# In the Supreme Court of Bangladesh

**High Court Division**

**(Criminal Revision Jurisdiction)**

## Criminal Revision No. 460 of 2019

In the matter of:

An application under section 439 read with section 435 of the Code of Criminal Procedure, 1898

-And-

In the matter of:

Abul Hasan

..... Informant-Petitioner

-Versus-

Keramot Mollah and others

.....Opposite Parties

Mr. A.S.M. Khalequzzaman, Advocate

.....for the Informant-Petitioner

Mr. Ms. Suria Begum, Advocate

.....for the opposite parties

Mr. Dr. Md. Bashir Ullah, D.A.G with
Mr. Mizanur Rahman Khan Shaheen, A.A.G
Mr. Md. Shafayet Zamil, A.A.G
Mr. Ashikuzzaman Bablu, A.A.G and
Ms. Syeda Jahida Sultana (Ratna), A.A.G

.....for the State

Present:
Mr. Justice Jahangir Hossain
And
Mr. Justice Md. Badruzzaman

## Judgment delivered on 18.03.2021

## Jahangir Hossain, J:

By order dated 26.08.2019 the Rule was issued by this Court following an application filed under sections 435/439 of the Code of Criminal Procedure calling upon the opposite party to show cause as to why the judgment and order dated 16.08.2016 passed by the learned

Additional Sessions Judge, Gopalgonj in Sessions Case No. 05 dated 12.02.2010 corresponding to Kashiani G. R. No. 17 of 2010 initiated under sections 302/34 of the Penal Code acquitting the accused-opposite parties from the charge, should not be set aside.

The prosecution case is briefly described as under:

One Abul Hasan as informant lodged a first information report with Kashiani Police Station on 12.02.2010 under sections 302/34 of the Penal Code alleging, inter alia that his brother Obaidur Rahman used to work as a helper of a mason. His movement was with Keramot Mollah, Rafiqul Islam and Dalim who lived in the same village. They used to call on him in the night coming to their house. Mother of the informant tried to forbid them not to call her son but they did not pay heed to that effect. Although they assured her that nothing will happen but she did not believe them as there was enmity between them. On 11.02.2010 at about 08:45 pm the aforesaid three accused along with 4/5 unknown persons took the brother of the informant away on call. Informant's mother vetoed them not to take his son away but they said they would send him back. As Obaidur Rahman, the brother of the informant, did not return home till late night of the day they started searching for his whereabouts. At one stage of their search, they found the injured dead body of Obaidur Rahman in the land of one Haider Mollah in the eastern side of their house at around 06:30 am. The accused-persons killed Obaidur Rahman using sharp cutting weapons between 09:00 pm on 11.02.2010 and 06:30 am on 12.02.2010 in a preplanned manner. Hence, the case was initiated.

During investigation of the case, accused Md. Rafiqul Islam made a confessional statement recorded under section 164 of the Code of Criminal Procedure [shortly Cr.P.C] implicating himself and others in the killing of the victim. Investigating Officer, after conclusion of investigation, submitted police report vide Charge Sheet No. 95 dated 06.10.2010 against the 06[six] persons including 03[three] FIR named accused.

Thereafter, the case was transmitted to the Court of learned Sessions Judge, Gopalgonj where the case was registered on being re-numbered as Sessions Case No. 52 of 2012. Ultimately the said case was transferred on 30.10.2014 to the Additional Sessions Judge, Gopalgonj for trial and disposal. The learned Additional Sessions Judge fixed several dates for examination of prosecution witnesses [P.w] and lastly fixed 16.08.2016 for Pws. The learned Additional Sessions Judge by order dated 16.08.2016 acquitted all the accused-persons following section 265H of the Cr.P.C as the prosecution failed to produce the prosecution witnesses.

The informant being aggrieved by and dissatisfied with the aforesaid judgment and order moved this Court with an application, as noted earlier, after obtaining permission from the office of Solicitor Wings vide Memo No. 10.00.0000.137.40.089.16-231 dated 02.10.2016 and obtained the aforesaid Rule.

In support of the Rule, Mr. S.M. Khalequazzaman, learned Advocate appearing for the informant-petitioner submits that the accused-opposite parties brutally killed the victim in a pre-planned manner. Confessing accused in his confession clearly stated how the victim was

inflicted and killed by all the accused-persons. In the FIR the informant also categorically mentioned that the FIR named accused-persons took the victim away from his house giving hope to send him back. It is further contended that the learned trial judge has no authority to acquit the accused-persons under section 265H of the Cr.P.C from the charge brought against them without taking evidence. The informant as well as the witnesses did not get any process or notice issued by the learned trial judge for appearance before the court for giving their evidence. Learned Advocate finally submits that the impugned judgment and order of acquittal is perfunctory and is not based on legal reason and as such the same is liable to be set aside.

On the contrary, Ms. Suria Begum, learned Advocate appearing for the accused-opposite parties contends that the case was started on 12.02.2010 upon allegation of murder. The police having investigated the case submitted charge sheet on 06.10.2010. The learned Sessions Judge, Gopalgonj received the case record on 15.02.2012 for trial. After framing charge several dates were fixed by the learned Sessions Judge for prosecution witnesses but no witness was examined. Thereafter, the case was transmitted to the court of Additional Sessions Judge wherein the prosecution failed to examine any witnesses of the case. The learned trial judge having exhausted all process to compel attendance of prosecution witnesses rightly passed the order of acquittal under section 265H of the Cr.P.C. It is further submitted that how long should a trial court continue to wait for prosecution witnesses. In the present case it is found that more

than 06[six] years have elapsed for attendance of prosecution witnesses but in vain. Referring to 39 DLR 319 learned Advocate submits that there is nothing wrong with the order of acquittal passed by the learned Additional Judge in the instant case. Therefore, the Rule issued by this Court may kindly be discharged for the ends of justice.

We have heard the submissions of learned Advocates of both the parties, perused the impugned judgment and order of acquittal, FIR, confessional statement of an accused, charge sheet, counter-affidavit [affidavit-in-opposition] filed by the accused-opposite parties and other connected documents on record wherefrom it transpires that the case was initiated on 12.02.2010 against the accused-opposite parties under sections 302/34 of the Penal Code. The informant is the brother of the deceased, who alleged in the FIR that his brother was brutally killed by the accused-opposite parties in a pre-planned manner. However, in the present Rule, the main question is whether the impugned judgment and order of acquittal passed by the trial court under section 265H of the Cr.P.C has legal entity to be silent without interference.

In many criminal cases it is often seen that the court issues summons and lastly warrants on so many occasions to secure the attendance of the witnesses but those summons or warrants are not served upon the witnesses on time by the persons concerned for unknown reasons. At the same time it is also seen that the witnesses having being informed regarding summons of the court, do not show the interest for

giving evidence before the court. Under such circumstances, the Court has to wait for many years to dispose of a proceeding.

It reveals in the case in hand that one A.S.I Arifuzzaman upon official duty produced the informant Abul Hasan on 18.05.2014 in the court of the learned Sessions Judge, Gopalgonj where the trial of the case was going on but an adjournment had taken place on behalf of the State saying that the witnesses did not come to the court. Thereafter, the present trial court received the case record from the learned Sessions Judge, Gopalgonj and issued warrant of arrest against the witness Nos. 1-5 by order No. 18 dated 30.10.2014. It is to be noted here that the learned Sessions Judge had also issued warrant against witness Nos. 1-5 only. From order No. 19 to 25 it also reveals that the trial court issued warrant of arrest upon the witness Nos. 1-5 consecutively. But no summons or warrant was issued by the trial court or court of sessions upon the remaining witness Nos. 6-17. By order No. 26 learned judge of the trial court had acquitted the accused-opposite parties following an application filed by them [opposite parties] under section 265H of the Cr.P.C. Although on one occasion the informant of the case was produced to be examined by the prosecution but nothing was found in the record regarding his presence secured in the court by the prosecution. Nevertheless, trial court could not say all process to compel attendance of Pws failed unless the process for other witnesses was exhausted. The trial court for justifying its finding has stated in the impugned order that not only backlog of cases but also harassment and financial losses of the litigant people due to inordinate

delay of the disposal. It is true that due to huge back log of cases, the judiciary is now over burdened in functioning its justice delivery system. But in the name of quicker disposal, it cannot go beyond the law of the land. It has to be disposed of in accordance with the concerned law. If the case is not disposed of within the stipulated time as prescribed in law, then it may take recourse to its other forum. But there is no scope to apply section 265H of the Cr.P.C in acquitting the accused without taking evidence by the prosecution witnesses. Now let us see section 265H of the Cr.P.C for better understanding which is run as follows:

> *"265 H. If, after taking the evidence for the prosecution, examining the accused and having the prosecution and the defence on the point, the court considers that there is no evidence that the accused committed the offence, the court shall record an order of acquittal."*

From a plain reading of this section it is clearly found that when the evidence is produced and the accused has been examined under section 342 of the Cr.P.C and the argument of both parties is completed, then if the trial court thinks it proper that there is no sufficient evidence to find the accused guilty of the offence, as allegedly committed by the accused, then the court shall record an order of acquittal under this section. In the present case, no evidence was presented by the prosecution until the impugned order of acquittal was passed. In the case of Kamar Ali, reported in 39 DLR (1987) it was held that one Aftar Ali who rescued the victim, was not cited

as witness in the charge sheet and the place of occurrence was only 20 miles away from the police station which was not considered to be attending circumstances of the case for an order of acquittal. However, from the order sheet of the present case it appears that the trial court did not exhaust the process for ensuring attendance of the remaining prosecution witnesses before recording the order of acquittal of the accused. It is also revealed that the learned Advocate for the State was negligent in examining at least one witness, who was the informant of the case, produced by police but his presence was not shown in the Court. In the case of Hasan Arif Ullah –Vs-Most. Nilufar Yeasmin, reported in 3 ALR (AD) (2014) it was observed that an accused cannot be dragged to court for years together and she or he has lawful right to see the end of the trial expeditiously as possible and at the time an offender cannot go unpunished on the plea of non-attendance of witnesses if the prosecution has failed to take significant steps to secure the production of the witnesses. It is the absolute duty of the prosecution to secure the attendance of the prosecution witnesses and to take necessary legal and satisfactory steps in this regard as prescribed by law in the code. But we do not find any of the reasonable and acceptable arguments to substantiate the closure of the proceeding of the case by the impugned order of acquittal in favour of the accused opposite parties. Because of the fact that, section 265H of the Cr.P.C does not permit the trial court to pass an order of acquittal when the trial of the case is delayed for a long time, without having no evidence from the prosecution witnesses unexamined.

In the light of discussion made above, we find substance in the contention of the learned Advocate for the informant-petitioner. Therefore, the Rule is made absolute without any order as to costs. The impugned order dated 16.08.2016 is set aside.

However, the trial court is directed to proceed with the trial of the case in accordance with law and conclude the trial of the case within one year from the date of receipt of this judgment and order.

Send down the Lower Court Record to the court below along with a copy of this Judgment and order at once.

Md. Badruzzaman,J

I agree

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