

Present:

**Mr. Justice Muhammad Mahbub UI Islam
And
Mr. Justice Md. Hamidur Rahman**

Criminal Appeal No.8563 of 2017.

Eanam Ahmed ... Convict-Appellant.

-Vs-

The State. Respondent.

Dr. Kazi Akter Hamid, Advocate. with
Mrs. Mahmuda Begum (Shiuly) and
Mohammed Ikram Hossain, Advocates.
... For convict-appellant.

Mr. Mohammad Mujibur Rahman, D.A.G with
Mr. Chowdhury Shamsul Arifin, A.A.G and
Mr. Md. Jasim Uddin Khan, A.A.G.
...For the State.

**Heard on:07.11.2024, 21.11.2024,
05.12.2024, 12.12.2024,
08.01.2025.12.02.2025.**

Judgment on:13.03.2025.

Md. Hamidur Rahman, J:

By this appeal convict-appellant has challenged the
legality and propriety of the judgment and order of conviction
and sentence dated 12.06.2017 passed by the learned Special

Judge (District Judge) ex-officio Special Sessions Judge, Jashore in Sessions Case No. 192 of 2009 convicting the appellant under section 302 of the Penal Code and sentencing him to suffer imprisonment for life and also to pay a fine of Tk. 20,000/-(twenty thousand) in default to suffer rigorous imprisonment for one year more.

The prosecution case is projected in the First Information Report (briefly as FIR) and unfurled at trial are that on 15.04.2008 Ripon Hossain, son of Haider Ali Biswas of Biswas Para assaulted Palash, son of Moni Kha of Khan Para at a tea stall of Rajgonj Bazar over having tea; at that instance a dispute was develop between the people of Khan and Biswas Para of the same village. On 16.04.2008 in the morning the people of Khan Para namely Rashid, Palash, Shakwat and Khalil along with other some persons went and asked the reason of physical assault to Ripon and a free fight was taken place between the people of the aforesaid localities. On the same date i.e. on 16.04.2008 at about 9.00 hours in the morning the victim Helal who was a student of Agricultural Diploma College of Mushiahati was on the way to home by a rickshaw van pulled by one Rezaul with some iron piss (পেরেক)

along with other two persons namely Nazrul Kha and Rafikul Islam and while the victim reached at the place namely Vanur Mour of Chondipur Village, the accused namely Alamgir Hossain told that “হেলাল আমাদের আক্রমণ করিতে আসিয়াছে ওকে ধর, শেষ করে দে।” and then the other FIR named accused persons including convict-appellant along some terrorist made an unlawful assembly and attacked the victim possessing with sharp long banded knife (গাছিদা) iron rod, iron crowbars, hockey stick, etc. The convict-appellant dealt a blow with a Gachida (গাছিদা) at the head of the victim and sustained serious blood injury and felt down on the road. Thereafter, the other accused persons dealt blow by iron, crowbar, hockey stick on the different parts of the body of the victim, while the companions of the victim hued and cried, the witnesses namely Abdur Rashid, Delbar, Babor Ali, Arob Ali, Sirajul Islam, Mahbubur Rahman rapidly came to the place of occurrence and also see the incident. Witness namely- Abdur Rashid took him to Monirampur Thana Health Complex. Thereafter, the victim was taken to the Khulna Medical College Hospital, wherein the victim health condition was deteriorate and he was taken to the Dhaka Medical College Hospital where he died on 19.04.2008 at 9.00 p.m.

with these allegations the prosecution was launch by lodging FIR by Md. Shamsul Haque Mantu elder brother of the victim as informant which was recorded as Monirampur Police Station Case No. 17 dated 21.04.2008 corresponding to G.R. No. 94 of 2008 under sections 302/34 of the Penal Code.

After investigation the police submitted charge sheet being Charge Sheet No.150 dated 26.07.2008 accusing nine persons including convict-appellant under sections 143/323/326/302/149/114 of the Penal Code.

Eventually, the case was taken up for trial by the learned Special Judge and Sessions Judge, Jashore wherein the accused were called upon to answer the charge under sections 143/302/149 of the Penal Code to which the accused on dock pleaded not guilty and claimed to be tried.

In course of trial, the prosecution in all produced fourteen witnesses, out of twenty-four witnesses. The defence examined none.

After closure of the prosecution case accused on dock were examined under section 342 of the Code of Criminal Procedure and again they repeated their innocence by led no evidence in defence.

The defence case as it appears from the trend of cross-examination of the prosecution witnesses are that of innocence and false implication.

Before scrutiny of the evidence on record as against the submission of the learned Advocate, let us first describe, in short, as to what the prosecution witnesses deposed before the trial Court.

P.W. 1, Md. Shamsul Haque Montu, the brother of the victim Helal is the informant. He deposed about the story of FIR.

In his cross-examination, he deposed that he did not know there is any case against the said incident. He also deposed about case No. 14(4)2008.

P.W. 2, Md. Shariful Islam deposed that he heard about the incident from the eye witnesses.

In his cross-examination he deposed that at the time of seizure list the investigating officer enquired him about the said incident. He denied the suggestion that there was a crime between the victim held and the accused persons.

P.W. 3, Rafiqul Islam is an eye witness of the case. He deposed that convict-appellant dealt a blow with Gachida

(গাছিদা) to the head of the victim. The accused Ripon also hit the victim's by Rod Bar. He then with the help of Delbar, Mahbub, Rashid and Babor Ali sent the body of victim by van puller to the hospital. He did not go to the hospital. He also identified the accused persons on the dock.

In his cross-examination he deposed that at the time of incident he was stand nearby. He made his statement to the police after 9/10 days. He denied the suggestion that his house beside the house of informant.

P.W. 4, Md. Rezaul Islam confirmed the time, date and place of occurrence. He deposed that he along with others and Helal were in the van then at the place namely Vanur Moor the accused Eanam dealt blow with Gachida (গাছিদা) on the head of the victim and he fell down to the road and other accused hit the victim. Thereafter, they took the victim to the Monirampur Health Complex and the doctor referred him to the Khulna Medical College Hospital and his condition was deteriorated and took him to the Dhaka Medical College Hospital wherein he died on 19.04.2008. The Inquest Report was prepared before him.

In cross-examination, he deposed that they tried to fled away but the accused persons surrounded them in the road. The accused persons only hit the victim.

P.W. 5, Md. Nazrul Islam Khan also confirmed the date, time and place of occurrence. He is a van puller, the victim, Nazrul and Rafique were with him. They were coming Vanur Moor and when they reached the place nearby Vanur Moor then the accused persons came and dealt a blow with Gachida(গাছিদা) on the head of the victim. The other accused persons also hit the victim. He also identified accused persons on the dock.

In his cross-examination, he deposed that the accused persons did not hit them but he saw the incident.

P.W.6, Dr. Md. Mainuddin Molla is a doctor of Khulna Medical University. He initially issued certificate of injury of the victim. He issued the said certificate on 20.04.2008 wherein it has been observed that:

“মাথায় Cut injury 10 cm stitched এবং ধারালো অস্ত্রের আঘাত ছিল।

X-ray: Fracture in the frontal & parital bones on left side and occipital bone in the midline.

Multifocal haemorrhage & continuous in left cerebral lumphus & Rt. cerebral.

Haemorrhage fluids are present with the lateral ventricles 5th & 6th ventricles are present.

Diffuse oedema present in the brain fluid containing specks are under stress.

Age of the injury about 4 hours.”

In his cross-examination, he deposed that he found only one injury on the head. He also stated that the stitch was not done by them; they found the stitch on his head.

P.W.7, Md. Mahbubur Rahman also confirmed date, time and place of occurrence. He deposed that when they reached Vanur Moor then the accused Eanam dealt a blow with Gacida (গাছিদা) on the head of the victim. The other accused also hit the victim. Thereafter, the accused persons left the place and then Rashid and Rafiq took the victim to the hospital.

In his cross-examination deposed that after 15/16 days of the incident gave statement to the police. He was the accused of a case filed by Alamgir. He also informed about the incident to the informant over telephone.

P.W.8, Dr. A. Kha. M. Safiuzzaman was a formal witness as he was the doctor who conducted Post Mortem on the dead body of the victim. According to his deposition he was working as Professor of the Dhaka Medical College Hospital on 20.04.2008 at 12.30 p.m. the dead body of Helaluzzaman aged about 23 years was brought to him and accordingly conducted Post Mortem report and found the following injuries:

“Surgical stitch wound in the middle of the vault. 6 stich & 1 in length.”

Internal dissection: Hamatoma found in the all over skull. Fracture of the fontal bone of left side. Crack fracture of the left temporal, occipital and right parital bone. Depressed fracture of the left parietal bone of the skull. Mening intact. Extradural Haemorrhage present in the left parietal region of brain. Subdural and sub arachnaid haemorrhage present.

In his opinion the cause of death due to haemorrhage followed by shock as a result of above mentioned head injuries which was

antemortem and homicidal in nature and caused by sharp cutting weapon.”

P.W. 9, Md. Sarwar Hossain was the investigating officer of the case. He deposed that on 21.04.2008 he was Sub inspector of the Monirampur Police Station under Jashore District. That on that day officer-in-charge of the said Police Station recorded FIR lodged by the informant and handed over the investigating charge on him. He accordingly visited the place of occurrence, prepared sketch map and index on different papers and recorded statements of the witnesses under section 161 of the Code of Criminal Procedure.

In his cross-examination he deposed that after 5 days of the incident he seized some alamots from the place of occurrence. He did not file the charge sheet. He did not send the alamoith for examination.

P.W.10, Abdur Rashid is the neighbour of the informant. He also confirmed the time, place and date of occurrence. He is also an eye witness. He saw that accused Eanam dealt blow by “Gachida (গাছিদা)” on the head of the victim. The other accused also hits the victim.

In his cross-examination he deposed that total 7 accused persons hits the victim's head. He did not go forward to defend the victim.

P.W.11, Suruzzaman is the Sub-inspector of the Shahbag Police Station of the Dhaka Metropolitan Police. On 20.04.2008 he made the Inquest Report of the victim by virtue of G.D. No. 1349 dated 20.04.2008 in the Dhaka Medical College Hospital. The said dead body was identified by his brother Shamsul Haque Montu.

In his cross-examination, he deposed that who lodged the G.D he don't know. There was bandage on the head of the victim.

P.W.12, Tarun Kumar Ray is a Sub-inspector of Monirampur Police Station and second Investigation officer of the case. He submitted the charge sheet being No. 150 dated 26.07.2008.

In his cross-examination, he deposed that he did not record witnesses' statements and blood stained soil and cloths were not sending for chemical examination.

P.W.13, Shawkot also confirmed the date, time and place of occurrence. He is also an eye witness.

In his cross-examination he deposed that he made statement to the police. He denied the suggestion that the case was filed for previous enmity.

P.W.14, Khalilur Rahman also confirmed the date, time, and place of occurrence. He is also an eye witness of the case. He saw that accused dealt blow by “Gachida (গাছিদা)” on the head of the victim.

In his cross-examination he deposed that police investigated him. At the time of incident Rashid and Mehedi were present.

Dr. Kazi Akter Hamid the learned Advocate appearing on behalf of the convict-appellant submits that he has taken us through the FIR, testimonies of the witnesses, the judgment and order passed by the trial Court, the Post Mortem report and the connected materials on record.

The Court below has failed to take notice of the fact that the prosecution witnesses contradicted each other in many vital issues and the trial court committed an error in not giving the advantage of contradiction in favour of the convict-appellant.

He further submits that conclusion drawn from the Post Mortem report i.e. “caused by sharp cutting weapon is oxymoronic in nature. Hence, conclusion of the Post Mortem report does not align with the actual findings.

Trial Court failed to consider that there was admittedly a counter being case No. 14(8) 2008 filed by the father of the appellant and confirmed by the prosecution witnesses which took place at 8.00 a.m on the same day i.e. on 16.08.2008.

He also submits that no weapon was recovered by the Investigating officer which is vital point of the prosecution to proof beyond reasonable doubt.

On the other hand, Mr. Mohammad Mujibur Rahman, the learned Deputy Attorney General appearing on behalf of the State submits that there are 7 eye witnesses who deposed that they saw that the convict-appellant dealt a blow by Gacida (গাছিদা) to the victim’s head and learned trial Court positively passed the judgment relying upon statement of eye witnesses. He further submits that there are contradictions amongst the witnesses and the appellant cannot get the benefit of doubt take other accused of the case.

Learned D.A.G also submits that the prosecution case was proved by the witnesses and it is not necessary to examine all witnesses. He next submits that the prosecution proof date, time, place and manner of occurrence. The evidence on record in particular the depositions of the eye witnesses.

Now in view of the submissions and counter submission let us review the relevant evidence, materials on record and scan the attending circumstances of the case to arrive at decision as to whether the trial Court was justified in passing the impugned judgment and order of conviction.

On scrutiny of the eye witnesses namely P.W.3, P.W.4, P.W.5, P.W.6 and P.W.7, we find that they categorically mentioned that Enam Ahmed dealt blow with Gachida (গাছিদা) and the victim was seriously injured and died after 4 days.

Appellant lawyer's submission regarding counter being case No. 14(8)2008 filed by the father of the appellant and suggestions by the appellant's lawyer at the trial stage that the said incident took place at 8 a.m. on the same day i.e. on 16.08.2008 and the appellant was seriously injured by the said Gachida (গাছিদা). The appellant did not file any documents

regarding said case. At the appellate stage in a bail application, the appellant lawyer submitted/annexed some documents regarding the said criminal case and injury certificate. On scrutiny of the said document we find that on 14.03.2013 learned Court released the accused from the charges. So the contention advanced by the learned lawyer is not acceptable.

The learned lawyer of the appellant contends that no weapon was recovered and the hence conviction and sentence imposed upon the convict-appellant is liable to be set aside. The Indian Supreme Court held in *Yogush Singh V. Mahabir Singh* reported in (2017) Vol. II page 167 held that:

“In any case it is established proposition of law that there non-recovery of weapon does not falsely prosecution case where there is impel unimpeachable ocular witness.” So the contention taken by the learned lawyer for appellant regards non-recovery of the weapon is not acceptable.”

From a careful scrutiny of the evidence on record, it appears that there were enmity and quarrel between the parties, the appellant Eanam inflicted ‘Gachida (গাছিদা)’ blow on

the head of the victim. As a result, the victim fell down on the ground and initially he was taken to Monirampur Hospital for treatment. Thereafter, he was transferred to Khulna Medical College Hospital for treatment and then he referred to the Dhaka Medical College Hospital and he died there after four days. In the Post Mortem Report, the nature of injury was described as below:

“On dissection: Haematoma found in the all over the skull. Fracture of the frontal bone of the left side. crack fracture of the left temporal occipital and right parietal bone. Depressed fracture of the left parietal bone of the skull. Meningeal and intact. Intracranial hemorrhage present in the left parietal region of brain, skull and scalp wound and injury are ante mortem”.

Regarding cause of death, the doctor opined that the cause of death was due to haemorrhage followed by shock as a result of above mentioned head injury which was ante-mortem and homicidal in nature and caused by sharp cutting weapon.

Now the question before us to be decided is that, whether the act of the appellant would fall within the ambit as offence of murder punishable under section 302 of the Penal

Code or culpable homicide not amounting to murder i.e. under Exceptions 1 and 4 to section 302 punishable under section 304 part-1 of the Penal Code.

Culpable homicide has been defined in section 299 of the Penal Code which read as under:

“Whoever causes death by doing an act with the intention of causing such bodily injuries as is likely to cause death, or with the knowledge that he is likely by such act to cause death. Commits the offence of culpable homicide.”

Culpable homicide becomes murder if it attracts any circumstances enunciated in section 300 of the Penal Code. To consider culpable homicide not amounting to murder; five exceptions have been referred in section 300 of the Penal Code. If any act falls with the purview of any exceptions enunciated in section 300 of the Penal Code, the culpable homicide becomes not amounting to murder.

Decision reported in 40 DLR(AD) 6 State Vs Tyeb Ali page-18... Exception 4- Culpable homicide is not murder if it is committed without pre-mediation in a sudden quarrel and

without the offenders having taken under advantage or acted in a cruel or unusual manner.

It is admitted by the informant that there was dispute between the parties and fight/quarrel was taken place before an hour of the incident and when the appellant saw the victim Helal in vanur more, on the spur of the moment without premeditation inflicted 'Gachida (গাছিদা) blow on the head of the deceased.

So, we are of the view that in the present case we have already noticed that accused Eanam inflicted 'Gachida (গাছিদা)' blow only once. Accused Eanam was quite free to inflict as many blows but he merely dealt one blow. It speaks that he restrained himself to inflict further injury on the head which might resulted in his death. Thereafter, accused Eanam did not intent to kill Helal. The act of Eanam was done without premeditation and not is a cool blooded manner but the heart of passion and as such, in our view the offence altered the provision of section 304 part 1 and 4 of the Penal Code. Thus the appeal is dismissed with the modification of the sentence of the appellant; we therefore alter from the evidence on record that the deposition of the P.W.3, P.W.4, P.W.5, P.W.7,

P.W.10 and P.W.11 are the eye witnesses. It is admitted that there was dispute between the parties and there was fight between the parties one hour ago of the said incident. A Criminal case being No. 17/109 was lodged before the Police Station which case was ultimately discharged. Immediate after the said incident the accused came from the bazar and at a place namely vanur mour the appellant inflicted "Gachida" blow on the head of the victim and he fell down on the ground. Other accused also hit the victim. Thereafter, Helal was taken to Monirampur Hospital for treatment and then the doctor referred to him the Khulna Medical College Hospital and being transferred to Dhaka Medical College Hospital for better treatment and after four days he died. It appears that there was dispute between them and fight was held before an hour of the incident. So, the ingredients of section 300 of the Penal Code are available in the present case is the appellant inflicted 'Gachida' blow with the intention of causing death. But the Exception No.4 to Section 300 of the Penal Code read as follows:

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of

passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

It was also observed by the Appellate Division in the case of ***Superintendent & Remembrancer of Legal Affairs, Government of Bangladesh Vs Siddique Ahmed*** reported in ***31 DLR (AD) 29 (Para-7)*** that, "...../Section 304 of the Code which consists of two parts, does not create any offence but provides for the punishment of manslaughter or culpable homicide not amounting to murder. The Section makes a distinction in the award of punishment. Under the first part of the Section, the intention to kill is present, and the act would have amounted to murder if the act is done with the intention of causing such bodily injuries as is likely to cause death, but the act having fallen within any one of the five exceptions, in Section 300 of the Code, the offence will fall within its ambit. The second part of the Section is attracted to a case where the act is done with the knowledge likely to cause death but without any intention of causing death or to a case where bodily injury is caused as is likely to cause death. The first part applies to a case where there is guilty intention, and the

second part where there is no such intention, but there is guilty knowledge”.

Thus, the appeal is dismissed with modification in respect of the sentence of the appellant, we, therefore, after the conviction of the appellant from section 302 to section 304 Part-1 and reduce the sentence to rigorous imprisonment for 10 (ten) years.

The order of bail granted earlier by this Court is hereby recall and cancelled.

Let a copy of the judgment and order along with lower court records be sent to the trial Court for information and necessary action at once.

Muhammad Mahbub UI Islam, J:

I agree.