

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 276 of 1993

Jahur Uddin and others

...Appellants

-Versus-

The State

...Respondent

Mr. Tabarak Hussain, Advocate with

Mr. Mahmudul Mursalin, Advocate with

Ms. Nasrin Akhter Sheela, Advocate

...For the appellants

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan (Manna), A.A.G

...For the State

Heard on 15.11.2023, 20.11.2023, 23.11.2023,
27.11.2023 and 28.11.2023**Judgment delivered on 07.12.2023**

This appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed against the impugned judgment and order dated 23.01.1993 passed by Additional Sessions Judge, Court No. 1, Sylhet in Session Case No. 80 of 1991 arising out of Beanibazar Police Station Case No. 9(3) 1991, G.R. No. 26 of 1991 convicting the appellants under Section 394 of the Penal Code, 1860 and sentencing them to suffer rigorous imprisonment for five years and fine of Tk. 1,000, in default, to suffer rigorous imprisonment for one month more.

The prosecution case, in short, is that on 10.03.1991 corresponding to 25th Falgoon, 1397 B.S at about 2.00 am P.W. 2 Md. Lala Mia, a grocery shopkeeper, after returning home from his shop went to the western side of his dwelling house to see the cow in the cowshed and found that the accused Jahur, Helal and Nurul Islam were cutting the fence of his bhiti hut. At that time, he recognized the accused persons and raised a hue and cry. The accused persons by cutting the fence looted half mond rice kept in a sac from his bhiti hut. At that time, P.W. 2 caught the accused Jahur. The accused Helal Uddin and Nurul Islam attacked P.W. 2 to free accused Jahur. At the time of scuffling, the accused Helal Uddin

dealt a dagger blow on the leg and lower abdomen of P.W. 2 and the accused Nurul Islam dealt lathi blows on various parts of his body and snatched away the torchlight from P.W. 2. Hearing hue and cry of P.W. 2, the informant woke up from sleeping and came to the place of occurrence and by light of the hurricane, he saw the occurrence. After that, the witnesses also assembled at the place of occurrence. The witnesses took the victim P.W. 2 to Beanibazar Hospital.

P.W. 7 S.I Shyamol Kanti Barua took up the investigation of the case. During investigation, he visited the place of occurrence, prepared the sketch map and index, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898, seized the blood stain cloths and 40 kgs rice, collected the medical certificate of the victim and after completing investigation found the prima-facie truth of the allegation against the accused-persons and submitted charge sheet on 20.04.1991 against them under Section 382 of the Penal Code, 1860. After that, the case record was transmitted to the Sessions Judge, Sylhet and the Sessions Judge, Sylhet by order dated 01.10.1991 was pleased to take cognizance of the offence under Section 382 of the Penal Code, 1860 against the accused persons. The Sessions Judge, Sylhet by order dated 18.01.1992 was pleased to frame the charge under Section 392 of the Penal Code, 1860 against the accused persons and at the time of framing the charge, the accused persons were absconding.

On the prayer of the learned Public Prosecutor, the trial Court by order dated 26.10.1992 altered the charge to under Section 394 of the Penal Code, 1860. The prosecution examined 8(eight) witnesses to prove the charge against the accused persons. After examination of the prosecution witnesses, the accused persons were examined under Section 342 of the Code of Criminal Procedure, 1898 and the accused persons declined to examine any D.W. After concluding the trial, the trial Court by impugned judgment and order convicted the accused persons and sentenced them as stated above against which they filed the instant appeal.

P.W. 1 Habib Ali is the informant. He stated that on 25th Falgun 2(two) years ago at 2 am his son came from his shop situated to the west

of their house and went to the cowshed to see the cow. At that time, a person was coming out from their bhiti hut along with a sac kept on his back. The sac was taken from his house. The person who took away the sac is Jahur. At that time, his son caught him. The accused Helal dealt a knife blow on the knee and lower abdomen of his son Lala. At that time, his son raised a hue and cry and the accused Nurul Islam dealt a lathi blow to the neck and back of his son. Hearing hue and cry, the informant woke up and tried to catch the accused persons. They fled away by running. He recognized the accused persons by moonlight and their house was situated to the west side. He along with his brother, Rafique Uddin, Khalaque Uddin, Mahibur Rahman, Rafique and many others also attempted to detain the accused persons. Dudu Mia also came and heard about the occurrence. The accused persons by cutting the fence entered into the east bhiti hut. The people assembled at the place of occurrence, saw and heard the occurrence. The informant took the victim to Beanibazar Hospital for treatment. He claimed that he was busy with the treatment of his son for which it was delayed for 2(two) days in lodging the FIR. P.W. 1 proved the FIR as exhibit 1 and his signature as exhibit 1/1. P.W. 1 claimed that witnesses Samsu and Dudu Mia went abroad and Abdur Rahim is very sick. In reply to a question put to him by the Court, he stated that the rice was kept in the sac. During cross-examination, he stated that he is the owner of a small shop and he is also a cultivator. There is a road to the west of his house and after that, the Kushiara river is situated. After 3(three) bighas land to the west side the house of Masoi Mia is situated and the house of Akan and Nuruddin are situated to the west side of their house but none of them are witnesses of the case. There is vacant land to the south of his house and his shop was situated after 4/5 houses about 100 yards far from his house and there is no other shop along with his shop. He affirmed that hearing the hue and cry of his son, he came out from his house and saw three accused persons. Subsequently, stated that he saw four persons. He affirmed that there was a moonlight at the time of occurrence. Hearing hue and cry, about one hundred locals assembled at the place of occurrence and amongst them, there were 80 neutral persons.

Mahibur Rahman, Mosabbir Ali and other members are also neutral persons. When he came out from his house, he carried a torch and saw that his son was lying on the ground and three accused persons were running to the west. He affirmed that bleeding started due to injury caused by a dagger. After 4(four) days, he went to Thana. He affirmed that the FIR was written by an advocate. Rafiq is his brother and Mahibur Rahman is his relation. He affirmed that the thief had taken away the goods from his house. The accused is his nephew but not his enemy and they took away the sac by cutting the fence.

P.W. 2 Md. Lala Mia is the victim and son of informant P.W. 1. He stated that on 25th Falgun at 2/2.30 am 2 years ago, he was present in his shop. Sensing the sound of walking people, he opened the door and went to his house to ascertain whether his cow was stolen. He saw that a person was standing and two other persons were cutting the fence. At that time, he attempted to detain them. They had taken away the sac of paddy by cutting the fence. By moonlight and the torch, he saw that the accused Jahur had taken away the sac keeping on his back. While he attempted to detain Jahur, accused Helal dealt a dagger below on his lower abdomen and knee. The other person is Nurul Islam. Hearing his hue and cry, his father and uncle Rafique Uddin, Dudu Mia came out from their house and they attempted to detain them but they fled away. He claimed that the accused persons were known to him and he could recognize them. After the occurrence, he was taken to Beanibazar Hospital for treatment. During cross-examination, he stated that he is a shopkeeper as well as a cultivator. There are 4/5 houses between his shop and house. He affirmed that at about 1.30/2.00 am, he came. He used to come to see the cow. He saw the accused persons behind his cowshed. They were taking away the sac. When he caught the accused, Helal dealt a dagger blow on the lower abdomen. When they were scuffling Helal dealt a dagger blow on his back. The accused Nurul Islam dealt a lathi blow, consequently, he lost his sense. After half an hour, he regained his senses and saw 30/40 persons at the place of occurrence. He affirmed that he carried a torchlight when he came from his shop. He also affirmed that initially he could recognize the

accused without a torch and subsequently, he recognized them by torchlight. He did not see the accused persons to cut the fence. At 6.00 am on the next day, the victim was taken to hospital and he was admitted there for a week. After coming back, he again went to the hospital and stayed there for 6 days. He affirmed that the doctor had given stitches on the injuries caused on his lower abdomen. After 10/15 minutes of scuffling and sustaining injury, he lost his senses. He affirmed that Jahur could not flee away along with the sac. Because he detained him. The accused Helal is not his relation.

P.W. 3 Rafique Uddin is the brother of the informant and Lala is his nephew. The occurrence took place on 25th Falgun at 2/2.30 am 2 years ago. He saw that accused Helal and Safar were fleeing away by running. He chased them up to their houses and accused Helal, Safar and Nurul Islam fled away. Lala was injured on the lower abdomen and knee. Lala affirmed that when he attempted to detain the accused, Helal dealt a dagger blow. Lala was taken to hospital. In reply to a question put to him by the Court, he affirmed that Lala was hospitalized for 4/5 days. During cross-examination, he affirmed that he witnessed the occurrence that took place near his house and at the time of the occurrence, he was sleeping in his house. Hearing the hue and cry of Lala, he woke up and the place of occurrence was 5/6 hands far from his bhiti hut. He affirmed that he, Lala, Habib, Muhibur Rahman, Dudu Mia, Abdur Raqib and other 8/10 persons chased the accused persons. After going 4/5 hands, Lala fell to the ground. Three accused persons are residents of three separate houses. The accused persons fled away to their respective houses situated on the west side. At about 1/1.30 am, he chased the accused persons. He affirmed that there was blood on the clothes and the ground. He affirmed that local doctor Abdur Rahim came to the place of occurrence at 2/2.15 am and advised to take the victim to Beanibazar Hospital. After the fazar prayer, the victim was taken to Beanibazar Hospital which is situated about 6 miles away from the place of occurrence. Lala was hospitalized in Beanibazar Hospital for a day and his parents stayed with him at the hospital. He also affirmed that Lala raised a hue and cry saying that the thief entered his

house and his parents were sleeping in their house. On that day, there were 4/5 children in their house. He affirmed that his bhiti hut is situated 4/5 hands far from the house of the informant and the cowshed of Lala is situated about 2 hands far to the west of his bhiti hut and the shop of Lala was situated 50/60 hands far from his house.

P.W. 4 Mahibar Rahman stated that the informant and Lala are known to him. The occurrence took place on 25th Falgun at 1.30/2 am 2(two) years ago. Hearing hue and cry, he went to in front of the house of the informant and saw that Lala was lying on the ground in a bleeding condition. Lala informed me that he was injured in the lower abdomen and the knee. Jahur beats him with a stick. He also stated that Helal, Jahur and Nurul Islam cut the fence of the house and taken away the rice from his house but they could not take those. The neighbouring people also came, heard and saw the occurrence. On recall, P.W. 4 stated that he signed the seizure list. He proved his signature on the seizure list as exhibit 3/2. He took the custody of rice kept in a sac and he proved his signature on the carbon copy. He identified his signature on the carbon copy. He proved the jimnana of the carbon copy as exhibit 4. During cross-examination, he affirmed that only one sac full of rice was given in his custody and aman rice was kept in the sac.

P.W. 5 Abdur Rakib was tendered and declined by the prosecution.

P.W. 6 Dr. Md. Ibrahim Khalil stated that on 10.03.1991, he examined P.W. 2 Lala Mia aged about 30 years at Beanibazar Health Complex and found the following injuries:-

- “1. One incised wound over the lower abdomen which is situated about 2” inches below the left lateral part of the ambicuous which is about 1"x½"x¼" inch. Weapon used: Hard moderately heavy sharp cutting.
2. One incised wound over the upper and anterior part of the right leg just below the right knee joint. Size ½"x¼"x¼" inch. Weapon used hard moderately heavy and sharp cutting.
3. Multiple abrasions over the upper and anterior part of the right leg. The weapon used a hard moderately heavy blunt weapon.

Nature of injury-Simple in nature.”

During cross-examination, he stated that it was not written in the register that the victim was taken by police. Nothing was written in the medical certificate as regards the person who identified Lala. He denied the suggestion that in connivance with the informant, he issued the certificate without examining the victim.

P.W. 7 S.I Shyamol Kanti Barua is the recording officer. He stated that on 12.03.1991, he was posted at Beanibazar Thana. On that day, he received a written FIR through the Magistrate and he registered the FIR. He proved the FIR form as exhibit 2 and his signature as exhibit 2/1. He proved his signature on the written FIR as exhibit 1/2. He took up the investigation of the case. During the investigation, he visited the place of occurrence, prepared the sketch map and index, and recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898. He seized a blood stain lungi and genji and 40 kg rice and took the signatures of the witnesses on the seizure list. He proved the seizure list as exhibit 3 and his signature as exhibit 3/1. He collected the certificate. He perused the certificate issued by the doctor and after completing the investigation found the prima facie truth of the allegation against the accused persons and submitted charge sheet against them under Section 382 of the Penal Code, 1860. During cross-examination, he stated that the alleged occurrence took place on 10.03.1991 at about 2.00 am and the FIR was lodged on 12.03.1991. After recording the FIR, he visited the place of occurrence on that day at 4.30 pm and recorded the statement of witnesses Abdur Rashid Chowdhury, Mahibur Rahman, Abdur Rakib and others. On that day, he also prepared the seizure list. The seized articles were not produced in Court. He affirmed that he did not seize any torchlight. He denied the suggestion that the accused persons were falsely implicated in the case and that he did not collect any medical certificate and that the victim was not injured.

P.W. 8 Md. Jalal Uddin is an Advocate of Sylhet Judge Court. He stated that now he is a practicing Advocate of the Magistrate Court, Beanibazar. He stated that on 11.03.1991, he wrote the FIR as per the

statement of informant Habib Ali. He identified his signature in the FIR. The informant put his signature. During cross-examination, he stated that he had no personal knowledge about the occurrence.

Learned Advocate Mr. Tabarak Hussain appearing along with learned Advocate Mr. Mahmudul Mursalin and the learned Advocate Ms. Nasrin Akhter Sheela on behalf of the accused Jahur Uddin, Helal Uddin and Nurul Islam submits that there is a previous enmity between the accused and the informant and the witnesses examined by the prosecution are closely related with each other and the neutral persons who were admittedly present at the place of occurrence was withheld by the prosecution with oblique motive. There is a contradiction in the evidence of P.Ws. 1 and 2 regarding the recognition of the accused persons. He further submits that after collecting the medical certificate from the doctor, the informant lodged the FIR following the injury mentioned in the medical certificate and the informant subsequently embellished the occurrence as stated in the FIR. The prosecution failed to prove the charge against the accused persons by adducing legal evidence. He also submits that the blood stain cloth of the victim, the soil and the rice seized by the Investigating Officer were not proved during the trial of the case for which a doubt is created as regards the manner of occurrence. He lastly submits that recognition of the accused-persons by moonlight is doubtful and the torchlight by which the witnesses recognized the accused-persons was not proved by the prosecution. He relied on the decision made in the case of Abdul Haq and others versus The State reported in 14 BLT (HCD) 476, 15 BLD 121, 49 DLR 480, BCR 1984 (AD) 370 and BCR 1986 (AD) 225. He prayed for the acquittal of the accused persons.

Learned Deputy Attorney General Mr. S.M. Golam Mostofa Tara appearing along with learned Assistant Attorney General Mr. A. Monnan (Manna) on behalf of the state submits that P.W. 2 is the victim and the accused persons are neighbours and known to P.Ws. 1 to 4 who recognized them at the time of occurrence and the injuries caused on the P.W. 2 at the time of occurrence by the accused-persons were also corroborated by P.W. 6. The prosecution proved the charge against the

accused persons beyond all reasonable doubt. Therefore, he prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocate Mr. Tabarak Hussain who appeared on behalf of the accused and the learned Deputy Attorney General Mr. S.M. Golam Mostofa Tara who appeared on behalf of the State, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the records, it appears that P.W. 2 Md. Lala Mia is the victim, P.W. 1 is the father of P.W. 2, P.W. 3 Rafique Uddin is the brother of P.W. 1 and P.W. 4 Mahibar Rahman is the neighbour of P.W. 2. The occurrence took place at about 2.00 am. P.W. 2 victim Md. Lala Mia stated that on 25th Falgun at about 2 am about 2(two) years ago, sensing the sound of walking of the people, he opened the door of his shop and thereafter, came to his house to ascertain whether his cow was stolen. At that time, he saw that one accused was standing and two others were cutting the fence. The accused Jahur took away a sac full of rice. He could recognize the accused persons by moonlight and also by torchlight. While he attempted to detain accused Jahur, accused Helal dealt a dagger blow on his lower abdomen and below the knee and another accused was Nurul Islam. When he raised a hue and cry, his father and uncle Rafique Uddin Dudu came to the place of occurrence. They chased the accused persons but they fled away. Subsequently, the victim was taken to hospital. The evidence of P.W. 2 as regards causing injury by accused Helal and Nurul Islam is corroborated by P.Ws. 1 and 3. P.W. 4 also stated that hearing hue and cry, he came to the place of occurrence and saw Lala in an injured condition on his lower abdomen and knee. Lala also informed him that Helal caused injury by a dagger and he was taken to hospital. The evidence of P.W. 2 as regards causing injury by Helal and Nurul Islam is also corroborated by the medical certificate issued by P.W. 6 Dr Md. Ibrahim Khalil who treated P.W. 2 at the Hospital. During cross-examining of P.W. 2, the defence affirmed that P.W. 2 saw that the accused persons took away the rice kept in the sac. The defence also affirmed that when P.W. 2 attempted to detain the accused, accused Helal

dealt a dagger blow on his lower abdomen and at the time of scuffling, he dealt a knife blow on his back and the accused Nurul Islam beat him with a stick. The defence also affirmed that when he started from his shop, he carried a torchlight. Initially, he identified the accused by moonlight and subsequently, he recognized the accused by torch. The defence also affirmed that the stitch was given on the injury of P.W. 1 and bleeding started from his injury. During the cross-examination of P.W. 1, the defence further affirmed that P.W. 1 recognized the accused persons by moonlight and after the occurrence, P.W. 2 was injured and bleeding started as a consequence of injury caused by the dagger. During cross-examination of P.W. 3, the defence also affirmed that after the occurrence, he along with others chased the accused persons up to their house.

In the FIR, the informant stated that the accused also snatched away the torch of the P.W. 2 Md. Lala Mia. P.W. 2 recognized the accused persons by the torch and the hurricane but those were not proved by the prosecution. By cross-examining P.Ws. 1 and 2, the defence affirmed that at the time of occurrence, there was a moonlight. The accused persons are neighbours and previously known to P.Ws. 1 to 4. Non-production of the torch and hurricane is a material fact but the recognition of the accused persons by P.Ws. 1 and 2 by the moonlight is admitted by the defence. The accused persons were previously known to P.Ws. 1 to 4. At the time of recognition of the accused persons, P.W. 2 came to close proximity to the accused persons. When P.W. 2 caught the accused Jahur Uddin, he sustained injury by accused Helal. Nurul Islam also beat P.W. 2 by stick. Therefore, recognition of the accused persons by moonlight is not impossible. There is no doubt about the recognition of the accused persons by P.Ws. 1 to 4.

It is found that during investigation, the investigating officer collected the medical certificate of the victim and seized the blood stain cloth and the soil but during the trial those were not proved. Failure to prove the medical certificate, the blood stain cloth, wearing of the victim and the soil is an omission on the part of the prosecution. A medical certificate is corroborative evidence. P.W. 6 stated that he examined the

victim Lala Mia on 10.03.1991 at Beanibazar Hospital at 7.00 am and he found an incised wound on the lower abdomen, one incised wound over the upper and anterior part of the right leg and multiple abrasions over the upper and anterior part of the right leg. By cross-examining P.W. 6 the defence could not bring out any contradiction as regards the injury sustained by P.W. 2.

Indeed, P.Ws 1 to 4 are closely related to each other. Evidence of a witness cannot be rejected only because they are related to the victim. The evidence of a relation witnesses cannot be discarded unless the defence by cross-examining those witnesses brought out any material contradiction in their evidence. P.W. 2 is an injured victim and P.Ws. 1 and 3 are also eye witnesses of the occurrence. P.W. 4 came to the place of occurrence immediately after the occurrence and chased the accused persons when they fled away. P.Ws. 1 and 2 reside in the same house and P.Ws. 3 and 4 are close-door neighbours of P.W. 1 and the occurrence took place at late night. It is quite natural that hearing hue and cry at night the neighbouring people will come at the place of occurrence. Furthermore, the accused persons were known to the victim and P.Ws 1, 3 and 4. By cross-examining P.Ws. 1 to 3, the defence affirmed that P.W. 2 was injured and by cutting the fence of the bhiti hut accused-persons stole the rice. Therefore, I do not find any legal infirmity or material contradiction in the evidence of P.Ws. 1 to 4 to disbelieve them. Furthermore, the evidence of P.W. 2 as regards causing injury on his body is also corroborated by P.W. 6 Dr. Md. Ibrahim Khalil. Because of the above evidence, I am of the view that the prosecution proved the charge against the accused persons beyond all reasonable doubt.

On perusal of the records, it appears that the accused persons were taken to custody at the time of the pronouncement of the judgment on 23.01.1993. After that, the accused Jahur Uddin and accused Nurul Islam were granted bail by this Court by order dated 09.03.1994 and they served in custody for about 1 year 2 months and the accused Helal was granted bail by this Court by order dated 19.05.1994 and he served in custody about 1 year and 4 months.

It is found that initially, the accused persons entered the house of the informant by cutting the fence of the bhiti hut but they did not cause any injury to any witness. When the P.W. 2 detained the accused Jahur, the accused persons resisted and accused Helal and Nurul Islam caused injuries to P.W. 2. Therefore, considering the facts and circumstances of the case, I am of the view that ends of justice would be best served if the sentence passed by the trial Court is modified as under;

The accused persons (1) Jahur Uddin, (2) Helal Uddin and (3) Nurul Islam are found guilty of the offence under Section 394 of the Penal Code, 1860 and they are sentenced to suffer imprisonment already undergone and fine of Tk. 500 each.

The appeal is disposed of with a modification of the sentence.

Send down the lower Court's records at once.