

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Revision No. 1626 of 2019

Md. Mozammel and others

...Convict-petitioners

-Versus-

The State and another

...Opposite party

Mr. Md. Habibur Rahaman, Advocate with

Mr. Md. Azizul Islam, Advocate

...For the convict-petitioners

Mr. Md. Anichur Rahman Khan, D.A.G with

Mr. Sultan Mahmood Banna, A.A.G with

Mr. Mir Moniruzzaman, A.A.G

...For the State

Heard on 25.05.2025, 17.07.2025, 07.08.2025,  
12.08.2025, 14.08.2025 and 21.08.2025

**Judgment delivered on 27.08.2025**

On an application filed under section 439 read with section 435 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 10.03.2019 passed by the Additional Sessions Judge, Court No. 2, Narayangonj in Criminal Appeal No. 84 of 2016 reversing the judgment and order of acquittal dated 23.03.2016 passed by the Chief Judicial Magistrate, Narayangonj in Rupgonj Police Station Case No. 02(03)2009 corresponding GR. No. 84 of 2009 acquitting the accused from the charge framed against them.

The prosecution's case, in short, is that on 24.02.2009 at 6.30 am the accused persons 1. Md. Israfil, 2. Md. Zakir Hossain, 3. Md. Mozammel, 4. Delowar Hossain, 5. Ashraful, along with 2/3 unknown persons, cut down a few mehogoni trees from the land of the informant situated adjacent to the north side of his house. Abdul Matin, husband of the informant Most. Maksuda Akter, attempted to resist the accused. At that time, accused Md. Israfil scolded her husband Abdul Motin with filthy language and threatened him. The accused Md. Mozammel dealt a dao blow on the left side of the head

of her husband which caused bleeding injury and he fell on the ground. At that time, accused Md. Zakir Hossain dealt a teda blow to the left arm of her husband. She raised hue and cry to save her husband, but accused Israfil physically assaulted her. The accused Delowar Hossain dealt an Iron rod blow to her right hand which caused bleeding and swelling injuries. The accused Ashraful took away Tk. 1,00,000(one lakh) kept in the drawer made of steel and gold, valued at Tk. 45,000(forty five thousand). Hearing their hue and cry, the locals assembled at the place of occurrence, and the locals Hanjot Ali and Monju Mia took the victim Abdul Motin and the informant Most. Maksuda Akter to Rupgonj Thana Health Complex for treatment, wherefrom the victim Abdul Motin was referred to Dhaka Medical College Hospital. Subsequently, he was admitted to Dhaka Medical College Hospital for treatment. The informant also annexed the medical certificate along with the FIR lodged on 01.03.2009, after 5 days of the occurrence.

S.I. Md. Saiful Islam was appointed as the Investigating Officer of the case. During investigation, he visited the place of occurrence, prepared the sketch map and index, recorded the statement of witnesses under section 161 of the Code of Criminal Procedure, 1898, and seized the alamat. During the investigation, he found the prima facie truth of the allegation made against the accused persons and submitted charge sheet on 06.04.2009 under sections 447/ 448/ 323/ 324/ 326/ 380/506 of the Penal Code, 1860 against the accused Md. Israfil, Md. Zakir Hossain, Md. Mozammel and Delowar Hossain, and accused Ashraful was not sent up in the charge sheet.

During trial, charge was framed against the accused Md. Israfil and Md. Delowar Hossain under sections 447/ 323/506(II) of the Penal Code, 1860, against the accused Md. Zakir Hossain under sections 447/ 324/506(II) and against the accused Md. Mozammel under sections 447/326/506(II) of the Penal Code, 1860, which was

read over and explained to the accused persons present in Court. During trial, the prosecution examined 9(nine) witnesses to prove the charge against the accused persons. After examination of the prosecution witnesses, the accused persons were examined under section 342 of the Code of Criminal Procedure, 1898, and they declined to adduce any D.W. After concluding trial, the Chief Judicial Magistrate, Narayangonj, by judgment and order dated 23.03.2016, acquitted the convict-petitioners from the charge framed against them.

Being aggrieved by and dissatisfied with the said judgment and order passed by the trial Court, the informant Most. Maksuda Akter filed Criminal Appeal No. 84 of 2016 under section 417 of the Code of Criminal Procedure, 1898 before the Sessions Judge, Narayangonj, who transferred the said appeal to the Additional Sessions Judge, Court No. 2, Narayangonj, for hearing. The Appellate Court, by impugned judgment and order dated 10.03.2019, was pleased to convict the accused Mozammel under sections 447/326/506(II) of the Penal Code, 1860, and sentenced him thereunder to suffer rigorous imprisonment for 05 years and fine of Tk. 5,000, in default, to suffer imprisonment for 6(six) months, convicted the accused Zakir under sections 447/324/506(II) of the Penal Code, 1860 and sentenced him thereunder to suffer rigorous imprisonment for 02 years and fine of Tk. 5,000, in default, to suffer imprisonment for 06 months, convicted the accused Delowar Hossain and Israfil under section 447 of the Penal Code, 1860, and sentenced them thereunder to suffer rigorous imprisonment for 02 months and fine of Tk. 5,000, in default, to suffer imprisonment for 10 days, against which the convict-petitioners obtained the Rule.

Learned Advocate Mr. Md. Habibur Rahaman appearing along with learned Advocate Mr. Md. Azizul Islam on behalf of the convict-petitioners submits that the medical certificate of the victim allegedly issued from the Rupgonj Thana Health Complex and the Dhaka Medical College Hospital was not proved in the case and the trial

Court acquitted the convict-petitioners on the ground that medical certificate of the alleged victim was not proved and the appellate Court below without setting aside that finding of the trial Court convicted the accused. He further submits that the informant is not legally entitled to file appeal under section 417 of the Code of Criminal Procedure, 1898 against the judgment and order of acquittal passed by the trial Court before the Sessions Judge and the appeal filed by the informant before the Sessions Judge under section 417 of the Code of Criminal Procedure, 1898 was not maintainable and the impugned judgment and order passed by the appellate Court below is non est and suffer from coram-non-judice. He prayed for making the Rule absolute by setting aside the impugned judgment and order passed by the appellate Court.

No one appears on behalf of the informant-opposite party No. 2.

Learned Deputy Attorney General Mr. Md. Anichur Rahman Khan, appearing on behalf of the State, submits that P.W. 2 Abdul Motin and the P.W. 1 Most. Maksuda Akter are the direct witness of the occurrence, and P.Ws 3 to 5 corroborated the evidence of P.W. 2 regarding the alleged offence, and the evidence of P.W. 2 is also corroborated by P.W. 6 Doctor A.Q.M Nurul Islam, who issued the medical certificate (exhibit 3). He further submits that P.W. 6 proved the medical certificate of P.W. 2 Abdul Motin, and no objection was raised by the defence and the appellate Court below, considering the evidence of the prosecution witnesses, legally passed the impugned judgment and order. He prayed for discharging the Rule.

I have considered the submission of the learned Advocate Mr. Md. Habibur Rahaman who appeared along with learned Advocate Mr. Md. Azizul Islam on behalf of the convict-petitioners and the learned Deputy Attorney General Mr. Md. Anichur Rahman Khan who appeared on behalf of the State, perused the evidence, impugned judgments and orders passed by the Courts below, memo of appeal

filed by the informant before the Sessions Judge, Narayangonj and the records.

On perusal of the judgment and order passed by the trial Court, it reveals that the trial Court acquitted the convict-petitioners on the ground that the alleged medical certificate of the victim (exhibit 3) is the photocopy and no original medical certificate of P.W. 2 was proved in the case but the appellate Court without arriving at any finding regarding the alleged photocopy of the medical certificate (exhibit 3) convicted the petitioners. On scrutiny of the medical certificate (exhibit 3) of P.W. 2 Abdul Motin, it is found that the medical certificate dated 25.02.2009 issued by P.W. 6 Doctor A.Q.M Nurul Islam is a photocopy. The original medical certificate of P.W. 2 has not been proved in the case. To prove charge under sections 326 or 324 of the Penal Code, 1860 the prosecution shall prove medical certificate of the victim.

It is found that immediately after the occurrence, P.W. 2 was taken to Rupgonj Thana Health Complex, wherefrom he was referred to the Dhaka Medical College Hospital. No medical record of P.W. 2 from Rupgonj Thana Health Complex has been proved in the case. Therefore, it cannot be said that immediately after the occurrence, the victim was taken to Rupgonj Thana Health Complex. P.W. 2 stated that he was admitted to Dhaka Medical College Hospital on 24.02.2009, and he was under treatment there for about 25 days, but no discharge certificate was proved in the case.

At this stage, it is relevant here to rely on a decision made in the case of *The State v. Abul Basher Tipu and others* reported in 3 ALR (AD) 211, judgment dated 09.01.2013, in which it has been held that;

“So far as the charge under section 326 of the Penal Code against accused Hashim and Nazrul is concerned, Mr. Md. Shohrowardi, learned Deputy Attorney General, argued that it is in evidence that PW3 was in

hospital for 16 days and he suffered grievous injuries caused by the accused shown in open Court. Therefore, accused Hashim and Nazrul are also liable to be convicted under section 326 of the Penal Code. We find it difficult to accept the submission of the learned Deputy Attorney General and find accused Hashim and Nazrul guilty under section 326 of the Penal Code in the absence of any medical evidence. The reasons assigned by the High Court Division in acquitting accused Hashim and Nazrul of the charges brought against them under section 326 of the Penal Code appear to us cogent and based on materials on record. Accordingly, we maintain the order of acquittal passed by the High Court Division in respect of accused Hashim and Nazrul of the charge brought against them under section 326 of the Penal Code.”

On perusal of the memo of appeal, it reveals that the informant Most. Maksuda Akter filed the appeal against the judgment and order of acquittal passed by the trial Court before the Sessions Judge, Narayangonj under section 417 of the Code of Criminal Procedure, 1898. On a bare reading of section 417 of the Code of Criminal Procedure, 1898, it reveals that subject to the provisions of sub-section (4), the government may, in any case, direct the Public Prosecutor to present an appeal (a) to the High Court Division from an original or appellate order of acquittal passed by any Court of Session, (b) to the Court of Session from an original order or appellate order of acquittal passed by any Magistrate. Therefore, the informant is not legally entitled to file any appeal under section 417 of the Code of Criminal Procedure, 1898 against the judgment and order of acquittal passed by the trial Court. However, if the informant is aggrieved by any judgment and order of acquittal passed by the trial Court, he/she may prefer revision under section 439A of the Code of

Criminal Procedure, 1898 to the Sessions Judge or under section 439 of the Code of Criminal Procedure, 1898 before the High Court Division. Therefore, the criminal appeal filed by the informant P.W. 1 before the Sessions Judge, Narayangonj, against the judgment and order of acquittal passed by the trial Court is not maintainable in law and the appeal filed by the informant is non est, and the impugned judgment and order passed by the appellate Court below suffers from coram-non-judice.

At this point, it is relevant here to rely on a decision made by this bench in the case of Mamun Miah alias Md. Mamun-Ur-Rashid Mamun and others vs. The State in Criminal Revision No. 895 of 2010, judgment dated 21.03.2024, in which this bench has held that;

“The trial court acquitted the convict petitioners against which the informant filed criminal appeal under section 417(1)(b) of the Code of Criminal Procedure, 1898. Under section 417(1) of the Code of Criminal Procedure, 1898, subject to the provision of sub-section (4), the government may, in any case, direct the public prosecutor to present an appeal, (a) to the High Court Division from an original or appellate order of acquittal passed by any Court of Session, and (b) to the Court of Session from an original or appellate order of acquittal passed by any Magistrate. No provision is made in the Code of Criminal Procedure, 1898, or any law to prefer an appeal by the informant to the Sessions Judge against the order of acquittal passed by any Magistrate in a police case. However, if an order of acquittal is passed in any case instituted upon complaint, the complainant may present an appeal under section 417 (2) of the Code of Criminal Procedure, 1898 to the High Court Division following law against such acquittal on any ground of

appeal which involves a matter of law only. Criminal Appeal No. 50 of 2008, has been preferred by informant P.W. 1 Most. Salma Akter. Therefore, I am of the view that Criminal Appeal No. 50 of 2008 was not maintainable before Session Judge, Netrokona. However, if the informant is aggrieved by any order of acquittal passed by the trial court, he/she is legally entitled under section 439A of the Code of Criminal Procedure, 1898 to prefer revision to the Sessions Judge or to the High Court Division under section 439 of the Code of Criminal Procedure, 1898 following the law. Because of the restriction in sub-section 4 of section 439 of the Code of Criminal Procedure, 1898, the High Court Division is not empowered to convert a finding of acquittal into one of conviction or to entertain any proceeding in revision concerning an order passed by the Sessions Judge under section 439A. Under section 439A of the Code of Criminal Procedure, 1898 the Sessions Judge exercises all or any of the powers which may be exercised by the High Court Division under section 439. Therefore, the Sessions Judge is not empowered to convert a finding of acquittal into one of conviction, exercising jurisdiction under section 439A of the Code of Criminal Procedure, 1898.”

The proposition discussed hereinabove clearly speaks that the appeal filed by the informant before the Sessions Judge, Narayanganj, is not maintainable, and the appellate Court below illegally admitted the appeal, and the impugned judgment and order passed by the appellate Court below suffers from coram-non-judice.

I find merit in the Rule.



In the result, the Rule is made absolute.

The impugned judgment and order of conviction and sentence passed by the appellate Court below against the convict-petitioners Md. Mozammel, Md. Zakir Hossain, Md. Delowar Hossain and Md. Israfil is hereby set aside, and the judgment and order of acquittal passed by the trial Court is hereby restored.

Send down the lower Court's records at once.