Tasli @ Taslim disappeared from the locality, which indicates their guilt and that is relevant under section 8 of the Evidence Act. It transpires that the convict-appellants had a clear intention and premeditated plan to finish off the victim Aziron and there was no element of provocation on her part.

37. Considering the above aspects of the case, attending facts and circumstances and the evidence on record, we are inclined to hold that the prosecution has succeeded to prove the charge under section 302/34 of the Penal Code against the convict appellants beyond all reasonable doubt and thereby make them liable to suffer the sentences thereunder.

38. Since the impugned judgment and order of conviction does not suffer from any infirmity or illegality, we thus find no reason to interfere with the impugned judgment passed by the trial Court.

39. Consequently both the appeals are dismissed. The judgment and order of conviction dated 22.04.2008 passed by the learned Sessions Judge, Jamalpur, in Sessions Case No. 162 of 2007 arising out of Dewangonj Police Station Case No. 14, corresponding to G.R. Case

No. 40 of 2004 convicting the appellants and sentencing them to suffer rigorous imprisonment for life under section 302/34 of the Penal Code are hereby affirmed.

40. The convict-appellant Md. Tasli @ Taslim on bail is directed to surrender before the Trial Court within 60(sixty) days from the date of receipt of the record and to serve out the remaining period of sentence.

41. Send down the L.C. Record along with the copy of this judgment to the Court concerned and Jail authority immediately.