

**IN THE SUPREME COURT OF BANGLADESH**  
**APPELLATE DIVISION**

PRESENT:

**Mr. Justice Hasan Foez Siddique**  
**-Chief Justice**  
**Mr. Justice Obaidul Hassan**  
**Mr. Justice Borhanuddin**  
**Mr. Justice M. Enayetur Rahim**

**CRIMINAL PETITION FOR LEAVE TO APPEAL NO.738 OF 2019**

(From the judgment and order dated 04.12.2018 passed by the High Court Division in Criminal Revision No.1689 of 2016).

Md. Helal Uddin. : ....Petitioner.

**-Versus-**

The State. : ....Respondent.

For the Petitioner. : Mr. S. M. Shahjahan, Senior Advocate instructed by Mr. Md. Ziaur Rahman, Advocate-on-Record.

For the Respondent. : Mr. Sarwar Hossain, Deputy Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.

Date of Hearing. : **The 13<sup>th</sup> November, 2022.**

Date of Judgment. : **The 13<sup>th</sup> November, 2022.**

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

**Borhanuddin, J:** Delay of 152 days in filing this criminal petition for leave to appeal is hereby condoned.

This criminal petition for leave to appeal is directed against the judgment and order dated 04.12.2018 passed by a Single Bench of the High Court Division in Criminal Revision No.1689 of 2016 making the rule absolute by sending the appeal back on remand for hearing and setting aside the judgment and order dated 27.07.2016

passed by the learned Additional Metropolitan Sessions Judge, 5<sup>th</sup> Court, Dhaka in Metro Criminal Appeal No.458 of 2016 disallowing the appeal and thereby affirming the judgment and order dated 17.05.2015 passed by the learned Additional Chief Metropolitan Magistrate, 2<sup>nd</sup> Court, Dhaka in G.R. Case No.41 of 2012 corresponding to Khilgaon Police Station Case No.41(1)2012 convicting the present petitioner under section 324 of the Penal Code and sentencing him to suffer simple imprisonment for a period of 3 (three) years with a fine of Tk.10,000/- (Ten thousand), in default to suffer simple imprisonment for a period of 3 (three) months more.

The prosecution case, in short, is that on 16.07.2011 at about 1.30 A.M. the informant i.e. Md. Abdul Kader was returning back on foot from the residence of his aunt situated at Doctor's Quarter of Holy Family Hospital, Eskaton, Dhaka, towards Fazlul Haque Muslim Hall of the University of Dhaka and when reached near to the Durnity Daman Commission Office, Segunbagicha, some police personnel in civil dress rushed towards him and detained him and tortured him with lathi; At that time the informant asked the reason for detaining him disclosing

that he is a student of University of Dhaka, even after knowing the identity of the informant, the police personnel tortured him and took him in Khilgaon Thana hajot; On 16.07.2011 at about 9.45 A.M. the informant was taken before the officer-in-charge of that police station to obtain confessional statement by force; While refusing to do so the accused caused serious injury on the informant's leg, backbone and different parts of his body; Thereafter, the accused at one stage being failed to get any such confessional statement gave Chapati blow beneath the left knee of informant and caused serious injury; Thereafter, the accused lodged two criminal cases against the informant under sections 399/402 of the Penal Code and also under section 19A of the Arms Act, 1978 respectively; The informant challenged the proceeding of said two cases before the High Court Division and obtained a direction; Thereafter, on the basis of that direction given by the High Court Division the instant case has been started.

S.I. Md. Mahbubur Rahman Chakdar as a duty officer of the Khilgaon Police Station recorded the case under

sections 323/324/325/326/331 of the Penal Code against accused Md. Helal Uddin.

After investigation police submitted charge sheet no. 120 of Khilgaon Police Station, dated 26.03.2012 against the accused Md. Abdul Kader under sections 323/324/325/326/331 of the Penal Code.

The learned Chief Metropolitan Magistrate, Dhaka, took cognizance of the offence against the accused person and transferred the case in the court of learned Additional Chief Metropolitan Magistrate, 2<sup>nd</sup> Court, Dhaka for trial.

The trial court on 01.10.2012 framed charge against the accused person under sections 331/324 of the Penal Code and the same was read over to the accused present on the dock who pleaded not guilty and claimed to be tried. Again on 02.03.2015 the charge was altered under section 227 of the Code of Criminal Procedure and the trial court again framed charge against the accused person under section 324 of the Penal Code and the same was read over to the accused who pleaded not guilty and claimed to be tried.

The prosecution examined as many as 13 (thirteen) witnesses and the defence examined none. But from the trend of cross examination of the prosecution witnesses it appears that the defence case is of total denial who claimed that he is falsely implicated in the case and the informant was beaten by the mob.

After closing the evidence of prosecution on 10.03.2015 the accused present on the dock namely Md. Helal Uddin was examined under section 342 of the Code of Criminal Procedure and the prosecution case briefly narrated to him but again he pleaded his innocence.

The learned Additional Chief Metropolitan Magistrate, 2<sup>nd</sup> Court, Dhaka upon hearing the parties and perusing evidences on record found accused Md. Helal Uddin guilty of the offence committed under section 324 of the Penal Code and sentenced him to suffer simple imprisonment for a period of 3 (three) years and to pay a fine of Tk.10,000/- (Ten thousand), in default to suffer simple imprisonment for a period of 3 (three) months more vide judgment and order dated 17.05.2015.

Being aggrieved, the convict-accused as appellant filed Metro Criminal Appeal No.458 of 2016 before the learned Metropolitan Sessions Judge Court, Dhaka, which was transferred to the learned Additional Metropolitan Sessions Judge, 5<sup>th</sup> Court, Dhaka.

Upon hearing the parties and perusing the evidence on record learned Additional Metropolitan Sessions Judge, 5<sup>th</sup> Court, Dhaka, disallowed the appeal vide judgment and order dated 27.07.2016 affirming the order of conviction passed by the trial Court.

Having aggrieved by and dissatisfied with the aforesaid judgment and order, the convict-accused as petitioner filed Criminal Revision No.1689 of 2016 before the High Court Division. Upon hearing learned Advocate for the parties and perusing the evidence on record, a Single Bench of the High Court Division made the Rule absolute by sending the appeal on remand to the appellate court below vide judgment and order dated 04.12.2018.

Feeling aggrieved, the convict-accused preferred instant criminal petition for leave to appeal under Article 103 of the Constitution.

Mr. S. M. Sahajahan, learned Senior Advocate for the petitioner submits that the impugned judgment and order passed by the High Court Division having not been in true spirit of laws and principles regulating remand and the same having not been well reasoned, the petitioner is liable to be acquitted. He also submits that the prosecution miserably failed to prove the version of the ejahar as such the trial court as well as the appellate court below committed miscarriage of justice in awarding punishment to the petitioner as such the impugned judgment and order of the High Court Division is liable to be set-aside so far as it relates to sending the appeal back on remand for re-hearing. He lastly submits that there is no enmity between the petitioner and the victim, thus the allegation of giving chapati blow by the petitioner to the victim is not believable and as such the High Court Division erred in law by sending the case back on remand instead of acquitting the petitioner.

On the other hand, Mr. Sarwar Hossain learned Deputy Attorney General appearing for the respondent supports the impugned judgment and order passed by the High Court Division.

Heard learned Advocate for the petitioner and learned Deputy Attorney General for the respondent. Perused the papers/documents contained in the paper book.

The only question is to be decided in this criminal petition is that whether the order of remand passed by the High Court Division for re-hearing of the appeal by the appellate court below was just and proper.

It is now well settled that the remand orders are not to be made as a matter of course. The High court Division as a revisional court is require to appreciate properly the relevance of the evidence on record before making such order of remand.

On perusal of record it appears that charge was framed under section 324 of the Penal Code against the petitioner and prosecution in support of their case examined 13 (thirteen) witnesses including the doctor who prepared the medical examination certificate. Again, on perusal of record it also appears that prosecution exhibited the ejahar, medical certificate as well as other documentary evidences. The trial court after discussing the evidences on record convicted the

petitioner which is affirmed by the appellate court below. In criminal revision High Court Division without assigning any independent findings upon evidence on record remanded the case to the appellate court below simply holding that:

*"From a close scrutiny, it appears that the learned appellate court below ought to scrutinize the findings of the trial court and on materials on record but failed to exhaust all the processes to scrutinize the vital witnesses, Alamot and Medical evidence. Both the court put much reliance on the issue of causing by 'CHAPATI' by which the accused allegedly cause injury but failed to produce the said 'chapati' as Alamot. The materials exhibits and other facts such as place of occurrence, which was a must in concluding a case not been addressed properly by the appellate court below as a final court of facts and should be addressed these peculiar case on re-hearing the parties.-----*

*-----  
Thus, I am of the view that the situation and the material facts and peculiar circumstances should be addressed and for this purpose the case requires to be sent back on remand to the Appellate Court for re-hearing, the parties on the basis of materials on record and for writing out the proper judgment."*

Analyzing the aforementioned findings of the High Court Division it appears that the High Court Division did not send the case on remand to the appellate court below because trial of the lower court has been vitiated by illegality, irregularity or otherwise defective or evidence had been wrongly rejected or admitted or the court had refused to hear certain witnesses who should have been heard or on similar other grounds. The High Court Division has sent the case on remand for writing a fresh judgment upon the existing evidences which are already kept in the record which is not permitted by law. This Division in the case of *Md. Moslehuddin vs. the State*, reported in 10 BLD (AD) 129, held:

*"It is only in a very rare case that a remand order such as in the present case is and should be made for the purpose of only writing a proper judgment. If the trial court's judgment is such that it cannot be termed as a judgment at all in accordance with the requirements of section 367 of the Code of Criminal Procedure then an order for writing a proper judgment may be necessary and desirable but ordinarily when the entire matter is open to the first appellate court and it is required under the law for that court to assess the evidence independently and to record it's own findings then merely because there have been some omissions made*

*by the trial court in not considering a piece or pieces of evidence would hardly afford a valid ground for sending the case on remand for writing a proper judgment."*

Again, this Division in the case of *Abu Siddique alias Abu Siddique Ahmed vs. The State*, reported in (1990) 10 BLD (AD) 166, held:

*"The appellate court may send a case for retrial; but if evidence already on record is sufficient to dispose of it no such retrial is called for."*

Thus, from the above discussions and the principle enunciated in the cited cases, we are of the view that the High Court Division as a revisional court ought to have disposed of the criminal revision on the basis of the evidence already on record. The order of rehearing by the appellate court below is found to be uncalled for, particularly after a decade.

In the result, the criminal petition for leave to appeal is disposed of.

The impugned judgment and order of the High Court Division in Criminal Revision No.1689 of 2016 is hereby set-aside.

The case is remanded to the High court Division for hearing afresh. A single Bench of the High Court Division constituted by Fatema Najib, J., is directed to dispose of the Criminal Revision within 06 (Six) months from the date of receipt of this judgment.

The order of bail of the petitioner granted by the High Court Division shall continue till disposal of the Criminal Revision.

No order as to costs.

C.J.

J.

J.

J.