Present

Mr. Justice Sheikh Abdul Awal

Criminal Revision No. 317 of 2019

Arifuzzaman (Hasu)

................Convict-Petitioner.

-Versus-

The State.

.....Opposite party.

Mr. Md. Zahidul Murad Tuhin, Advocate

.....For the Petitioner.

Ms. Shahida Khatoon, D.A.G with
Ms. Sabina Perven, A.A.G with
Ms. Kohenoor Akter, A.A.G.

.... For the Opposite party.

Heard on 21.01.2024, 05.02.2024, 07.02.2024 and Judgment on 12.02.2024

Sheikh Abdul Awal, J:

This Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 08.10.2018 passed by the learned Additional Sessions Judge, Meherpur in Criminal Appeal No. 48 of 2016 allowing the appeal in-part by modifying the judgment and order of conviction and sentence dated 28.09.2016 passed by the learned Chief

Judicial Magistrate, Meherpur in G.R No. 483 of 2009 corresponding to Meherpur Police Station Case No. 03 dated 04.10.2009 convicting the petitioner under section 325 of the Penal Code, 1860 and sentencing him thereunder to suffer rigorous imprisonment for a period of 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer imprisonment for a period of 3 (three) months more should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The relevant facts briefly are that on 15.09.2009 one, Azizul Haque as complainant filed a petition of complaint in the Court of the learned Senior Judicial Magistrate, cognizance Court, Meherpur against the convict petitioner and 5 others under section 114/ 143/ 323/ 324/ 325/ 307 and 379 of the Penal Code alleging, inter-alia, that on 13.09.2009 while the complainant and his father and two brothers went to Dindatta bridge under Meherpur district to dry out 60 bundles of jute and 30 bags of IRRI dhan and then one driver of auto rickshaw made an altercation with the complainant party and thereafter the accused persons after being armed with Shabol, lathi and rod conjointly attacked witness No. 1 and at one stage accused petitioner gave shabol blow upon him while witness No. 1 resisted the same by

his left hand resulting the witness No.1 sustained serious injury on his left hand and then the accused No.3 dealt another shabol blow on the person of the witness No.1, who resisted the same by right hand resulting he sustained serious bleeding injury on kobji of right hand and thereafter, the accused persons conjointly beaten on the person of witness No.1 resulting he fallen to the ground and at that time the accused No.4 also pushed by his sharp rod resulting victim sustained serious bleeding injury while the complainant went there and tried to rescue him and then the accused No.5 dealt a rod blow on his head and another accused also dealt rod blow on his left head resulting the complainant sustained bone-crack injury and thereafter, the accused persons took away the jute and paddy from the place of occurrence, which valued at taka 60,000/-. On hearing hue and cry local people came there and took the victims at Meherpur hospital for treatment.

On receipt of the petition of complaint, the learned Judicial Magistrate examined the complainant under section 200 cr. p. c. and sent the petition of complaint to local police station with a direction to treat the same as first information report.

In this backdrop Meherpur Police Station Case No. 03 dated 04.10.2009 under section 114/ 143/ 323/ 324/

325/ 307 and 379 of the Penal Code was started against the accused petitioner and 5 others.

Police after completion of investigation submitted charge sheet being charge sheet No. 22 dated 15.02.2010 under section 143/323/325 of the Penal Code against all the F.I.R. named accused persons.

Thereafter, the accused persons were put on trial before the Chief Judicial Magistrate, Meherpur to answer the charge under section 143/323/325 of the Penal Code in which the accused-petitioner and others pleaded not guilty and claimed to be tried stating that they have been falsely implicated in this case out of previous enmity with the informant party.

At the trial, the complainant party examined as many as 11(eleven) witnesses and exhibited some documents to prove their case, while the defence examined none.

On conclusion of trial, the learned Chief judicial Magistrate, Meherpur by his judgment and order dated 28.09.2016 found the accused petitioner guilty under section 325 of the Penal Code and sentenced him thereunder to suffer rigorous imprisonment for a period of 3(three) years and also to pay a fine of Taka 5,000/- (five thousand) each in default to suffer imprisonment

for a period of 3 (three) months more and also found 3 others guilty under section 323 of the Penal Code and sentenced them thereunder to suffer rigorous imprisonment for a period of 1(one) year each and also to pay a fine of Taka 1,000/- (one thousand) each in default to suffer imprisonment for a period of 3 (three) months more and acquitting 2 other accused persons from the charges levelled against them.

Against the aforesaid judgment and order dated 28.09.2016 the accused-petitioner and 3 others preferred Criminal Appeal No. 48 of 2016 before the learned Sessions Judge, Mehrpur, which was subsequently transmitted to the Court of the learned Additional Sessions Judge, Meherpur for disposal, who by the impugned judgment and order dated 08.10.2018 allowed the appeal in-part by modifying the judgment and order of conviction and sentence dated 28.09.2016.

Being aggrieved by the aforesaid impugned judgment and order dated 08.10.2018 the convict petitioner moved before this Court and obtained the present Rule.

Mr. Md. Zahidul Murad Tuhin, the learned Advocate appearing for convict-petitioner submits that the instant case is a counter case, over the self-same

occurrence the father of the convict-petitioner filed Meherpur police station case No. 16 dated 13.09.2009 under section 143/341/323/324/326/307/506 of the Penal Code just immediate after occurrence against the complaint party and the said case was ended by conviction but in appeal the accused persons were acquitted. The learned Advocate further submits that in this case total 11 witnesses were examined out of which PW-1, PW-2, PW-3 and PW-4 are close relatives with each others, they inconsistently deposed before the trial Court as to the fact of the case and rest witnesses are hearsay witnesses. The learned Advocate further submits that just after the occurrence the father of the present convict petitioner lodged a first information report being Meherpur Police Station Case No. 16 dated 13.09.2009 and long 2 days after the occurrence the complainant filed this case on 15.09.2009 without any explanation of delay which creates a serious doubt as to truthfulness of the complaint case. Finally, the learned Advocate submits that as per petition of complaint the only eye witness (driver of local auto-rickshaw), who firstly made altercation was not made witness in the case and admittedly instant case is offshoot of earlier G.R. case to frustrate the main case and to harass the convict-petitioner although both the Courts below without

considering all these vital aspects of the case erroneously found the accused-petitioner guilty under section 325 of the Penal Code and convicted him thereunder to suffer rigorous imprisonment for a period of 3(three) years and also to pay a fine of Taka 5,000/- (five thousand) in default to suffer imprisonment of a period of 3 (three) months more which occasioned a failure of justice and as such, the judgments of 2 courts below are liable to be set-aside. The learned Advocate to fortify his submissions has relied on the decisions reported in 44 DLR 492, 10 BLC 174, 9BLD 474, 43 DLR 66, 38 DLR (AD) 75 and 6 BLC 310.

Ms. Shahida Khatoon, the learned Deputy Attorney-General appearing for the State-opposite party, on the other hand, supports the judgments of 2 Courts below, which were according to her just, correct and proper. She submits that in this case all the witnesses proved the prosecution case as to the time, place and manner of occurrence and thus, the prosecution proved the guilt of the accused petitioner beyond reasonable doubt.

Having heard the learned counsel for the parties and having gone through the materials on record, the only question that calls for my consideration in this Rule is whether the 2 courts below committed any error in

finding the accused-petitioner guilty of the offence under section 325 of the Penal Code.

On scrutiny of the record, it appears that one, Azizul Haque as complainant filed a petition of complainant on 15.09.2009 against the convict petitioner and 5 others under section 114/ 143/ 323/ 324/ 325/ 307 and 379 of the Penal Code on the allegation that the accused persons after being armed with deadly weapon attacked the complainant named witness No.1 Abdur Rahman and at one stage the convict-petitioner and others dealt blows on the person of the victim Abdur Rahman causing serious bleeding injury. It further appears that just after the occurrence victim Abdur Rahman was shifted to Meherpur hospital for treatment and doctor PW-10 stated in his medical report that injury No.1 was grievous in nature and injury No.2 was simple in nature. This witness in his cross-examination stated that- "এই প্রকার আঘাত পিচ রাস্তার উপর পড়ে গেলেও হতে পারে। পরিমাপ গুলো স্কেল দ্বারা মেপে করা হয়। আজ ইনজুরী Regs আনি নাই।" PW-1, PW-2, PW-3 and PW-4 in their respective evidence categorically stated that the accused persons out of previous enmity after being armed with deadly weapons attacked the victim Abdur Rahman and at one stage they dealt rod and shabol blows on the person of the victim, Abdur Rahman causing serious bleeding

injury. It further appears that victim Abdur Rahman stated in his deposition that he was in hospital for 7 days and PW-3, PW-4 corroborated the evidence of PW-1 in respect of all material particulars.

In the Case of Abdul Latif alias Budu and 6 others Vs. The State reported in 44 DLR 492 it has been held as follows:

> "Ordinarily when a first information report is lodged soon after the occurrence leaving no scope for consultation and fabrication, the presumption is that it is a truthful account eliminating the possibility of substitution or false implication. On the other hand, the Courts have always viewed first information report with grave suspicion when there has been unexplained delay in giving it and under this situation it can be presumed that the delay in the of FIR was used for the purpose of manipulation of the prosecution story."

I have already indicated that in this case the complainant (PW-1) has not been explained the delay of 2 days in filing the case. The complainant filed the case in the Court of the learned Senior Judicial Magistrate, cognizance Court, Meherpur after an inordinate and unexplained delay of two days. The delay in filing the complaint case corrodes the credibility of the

prosecution story. The Hon'ble Supreme Court in several cases held that delay in lodging the FIR creates a doubt, if the said delay is not properly explained.

Now, I want to deal with the contention raised by the learned Advocate, as regards drawing of adverse inference against the prosecution under Section 114(g) of the Evidence Act, for non-examination of the material witnesses, as according to Mr. Md. Zahidul Murad Tuhin, if those witnesses would have been examined, then probably the ocular version of the eyewitnesses would have stood falsified.

I have already noticed that in this case a number of charge sheeted witnesses, specially some of the close neighbours including the driver of auto rickshaw (eye witness) have not been examined by the prosecution. Thus, it can be said that the entire prosecution may be disbelieved by applying a straight jacket formula of non-examination of a material witness and drawing of adverse inference under Section 114(g) of the Evidence Act.

As discussed above, there are so many limps and gaps as well as doubts about the existence of the facts as well as circumstance. In that light, it creates a doubt in the case of the prosecution about the accused being

involved in the alleged crime. It is trite law that if any benefit of doubt arises, then the benefit should be given to accused. In that light, the trial Court ought to have acquitted the accused petitioner by giving the benefit of doubt. In that light, the judgment of the trial Court is to be interfered with.

In the result, the Rule is made absolute. The impugned judgment and order dated 08.10.2018 passed by the learned Additional Sessions Judge, Meherpur in Criminal Appeal No. 48 of 2016 allowing the appeal in part by modifying the judgment and order of conviction and sentence dated 28.09.2016 passed by the learned Chief Judicial Magistrate, Meherpur in G.R No. 483 of 2009 corresponding to Meherpur Police Station Case No. 03 dated 04.10.2009 convicting the petitioner under section 325 of the Penal Code, 1860 and sentencing him thereunder to suffer rigorous imprisonment for a period of 3(three) years and to pay a fine of Taka 5,000/- (five thousand) in default to suffer imprisonment for a period of 3 (three) months more is set-aside and he (Arifuzzaman alias Hasu) is acquitted from the charge levelled against her.

Convict appellant, Arifuzzaman (Hasu) is discharged from his bail bond.

Send down the lower Court records at once.