

IN THE SUPREME COURT OF BANGLADESH  
APPELLATE DIVISION

**PRESENT:**

*Mr. Justice Md. Nuruzzaman*

*Mr. Justice M. Enayetur Rahim*

*Mr. Justice Md. Ashfaquul Islam*

**CRIMINAL APPEAL NO.40 OF 2018**

**(Arising out of Criminal Petition No.337 of 2017)**

(From the judgment and order dated 14<sup>th</sup> June, 2012 passed by the High Court Division in Death Reference No.33 of 2007 heard along with Criminal Appeal Nos.1931 of 2007, 2693 of 2007 and Jail Appeal Nos.769 of 2007, 331 of 2007 and 770 of 2007)

Shamim Uddin : . . . Appellant

-Versus-

The State : . . . Respondent

For the Appellant : Mr. Md. Helal Uddin Mollah, Advocate instructed by Mr. Ziaur Rahman, Advocate-on-Record

For the Respondent : Mr. Md. Sarwar Hossain, Deputy Attorney General instructed by Ms. Shirin Afroz, Advocate-on-Record

**Date of hearing** : **The 30<sup>th</sup> day of May, 2023**

**Date of Judgment** : **The 31<sup>st</sup> day of May, 2023**

**J U D G M E N T**

**M. Enayetur Rahim, J:** This criminal appeal, by leave, is directed against the judgment and order dated 13.06.2012 and 14.06.2012, passed by the High Court Division in Death Reference No.33 of 2007 heard along with Criminal Appeal Nos.1931 of 2007, 2693 of 2007 and Jail Appeal Nos.769 of 2007 and 770 of 2007 and jail appeal No.331 of 2007, accepting the death reference in part with modification of the sentence in respect of condemned prisoner Shamim Uddin, the present appellant by altering

his sentence from death penalty to imprisonment for life and confirming the death sentence in respect of other three condemned prisoners passed by the trial court and thereby allowing criminal appeal No.1931 of 2007 and jail Appeal No.331 of 2007 both filed by the condemned prisoner Shamim Uddin, in part and dismissing the Criminal Appeal No.2693 of 2007 and Jail Appeal No.769-70 of 2007 filed by other two convicts Selimuddin alias Selim and Md. Nasir, (not before us in this case) and to pay a fine of Tk.30,000/- in default to suffer rigorous imprisonment for 3(three) years more.

The facts, relevant for disposal of the present appeal are as follows:

The present appellant along with 09(nine) others were put on trial before the Druta Bichar Tribunal, Chattogram in Druta Bichar Case No.18 of 2006 to answer charge under sections 302/ 34 of the Penal Code to which the present appellant pleaded not guilty and claimed to be tried.

The prosecution case as it reveals from the First Information Report and charge sheet, in short, is that the victim G.M. Ismail was a businessman at Chawkbazar Chattogram. On 18.03.2023 at 10.00 a.m he was going to Chattogram town by a taxi-cab, and when he reached at Garjaina Tila the accused persons namely, Shamim, Daulat, Tauhidul Alam, Mahbubul Alam alias Chhoto Mahbub, Selim, Daulat alias Kala Daulat, Nezamuddin alias Didar, Nasiruddin, Abu Taher, Ayub, Nazimuddin and others being

armed with deadly weapons attacked the victims taxi-cab and got him down. They forcibly took him at Asrayon Prokolpa corner of north hill, (the place of occurrence). Then accused Shamim shot him beneath his chest, Daulat shot at his thigh, Touhid shot at his abdomen and Mahbub shot at his head causing profuse bleeding injuries. Other accused persons also assisted the strikers as a result of which the victim died on the spot. The accused persons departed from the place of occurrence upon taking one mobile phone, cash of Tk.20,000/-, one attached case and one gold chain from the deceased. Having heard about the incident, Most. Rokeya Begum (P.W.1) wife of deceased rushed to the scene and found his dead-body at the place of occurrence. Many local people assembled there. Being informed from the eye witnesses she lodged the first information report (FIR) with the local police station which was recorded as Fatikchari Police Station Case No.7(3) of 2003 corresponding to G.R. No.24 of 2003.

Police after investigation submitted charge sheet against the 12(twelve) person including the present appellant. later on police submitted a supplementary charge sheet incorporating the names of two witnesses, namely, Nurul Islam and Belal.

Eventually, the case record was transmitted to the Druto Bichar Tribunal, Chattogram for trial. It is pertinent to be mentioned here that, the trial was held in absentia, against all the accused persons except Shamimuddin.

In course of trial the prosecution in all examined twelve witnesses out of twenty seven charge sheet witness and the defence examined none. After closure of the prosecution case, Shamimuddin, the present appellant, on dock was examined under section 342 of the code who again repeated his innocence but led no evidence in defence. However, the defence case, as it appears from the trend of cross examination of the prosecution witnesses, are that of innocence and of being falsely implicated. It was divulged in defence that due to internal political conflict between the rival parties they were falsely implicated in this case out of vengeance at the instance of their local rivals.

On conclusion of the trial, the learned Judge of the Tribunal by judgment and order dated 24.04.2007 convicted four accused persons namely, Shamimuddin, Daulat, Tauhidul Alam and Mahbubul Alam alias Chhoto Mahbub under sections 302/34 of the Penal Code and sentenced all of them to death finding them guilty for committing murder of the deceased Ismail. The Tribunal also convicted other seven accused persons under sections 302/34 of the Penal Code and sentenced each one of them to suffer imprisonment for life with fine of TK.30,000/- each in default to suffer 3(three) years rigorous imprisonment more.

A reference under section 374 of the Code of Criminal Procedure was sent for confirmation of death sentence to the High Court Division which was registered

as Death Reference No.33 of 2007. The present appellant, being aggrieved by the aforesaid judgment and order of conviction and sentence dated 24.04.2007 preferred Criminal Appeal No.1931 of 2007 and Jail Appeal No.331 of 2007.

A Division Bench of the High Court Division after hearing the said Death Reference along with the connected Criminal Appeals and Jail Appeals rejected the Death Reference so far the present appellant is concerned with the modification of sentence. The High Court Division modified the sentence of the present appellant from death to imprisonment for life.

The present appellant, feeling aggrieved by the impugned judgment and order preferred criminal petition for leave to appeal No.337 of 2017 and accordingly leave was granted.

Hence the present appeal.

Mr. Helal Uddin Mollah, the learned Advocate appearing for the appellant submits that the High Court Division maintained the conviction of the appellant relying on the evidence of P.Ws-2 and P.W-6, the alleged eye witnesses; save and accept the said witnesses no one saw the alleged occurrence; most of the witnesses are hear say witnesses and they reached at the place of occurrence after the alleged occurrence. He further submits that the High Court Division failed to appreciate that the said P.Ws-2 and P.W-6 were examined by the investigating officer after a long lapse of time that is

6(six) months after the alleged occurrence and as such chance of concoction cannot be ruled out and, thus, it is not safe to maintain the conviction relying the evidence of said witnesses.

On the other hand Mr. Sarwar Hossain, learned Deputy Attorney General, appearing for the respondent-State submits that considering the facts and circumstances of the present case and prevailing circumstances the High Court Division did not commit any error in relying the evidence of said P.Ws-2 and P.W-6 though they were examined by the investigating officer in a belated stage.

Heard the learned Advocates for the respective parties, perused the impugned judgment, evidence adduced by the prosecution and other materials as placed before us.

Let us first consider whether the prosecution has been able to prove the manner of killing of victim Ismail as alleged.

P.W-3 Ashit Kumar Das, who held autopsy of the deceased-Ismail deposed before the Court. He found the following injuries on the body of the victim-Ismail:

1. A  $\frac{1}{4}$ " diameter rounded wound with burn mark present on the left side of upper abdomen (5" to the left from midline and 6" and below obliquely from left nipple).

2. A  $1\frac{1}{2}$ " diameter rounded wound present on the right lateral side of abdomen (6" to the right from the midline and  $2\frac{1}{2}$ " above from right anterior superior iliac spine).

3. There are eight small sized 1/8" diameter rounded wound present on the lateral aspect of right upper thigh.

4. An abrasion of 1 1/2" size present on the left forearm.

5. A small rounded of 1/8" diameter present on the right side of temporal region of the head.

6. A lacerated wound of 1 1/2" X 1" X 1" X 1/4" size present on the back of right forearm.

7. Subdural clotted blood present on the both parietal temporal and occipital lobes of the brain.

8. Peritoneum injured.

9. Small intestines injured.

10. Spleen injured.

All the above injuries were antemortem in nature and caused by firearms and also by blunt weapons.

The P.W-3 opined to the effect:

"Death was due to head injury and hemorrhage leading to shock as a result of above mentioned injuries which were antemortem and homicidal in nature."

He proved the autopsy report, exhibit-3, his signature on it, exhibit-3/1 respectively.

Inquest report, exhibit-8 also supports the post mortem report.

P.W-10, first investigation officer seized bullet shell from the place of occurrence and he and P.W-9 proved the seizure list, and their signatures thereon, exhibit-9, 9/2, 9/1 respectively. Bullet shell was exhibited as material exhibit-I.

Thus, the manner of killing of victim-Ismail as narrated by the informant P.W-1 that the accused persons killed victim Ismail by gunshot and beating have been proved by the post-mortem report, exhibit-3, inquest report, exhibit-8, seizure list exhibit-9.

It is true that P.W-1, the informant of the case is not an eye witness of the occurrence. However, she reached the place of occurrence immediate after hearing the occurrence and having reached at the place of occurrence she found the dead body of the victim Ismail, her husband.

We have examined the evidence of P.W-2 and P.W-6, the alleged eye witnesses.

P.W-2 in his deposition stated that on 18.03.2003 he along with Md. Yaqub (P.W-6) on way from Berajali to Bibirhat by baby-taxi when reached at Khalifa Pukur at 10.45 a.m. they found that accused 1. Shamim, 2. Doulat, 3. Touhid, 4. Mahabul alias Chhoto Mahbub, 5. Nurul Alam alias Balliya, 6. Selim, 7. Kala Doulat, 8. Nezam Uddin alias Didar, 9. Nasir Uddin, 10. Abu Taher, 11. Aiyub, 12. Nazim Uddin being armed with fire arms were taking away victim Ismail towards the place of occurrence; he and Yaqub got down from the baby-taxi and followed them; after sometime Ismail was not willing to proceed, then accused Nasir, Abu Taher, Aiyub and Nazimuddin tied Ismail's hands and were dragging him; other accused were beating Ismail from his back for which Ismail was screaming; he (P.W.2) and others tried to rescue Ismail

but the accused were causing blank fires; then accused took Ismail to P.O. Ismail did not want to proceed anymore; then the accused were beating Ismail mercilessly; he and others were trying to proceed to Ismail to rescue him but the accused then aimed their fire arms to them and then accused Shamim shot beneath the chest of Ismail, accused Doulat shot him at the thigh; accused Touhid shot at his abdomen; then victim Ismail fell down at the spot who was trying to get up but accused Mahbub kicked him; later Mahbub shot him at Ismail's head; he witnessed the incident from Khalifa Pukur; accused were threatening him in different ways and for that he lodged G.D. No.268 dated 06.10.06, exhibit-2.

P.W-2 in his cross examination state that at 10.45 '0' clock he reached at Khalifa pukur par through baby taxi and in that baby taxi among the passengers with him there was one person named Yaqub of his locality. He has stated further in cross that after the alleged occurrence police has noticed him to go at police station but he cannot remember the date of his attendance at police station. He has stated further in cross that there was a brick field near by Khalifa Pukurpar and while the terrorists were abducting Ismail then he (PW-2) did not call any workers from the said brick field; while terrorists were abducting victim Ismail then he (PW-2) followed them though the terrorists threatened him; when the terrorists killed Ismail then he was at a distance of 20/22 cubits from the said spot of killing; on that day

he has informed about the news of killing to the house of Ismail and then Yaqub was with him but he cannot mention the name of said other people. He denied the suggestions non seeing of alleged incidence of death.

P.W-6 Md. Yaqub in his deposition stated that on 18.03.2003 he and Md. Joynal (P.W-2) started for Bibirhat through baby-taxi form Berajali and when they reached at Khalifa Pukur at about 10.45 a.m. they found accused Shamim, Doulat, Touhid, Mahbub, Nur Alam alias Balliya, Salim, Kala Doulat, Nezam Uddin alias Didar, Nasir Uddin, Abu Taher, Md. Ayub, Nazim Uddin were dragging and beating Ismail; they were taking him towards Asrayan Prokolpa of north; he and Joynal got down from their baby-taxi and followed them but accused caused blank fire and threatened the viewers not to proceed and then he and Joynal followed the accused at a certain distance; the accused took Ismail to the place of occurrence; Ismail did not want to proceed and he was screaming to rescue and he (P.w.-6) and Joynal again proceeded towards Ismail and then accused Shamim shot beneath the chest of Ismail, accused Doulat shot at his thigh, accused Touhid shot at his abdomen, accused Mahbub shot at his head; after killing Ismail accused took away mobile telephone with SIM card, gold chain, cash money of victim Ismail and fled away to north-west; when Ismail was going to Bibirhat by baby-taxi; and reached at Garzainnya Tila then the accused pulled down him from the baby-taxi forcibly to kill him; he witnessed the occurrence from

Khalifa Pukur; the accused are threatening him for which he lodged G.D entry at Fatikchari P.S. and he proved the same (Exhbt.6); accused Shamim threatened him not to depose in tribunal and indentified accused Shamim in Dock.

In cross-examination he stated that the distance of Khalifa Pukur par is  $1\frac{1}{2}$  k. m. from Garzainnya Tila; he, Joynal and others were coming through a baby-taxi together; there are two roads from Berajli to Bibirhat; Ismail was not his relative but he was man of his (PW 6) locality; Ismail's house is  $\frac{1}{2}$  k.m. far from his house; around the P.O. there was no house; there were house at the nearby top of the hill; when he and Joynal were approaching to rescue Ismail there were other people with them but he could not remember their names; but after occurrence people arrived at the P.O.; he made statement to police after six months of the alleged occurrence; on the date of occurrence he went to Ismail's house at 12:30 p.m. with Joinal and others and he talked with Ismail's wife and then he went to his own house; the P.O. was at a distance of  $1\frac{1}{2}$  k.m. from Ismail's house and during occurrence he was at a distance of 20/25 cubits from P.O; he went to his own house after the occurrence; Ismail's house was  $\frac{1}{2}$  k.m. far from his house; he and Joynal are neighbors to each other; he denied the suggestions that due to political rivalry accused Shamim was falsely implicated and he deposed falsely.

It is true that the said two eye witnesses were examined by the investigating officer after long lapse of time of the alleged occurrence. But it cannot be a sole ground to discard their evidence on the plea of belated examination by the investigating officer.

P.W-2 in his deposition categorically stated to the effect:

“সন্ত্রাসীরা বর্তমানে আমাকে বিভিন্নভাবে হুমকি দিতেছে এবং আমি জিডি করিয়াছি থানায়। ইহা ফটিকছড়ি থানার জিডি নং-২৬৮ তারিখ: ০৬/১০/২০০৬ এর কপি (প্রদর্শনী-২)”

P.W-7 G.M. Ilias, younger brother of victim-Ismail in his deposition categorically stated that:

“আমাদেরকে সন্ত্রাসীরা বলিয়াছে যদি আমরা মামলায় সাক্ষী দেই তবে সন্ত্রাসীরা আমাদেরকে স্ব-পরিবারে মারিয়া ফেলিবে। আমি চট্টগ্রামের বিজ্ঞ মহানগর হাকিম আদালতে একটি ডায়েরি করিয়াছি। ইহা সেই ডায়েরি নম্বর ১৮৮৭/২০০৬ এর সেই মুহুরী নকল প্রদর্শনী-৭। আমি ১২/১১/২০০৬ ইং তারিখে ডায়েরি করিয়াছিলাম।”

This assertion of P.W-2 and P.W-7 clearly prove that the informant party and witnesses were being threatened by the accused person in various ways.

In the case of **Mahmudul Islam alias Ratan Vs. The State, reported in 53 DLR (AD), page-1** it has been held that Judges are competent to take judicial notice of the fact about the present condition of law and order situation in the country and, as such, it is not unlikely that a witness will hesitate to tell the truth for fear of his life.

In the said case it has been observed that:

"We do not find any infirmity in the statement of this witness before the Court and we accept the belated disclosure of the names of the assailants by accepting the cogent explanation given by this witness. As a matter of fact, we do not find any valid reason to discard the evidence of P.W-12 to hold it incredible. A belated statement in Court, if can stand the scrutiny of cross-examination, can be believed if not otherwise unbelievable." (underlines supplied)

In the case of **State and another Vs. Abdul Kader @ Mobile Kader and others, 67 DLR(AD), page-6** it has been held that:

"84. It is true that section 157 of the Evidence Act stipulates that the statement of a fact by a witness should be made to the competent authority at or near the time when the fact to which the statement relates took place. What should be the span of time of making such statement by a witness is basically a question of fact and no hard and fast rule can be laid down in that regard. It would vary from case to case and upon the peculiar circumstances of a particular case under which delay in recording the statement of a witness about the fact which he knew or knows might be caused. And mere delay in recording the statement of a witness by the investigation officer cannot be the sole ground to discard his evidence, if he withstands the test of cross-examination and thus appears to be truthful witness. As in the instant case, the defence by cross-examining PWs 2,3 and 4 failed to shake the credibility of their

testimonies as discussed above. More so, we find the explanations given by PWs 2 and 4 for non-disclosing and non-informing the fact of holding meeting in the East bhiti tin shed room of accused-Mobile Quader on 5-10-2001 and of the decision taken therein for doing big harm to deceased-Moulana Abdul Quader to others quit plausible and so acceptable. It is also a fact that as many as 3(three) different Police Officer investigated the case, namely: PW 16, Md. Taibur Rahman, PW 17, Md. Akteruzzaman Bhuiya and PW 18, Md. Nazrul Islam. P.W18 examined PWs 2,3 and 4, and it appears to us that the change of Investigation Officer also contributed to the delay in examining them.”  
(Underlines supplied)

In the instant case we also find that 03(three) police officers namely P.Ws-10,11 and 12 had investigated the case. From the evidence of P.W-12 it transpires that he received the case docket and entrusted with investigation of the case on 15.09.2003 and on the following day he examined P.Ws-2 and P.W-6 and thereafter he filed the charge sheet on 17.09.2003, which clearly proves that P.W.-12, investigation officer, submitted the charge sheet after getting the job of investigation and he examined the said witnesses.

In view of the above facts coupled with the settled proposition of law, we have no hesitation to hold that in convicting the present appellant relying on the evidence of P.Ws-2 and P.W-6, the Trial Court as well as the High

Court Division did not commit any error of law. Since the evidence of P.Ws-2 and P.W-6, the eye witnesses have been found true, trust worthy and credible, we have no hesitation to hold that there is no scope to disbelieve the said witnesses.

Moreover, the said witnesses were thoroughly cross-examined by the defence and they failed to shake their credibility in any manner and as such no illegality has been committed in convicting the appellant relying on the evidence of P.W's- 2 and 6.

Thes, we find no merit in the appeal.

Accordingly, the appeal is dismissed.

J.

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