Present:

Mr. Justice Md. Salim

CRIMINAL APPEAL NO.12331 of 2019

Md. Maksudur Rahman Masud
.....Appellant.
-Versus-
The State
.....Respondent.

Mr. A.H.M. Kamruzzaman with
Mr. Nazmul Hasan Rakib, Advocate
.....For the Appellant.

Ms. Syeda Shajia Sharmin, D.A.G. with
Mr. Md. Rejaul Islam, A.A.G.
Mr. Khan Mahfuzun Noor, A.A.G.
For the State.

Heard on 06.01.2026, 13.01.2026, 20.01.2026 and 22.01.2026.

Judgment on 29.01.2026.

This appeal is directed against the judgment and order of conviction and sentence dated 20.10.2019 passed by the learned Additional Sessions Judge, 3rd Court, (In charge), Chattogram in Sessions Case No.1025 of 2010 arising out of G R No. 114 corresponding to Hathazari Police Station Case No.33 dated 28.05.2009 convicting the accused-appellant along with another under Section 365 of the Penal Code and sentencing them to suffer rigorous

imprisonment for 2(two) years with a fine of Tk.10,000/- in default to simple imprisonment for 3(three) month more.

The prosecution's case, in brief, is that one Md. Nurul Absar lodged the First Information Report with Hathazari Police Station against the appellant and others, alleging, inter alia, that on 28.05.2009, when he was on his way to Chattogram-City by a CNG from his residence, he reached near Kuaish Moor at around 14.30 hours; at that time, a microbus of bottle green color, having registration number Chatto-Metro-Cha-11-4112 got in the way of that CNG and blocked the microbus. Then, 4/5 miscreants forcibly brought the informant out of that CNG and tried to put handcuffs on him and pulled him inside the microbus. Upon hearing his hue and cries, an army vehicle carrying soldiers arrived and rescued the victim, arrested the accused-appellant, after searching the microbus, recovered two mobile phone sets, one bottle of Phensedyl, one pair of handcuffs, and Tk. 8,000/- from that microbus. Then, army personnel took the informant and the accused to the RAB-7 Chattogram

office; afterwards, they were taken to Chandgaon Police Station, from where they came to Hathazari Police Station with SI Aminur Rahman at around 09.05 pm, along with the seized materials. All the army personnel were from the 34 Bengal Battalion at Bandarban Cantonment. Hence the case.

The police investigated the case and, after investigation, submitted a charge sheet against the accused-appellant and three others under Sections 364 and 506 of the Penal Code.

Being ready, the case was transmitted to the Sessions Judge, Chattogram, for trial, where it was registered as Sessions case No.1025 of 2010. Subsequently, the learned Additional Sessions Judge, 3rd Court, Chattogram, framed Charges against the convict-appellant and others under Sections 364 and 506 of the Penal Code. The charges were read over and explained to the appellant, who pleaded not guilty and claimed to be tried.

During the trial, the prosecution examined as many as seven witnesses, while the defence examined none.

At the conclusion of the trial, the learned Additional Sessions Judge, 3rd Court (In charge), Chattogram, by the impugned judgment, found the accused-appellant and another guilty of the offence under section 365 of the Penal Code and sentenced him, along with another, to suffer rigorous imprisonment for two years and to pay a fine of Taka 10,000/- in default to suffers simple imprisonment for three months more.

Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence, the accused-appellant preferred the instant appeal.

Mr. A.H.M. Kamruzzaman, the learned Counsel appearing on behalf of the convict-appellant, upon taking us through the impugned judgment, evidence, and other materials on record, submits that none of the natural and independent witnesses support the prosecution's story, although co-accused Shafiul Bashar Rakib sought, in his judicial confession, to implicate this convict-appellant; the confession is not admissible under the law, and the confession of a co-

accused cannot be based on conviction against the appellant. He then submits that the prosecution failed to bring the informant to the Court for cross-examination; therefore, the whole trial is vitiated, and, as such, the impugned judgment is liable to be set aside.

On the contrary, Ms. Syeda Shajia Sharmin, the learned Deputy Attorney General for the State, opposes the contention so made by the learned advocate for the accused-appellant and submits that failure to produce the informant of the instant case for cross-examination by the defence has not vitiated the trial. She also submits that the defence has cross-examined this witness partly and, therefore, the non-production of the informant for examination is not fatal.

Be that as it may, in order to appreciate the submissions of the learned advocate for the appellant and the learned Deputy Attorney General, as well as for proper adjudication of the matter, we have gone through the impugned judgment, evidence, and other materials on record.

In order to bring home the charge, the prosecution side examined as many as 7 (seven) witnesses, among them, P.W.1-Md. Nurul Absar, the informant as well as victim of the instant case stated in his examination in chief that on 28.05.2009 when he was on his way to the Chattogram-city by a CNG from his residence, he reached near Kuaish Moor at around 14.30 hour, at that time, a microbus of bottle green color, having registration number Chatto-Metro-Cha - 11-4112, got in the way of that CNG and blocked the microbus. Then, 4/5 miscreants forcibly brought the informant out of that CNG, tried to put handcuffs on him, and pulled him inside the microbus. Upon hearing his hue and cries, an army vehicle carrying soldiers arrived and rescued him. Army personnel arrested the accused, and after searching the microbus, they recovered two mobile phone sets, one bottle of Phensedyl, a pair of handcuffs, and Tk. 8,000/- from that microbus. Then, the army personnel took the informant and the accused persons to the RAB-7 Chattogram office; afterwards, they were taken to Chandgaon Police Station, from where they came to

Hathazari Police Station with SI Aminur Rahman at around 09.05 pm, along with the seized materials.

P.W.2-Md. Nasir Mistry was declared hostile by the prosecution. In cross-examination by the prosecution, he denied the suggestion that he did not know anything about the attempt to kidnap the informant, and he made untrue statements.

PW.3-Md. Faruk was declared hostile by the prosecution. In cross-examination by the prosecution, he denied the suggestion that he did not know anything about the attempt to kidnap the informant, and he made untrue statements.

PW.4-Bashu Mitra Borua, police Constable, a seizure list witness, deposed that the defense personnel came to the police station and handed over the accused Maksud, along with a pair of handcuffs, a black colour optic, two mobile sets, and a money bag, to the O.C. The duty officer prepared a seizure list. He also identified the seizure list and his signature thereon.

During cross-examination, he admitted that he was not present at the place of occurrence.

PW.5-Md. Ismail, ppm, Assistant Commissioner of police, a formal witness who filled out the FIR column.

P.W.6-Nezam Uddin, Investigating Officer of the instant case, a formal witness, deposed that, in the course of the investigation, he took remand of the accused persons and arranged for the recording of the confessional statement. He also visited the incident site, prepared a sketch map, and finally submitted the police report against the accused persons.

During cross-examination, he stated that during the investigation, he did not examine any members of the army. He also admitted that no case is pending against the accused Masud in the PC and PR.

PW.7-Md. Ibrahim Mia, Magistrate, who recorded the confessional statement of the accused Shafiul Bashor Rakib. This witness identified the confessional statement and his signature therein.

During cross-examination, this witness identified that the confessional statement in the record is a photocopy.

Analyzing the above evidence on record, it appears that the informant, in his deposition, attempted to narrate the entire story as per the First Information Report. But none of the other witnesses support the prosecution's case. Although, co-accused Shafiul Bashor Rakib, in his judicial confession, tried to implicate this appellant. So, in the instant case, the evidence and materials relied upon by the prosecution to fasten guilt upon the convict-appellant only point a needle of suspicion towards the convict-appellant and nothing more. Suspicion, however strong, is no substitute for proof, and in criminal law the prosecution is to prove the guilt of the accused beyond a reasonable doubt. In the present case, a Court of law is justified in demanding satisfaction before the legality of the conviction in section 365 of the Penal Code can be pressed into service against the convict-appellant. The evidence and materials on record and the facts and circumstances of the case are not such as to penetrate the fortress of innocence built around the convict-appellant. The evidence, materials, evidence on record, and the facts and circumstances of the case fall

below the standard required of the prosecution to demand conviction and sentence upon the convict-appellant.

Further, it appears that P.W.1, who is the informant as well as the victim in the instant case, was the architect of the First Information report. But the prosecution failed to produce him before the Court for the defence to cross-examine him. In a Criminal case, cross-examination is one of the greatest modern weapons for testing the veracity of a witness's testimony. Cross-examination of witnesses is the greatest legal engine for the discovery of truth. It is the most effective of all means for extracting truth or falsehood. Cross-examination is directed to bring to light the truth by clarifying matters that a prosecution witness may wish to conceal. It is both a sword of attack and a shield of defence. It is the settled proposition of law that cross-examination is the best method of ascertaining forensic truth. In this regard, the Superior Courts of the Sub-Continent had emphasised the purpose and necessity of examination

in a good number of judgments delivered in different cases. Three cases may profitably be referred to.

In Md. Shafi and others Vs. State in Criminal Appeal No.40 of 1966 and Md. Sadik Vs. State in PSLA No.157 of 1966, 19 DLR (SC) 216.

The Supreme Court of Pakistan laid down:

> The purpose of cross-examination is to assist the Court in bringing the truth to light by discovering or clarifying matters with which witnesses may wish to conceal or confuse for motives of partisanship.

Supreme Court of India in State of Madhya Pradesh vs Chintaman Sada Shive Warshan Payan, AIR 1961 SC 1623, remarked:-

> It is hardly necessary to emphasise that the right to cross-examine the witness who gives evidence against him is a very valuable right and if it appears that effective exercise of this right has been prevented by enquiry officer by not giving to the officer relevant documents to which he is entitled, that inevitably would mean that the

enquiry had not been held in accordance with the rules of natural Justice.

In Muslimuddin and others Vs. State reported in 1987 BLD (AD) 1= 38 DLR (AD) 311, the Appellate Division dealt with the purpose and necessity of cross-examination and laid down:-

> In a criminal trial, the determination of a disputed fact is the main task before the Court, and such determination is dependent upon consideration of answers given by prosecution witnesses in their cross-examination. Cross-examination is, therefore, indispensably necessary to bring out desirable facts of a case, modifying the examination-in-chief or establishing the cross-examiner's own case. The object of cross-examination is two-fold: to bring out the case of the party cross-examining and to impeach the credit of the witness. In examination-in-chief, the witness discloses only those facts which are favourable to the party examining him and does not disclose the necessary facts which go in favour of the other

side. Cross-examination in a criminal case aims at the extraction of the facts which support the defence version, which is very often sought to be suppressed by the prosecution. The test of veracity or credit of a witness is an all-important means of ascertaining the truth of a disputed fact.

Notably, where a witness is not cross-examined on account of his death after examination-in-chief, his account offered in examination-in-chief cannot be flung to wind. But, it is equally true that the probative value of the evidence shall be very much small. In the case of the Maharaja of Kolhapur Vs. S Sundaram Ayyar and others, 1925 Madras 497, one witness was examined-in-chief, and her examination was adjourned after a few sentences were recorded in cross-examination. She died before cross-examination could be resumed. A Division Bench of the Madras High Court laid down that such evidence could not be rejected as inadmissible, but the probative value of the evidence might be very small and might even be disregarded.

In the instant case, we have already noticed that P.W.1 could not subject himself to cross-examine and the examination was adjourned after a few sentence but the learned Judge of the Trial court below failed to consider that by the deprivation of the right to cross-examine PW 1, the probative value of the evidence of PW 1 became very much tiny, and the prosecution's case, unfurled by PW 1, could not be suggested to have been proved, and this benefit must be given to the convict-appellant.

The Evidence Act contains no definition of "Confession". Judicially, it is interpreted in the way that a confession must, in terms that admit the offence on the act or at any rate substantially all the facts which constitute the offence.

Notably, confession is one of the species of admission of occurrence dealt under sections 24-30 of the Evidence Act, which are substantive laws, and sections 164 and 364 of the Code of Criminal Procedure are Adjunctive laws. A judicial Confession is made before a Magistrate or in a Court in the due course of a legal proceeding, recorded under section

164 read with section 364 of the Code of Criminal Procedure. A confession or admission is evidence against its maker if its admissibility is not excluded by some provisions of law. The law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it is voluntary. Confession, if true and voluntary though, can form the basis of conviction upon a confessing accused, but the confession of a co-accused cannot be used against the other co-accused, and the confession of a co-accused can be used against another co-accused if the said confession stands corroborated by other corroborative evidence. In this regard, in Saley Akram Vs. State, 73 DLR (AD)264 laid :

> "The confession made by a co-accused, Mosila, in the facts and circumstances of the instant case cannot be said that it is corroborated by other evidence, and as such, it cannot be sole basis of the conviction of another co-accused."

In the instant case, a judicial confession of Co-convict Shafiul Bashor Rakib was recorded on

26.07.2009. The said judicial confessional statement was recorded by Mr. Md. Ibrahim Mia, the Metropolitan Magistrate, Chattogram, under section 164 of the Code of Criminal Procedure, which is quoted below:

> "গত ২৮-০৫-০৮ তারিখে সকাল ১০.০০টার দিকে আমাদের □হদ্দারহাট মাইক্রো স্ট্যান্ডে পুলিশ মাকসুদ, সায়েম, রাউজানের দাড়ি আরিফ, □াঁদুরতলার জাহেদ তাকে □লে একটা □ড় লোক মানুষ টাকা নিয়ে আস□ ওনাকে আমরা আটক কর□ তুমি চলতোমাকে আমরা দ্বিগুন ভাড়া দি□। পুলিশ মাকসুদ আমাকে □লে কিছু হ□ না তোমার। আমি পুলিশআমিতো আছি। তারপর আমরা কুয়াইশ কলেজ নতুন রাস্তার মাথায় গিয়ে অ□স্হান করি। দুপুর ২/২.৩০ এর মধ্যে মাকসুদের কাছে একটা ফোন আসে। ফোনে মাকসুদকে □লে এত নম্বর সি,এন,জিতে লোকটি (আ□ছার নামের) টাকা নিয়ে □াচ্ছে। আমাকে সিএনজির সামনে গিয়ে দাড়াতে □লে। আমি আমার মাইক্রোটি সিএনজির সামনে দাঁড় করাই। তারপর ওরা ৪জন নেমে আ□ছার নামক লোকটাকে সিএনজি থেকে হ্যান্ডকাফ লাগিয়ে আমার গাড়িতে তুলতে চায়। তাদের মধ্যে ধস্তাধস্তি হয়। মাকসুদের শার্টের ভিতরে পুলিশের পোশাক ছিল। ধস্তাধস্তি চলা অ□স্হায় সেনা□াহিনীর লোক এসে মাকসুদকে চার্জ করে। আমি গাড়ি ফেলে পালিয়ে □াই। মাকসুদের কাছে এক জোড়া চা□িওয়ালা হ্যান্ডকাফ ছিল। দুটি Nokia মো□াইল ছিল, একটি ফেন্সি□িলের □োতল ছিলসে ফেন্সি□িলের কিছু খায়, কিছু □াকী থাকে। আমার ভুল হয়ে গেছে। আমার টাকার প্রয়োজন থাকায় গিয়েছিল। এই আমার জ□ান□ন্দি।"

On a careful survey of evidence, it became evidently clear that co-convict Shafiul Bashor Rakib, in

his statement, stated that the accused persons tried to pull the victim in his microbus. In contrast, P.W. 1 in his evidence stated that the accused persons pulled the victim into a Microbus and tried to close its door. Moreover, P.W.1, who was the victim and informant of the instant case, could not be subjected to cross-examination to the full extent, and, having not been fully examined, his testimony cannot be relied upon to convict the accused. Therefore, the learned Judge of the Trial Court has failed to consider that there is no corroboration of the judicial confessional statement by any of the witnesses. Moreover, the confession of the co-accused, Shafiul Bashor Rakib, cannot be the sole basis for the conviction of the accused appellant, as the facts and circumstances of the instant case are not corroborated by other evidence.

Notably, in every criminal trial, it is the duty of the prosecution to explore every avenue open to it in order to unveil the truth, bring to book the real offenders, and advance the cause of Justice. The prosecution witnesses who can throw sufficient light on the unfolding truth are to be produced by the

prosecution before the witness box. Witnesses, as Bantham said, are the eyes and ears of Justice. The non-examination of material witnesses shall give rise to a strong presumption against the prosecution's case in respect of the accused's involvement in the felony allegedly committed by him. If a material witness who would unroll the genesis of incident is not convincingly brought to fore otherwise or where there is a gap or infirmity in the prosecution case which could have been supplied or made by examining a witness who, though available is not examined, prosecution case can be termed as suffering from a serious deficiency and infirmity and withholding of a such a material and vital witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined he would not have supported the prosecution case as projected.

In the instant case, the informant, i.e., P.W. 1, in his evidence stated that, upon hearing his hue and cries, an army vehicle carrying soldiers arrived and rescued him. However, the investigating agency did not deem it necessary to examine them as witnesses or

record their statements under section 161 of the Code of Criminal Procedure, which constitutes gross irregularities and negligence on the part of the investigating agency.

In the background of the facts and circumstances of the case, withholding the above material witnesses was fatal to the structure of the prosecution's case, and an adverse inference against the prosecution for non-examination of any army staff who caught the accused red-handed might legitimately and virtually arise. The inevitable legal presumption arising from the non-examination of those persons is that, if they had been examined, they would not have definitely supported the prosecution's case in abridgement of the convict-appellant in the occurrence. On this score, also, the convict-appellant is entitled to get the benefit of doubt.

In the case in hand, evidence and materials relied upon by the prosecution to fasten guilt upon the convict-appellant only point a needle of suspicion towards the convict-appellant and nothing more. Suspicion, however strong, is no substitute for proof -

and in Criminal Law the prosecution is to prove the guilt of the accused beyond a reasonable doubt.

It was imperative on the part of the learned Trial Judge to find out whether each and every incriminating circumstance in respect of implication of the convict-appellant in the felony has been established by credible, reliable, and clinching evidence. Prosecution left no stone unturned to rope in the convict-appellant and had overdone its job by fabricating false evidence and a coloured version. Therefore, the learned Trial Judge committed a serious error in presuming the guilt of the convict-appellant first and trying, thereafter, to find out the other reason to justify such a conclusion without an objective, independent, and impartial analysis or assessment of materials before recording a finding of guilt upon the convict-appellant. Withholding of material and relevant witnesses has been unjustifiably glossed over despite the fact that the production of those material witnesses would have really helped to bring about the real truth in the alleged offence. The doubtful and suspect nature of the evidence sought to be relied upon to

substantiate the circumstances suffered from serious infirmities and lacked legal credibility. So, the findings of the learned Trial Judge do not deserve the merit of approval of this Court, having regard to the infirmities and illegalities vitiating them and the patent errors apparent on the face of the record, resulting in a serious and great miscarriage of Justice in convicting the appellant.

On assessing evidence, materials on record and rummaging fact and circumstances of the case and embarking a survey on the legal debate involved in the case, we are of this considered view that the prosecution failed to connect the convict-appellant in commission of offence under section 365 of the Penal Code beyond any shadow of doubt and convict appellant is required to be liberated of the charge and be acquitted on the concept of Criminal Jurisprudence of Benefit of Doubt on finding him not guilty of the charge staged against him. Thus, the appeal has substance, and the impugned judgment and order are liable to be set aside.

Resultantly, the appeal is allowed.

The impugned judgment and order so far relate to the conviction of the accused appellant, Md. Maksudur Rahman Masud, as imposed by the judgment and order dated 20.10.2019 passed by the learned Additional Sessions Judge, 3rd Court (In charge), Chattogram in Sessions Case No.1025 of 2010 arising out of Hathazari Police Station Case No.33 dated 28.05.2009, is hereby set aside.

The accused-appellant is acquitted of the charges levelled against him and discharged from his bail bonds.

Send down the lower Court records with a copy of this judgment.

.....
(Md. Salim, J)

Kabir/BO