

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 1127 of 2005

Al-Amin

...Convict-petitioner

-Versus-

The State

...Opposite party

No one appears.

...For the convict-petitioner

Ms. Sharmin Hamid, A.A.G with

Mr. Sultan Mahmood Banna, A.A.G

...For the State

Heard on 30.01.2025, 12.02.2025 and 20.02.2025

Judgment delivered on 26.02.2025

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 party to show cause as to why the impugned judgment and order dated 02.05.2005 passed by the Metropolitan Additional Sessions Judge, Court No. 4, Dhaka in Metropolitan Criminal Appeal No. 532 of 2004 affirming the judgment and order dated 22.06.2004 passed by the Additional Chief Metropolitan Magistrate, Court No. 1, Dhaka in G.R. No. 3269 of 2002 arising out of Dhanmondi Police Station Case No. 45(11)2002 convicting the petitioner under Section 326 of the Penal Code, 1860 and sentencing him thereunder to suffer rigorous imprisonment for 5(five) years and fine of Tk. 2,000(two thousand), in default, to suffer imprisonment for 6(six) months and convicting him under Section 307 of the Penal Code, 1860 and sentencing him to suffer rigorous imprisonment for 2(two) years and a fine of Tk. 1,000(one thousand), in default, to suffer imprisonment for 3(three) months more should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

The prosecution case, in short, is that the informant Md. Hossein Ali resides in his house at 243 Free School Street, Kathal Bagan, Dhanmondi, Dhaka along with his family. On 18.11.2002 at 1.00 pm, he went to the mosque to perform the Juma prayer and at 1.45 pm he came

back to his house and came to know that his wife Most. Safurun Begum and son Harun were injured by the gunshot and they were taken to Dhaka Medical College Hospital for treatment. Hearing the above information, instantaneously he went to the Dhaka Medical College Hospital and heard from his daughter Most. Rina that on 18.11.2002 at 1.25 pm, one Sumon of Kazipara along with unknown two young boys with arms entered the gate of his house and started firing aiming his wife and son. Consequently, his wife was injured by gunshot on the cheek and his son Harun sustained injury on the left side of the chest. Hearing the hue and cry of his son and daughter, the accused persons fled away to the west side of their house. After that, his daughter Rina with the help of the locals took his wife and son to Dhaka Medical College Hospital. His wife was admitted to Ward No. 14 and his son Harun was also admitted to the hospital and his operation was going on. Hearing about the occurrence from his daughter and others, he lodged the FIR.

P.W. 7 S.I Sheikh Motiar Rahman took up the investigation of the case. During the 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 made arrangements for a Test Identification Parade of the accused persons. After completing the investigation, he submitted charge sheet on 08.06.2002 against the accused Sumon and Al-Amin under Sections 326/307 of the Penal Code, 1860.

During the trial, the charge was framed against the accused under Sections 326/307/34 of the Penal Code, 1860 which was read over and explained to him and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 8(eight) witnesses to prove the charge against the accused and the defence cross-examined prosecution witnesses. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he declined to adduce any D.W.

After concluding the trial, the Additional Chief Metropolitan Magistrate, Court No. 1, Dhaka by judgment and order dated 22.06.2004 convicted the accused under Sections 326/307 of the Penal Code, 1860 and sentenced him under Section 326 of the Penal Code, 1860 to suffer rigorous imprisonment for 5(five) years and a fine of Tk. 2,000(two thousand), in default, to suffer imprisonment for 6(six) months and sentenced under Section 307 of the Penal Code, 1860 to suffer rigorous imprisonment for 2(two) years and a fine of Tk. 1,000(one thousand), in default, to suffer imprisonment for 3(three) months more. Against the said judgment the accused Al-Amin filed Metropolitan Criminal Appeal No. 532 of 2004 before the Metropolitan Sessions Judge, Dhaka who transferred the appeal to the Metropolitan Additional Sessions Judge, Court No. 4, Dhaka. The appellate Court by impugned judgment and order affirmed the judgment and order passed by the trial Court against which the convict-petitioner obtained the instant Rule.

P.W. 1 Hossein Ali is the informant. He stated that on 18.11.2002 at 1.15 pm he went to the mosque to perform the Juma prayer. At the time of prayer, he heard that his son Harun was injured by a gunshot. Thereafter, he came back to his house but he did not see his wife and son. He heard that they were taken to Dhaka Medical College Hospital. Thereafter, he went to Dhaka Medical College Hospital and saw the gunshot injury on the cheek of his wife. Consequently, her two teeth were broken. He also saw a gunshot injury on the abdomen. His son Harun said that they were injured by the gunshot of Sumon and Al-Amin. After that, he went to Thana and lodged the FIR. He proved the FIR as exhibit 1 and his signature as exhibit 1/1. He identified the accused Sumon and Al-Amin in the dock. He collected the medical certificate of his wife and handed it over to the police. He proved the medical certificate as exhibit Ka. During cross-examination, he stated that he is an illiterate person. The person who wrote the FIR is not known to him. He denied the suggestion that the accused Sumon and Al-Amin did not enter his house or no occurrence took place as stated by

him. He affirmed that the accused Sumon was known him for the last 4/5 years and he was a tenant under him. At that time, he had a good relationship with Sumon.

P.W. 2 Md. Harunur Rashid is the victim. He stated that on 18.11.2002 at 1.15-1.30 pm, the occurrence took place. At that time, he was present in his house. His mother was outside the house. The accused Sumon wanted to know his mother about him. At that time, he came out of the house and accused Al-Amin injured him in his abdomen with a pistol. He also sustained an injury by a gunshot on his leg. Al-Amin again caused injuries on his right leg and abdomen. He exposed the mark of injuries in open Court. He attempted to snatch away the pistol from Al-Amin. At that time, his mother embraced him. At that time, he also heard the sound of gun firing and saw that his mother sustained an injury to her mouth. After that, the accused persons fled away. At that time, his younger sister was present in his house. The locals attempted to take him to the hospital. At that time, Al-Amin said that he is alive till now. He again entered his house and came out from the house after 2/3 minutes. One Saiful took him and his mother by rickshaw up to Kathalbagan from where they were taken to Dhaka Medical College Hospital by baby taxi and they were admitted to Dhaka Medical College Hospital. While he was admitted to the hospital, he heard from the Sub-Inspector that accused Sumon and Al-Amin were arrested. He identified the accused Sumon and Al-Amin in the T.I. Parade. He was admitted 10 days in the Dhaka Medical College Hospital and his mother was under treatment for about 2 months. He proved the report of the T.I. Parade as exhibit 2 and his signature as exhibit 2/1. During cross-examination, he affirmed that he sustained the injury by gunshot of Al-Amin and accused Sumon was known to him from his boyhood. The accused was his neighbour for 7/8 years and he had an intimate relationship with Sumon. He affirmed that the accused Sumon did not fire.

P.W. 3 Safura Begum stated that on 18.11.2002 at 1.00/1.30 pm the accused Sumon came to her house and wanted to know about Harun.

At that time, the accused Al-Amin and another also came along with Sumon. The accused Al-Amin started firing by pistol. Her son sustained injuries on his abdomen and legs by gunshots. The accused Sumon started firing by pistol which caused injury on his left cheek. Consequently, her four teeth were broken. She embraced Harun to save him. At that time, she was injured by a gunshot of Sumon. Hearing the sound of the gun firing, the police assembled at the place of occurrence and started firing. Thereafter, she and her son were taken to hospital. She identified the accused Sumon during the T.I. Parade. During cross-examination, she stated that the accused Al-Amin, Sumon and another entered her house. Another person is not known to him. He denied the suggestion that she did not see accused Al-Amin at the place of occurrence or that no occurrence took place as stated by her or that accused Sumon did not shoot.

P.W. 4 Rina Akter stated that on 18.11.2002 at 1.20/1.30 pm accused Sumon, Al-Amin and another unknown person came to their house. The accused Sumon and Al-Amin shoot her brother. Instantaneously she stated that the accused Al-Amin shot her brother Harun and the accused Sumon shot her mother. Her brother sustained the injury on the chest. Her mother sustained the injury in her mouth. They were taken to Dhaka Medical Hospital. She identified the accused Al-Amin and Sumon in the T.I. Parade. During cross-examination, she stated that hearing hue and cry 30/40 persons assembled at the place of occurrence. Sumon was previously known to her and she saw Al-Amin for the first time at the place of occurrence. Another person was not known to her but she heard that his name was Sojib. He informed the matter to her father.

P.W. 5 Md. Tajul Islam stated that on 18.11.2002 the occurrence took place at 243/3, Free School Street. After prayer, he heard that the wife and son of the informant were injured by the gunshot. Police came to the place of occurrence and recovered three bullets and the blood-stained cloth. He proved the seizure list as exhibit 3 and his signature on

the seizure list as exhibit 3/1. He proved the blood-stained cloth and bullets as material exhibit I. During cross-examination, he stated that he did not find anything except three bullets and the blood-stained cloth. He did not see the occurrence.

P.W. 6 Sekul Sikder stated that he could not remember the date of occurrence. After the occurrence, he went to the place of occurrence took place at 243/3 Free School Street. Police recovered three bullets and bloodstained cloth in front of the said house. He signed the seizure list. He proved his signature on the seizure list as exhibit 3/2. He proved the three bullets and the blood-stained cloth as material exhibit I.

P.W. 7 S.I Sheikh Motiar Rahman stated that on 18.11.2002 while he was on duty at the Dhanmondi Thana area at 1.15/1.20 pm, he received an information through wireless that the gun firings were going on at 243/3, Free School Street. At that time, he along with his force went to the place of occurrence and came to know that three boys caused injury by gunshot to Harun and the wife of Hossein Ali and fled away. He recovered three bullets of .22 bore revolver and the blood stain cloth. He also saw the blood in front of the door of the house and on the earth. He went to the Dhaka Medical College Hospital and talked to the victims. During the investigation, he visited the place of occurrence, prepared the sketch map and index, seized alamat and recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898. After completing the investigation, he submitted charge sheet against the accused persons. He proved the seizure list as exhibit 3 and his signature as exhibit 3/1. He proved the signature of Duty Officer Rehana Begum on the FIR, as exhibit 4/1. He proved the sketch map and index as exhibits 5 and 6 and his signatures as exhibits 5/1 and 6/1. He proved 2/3 bullets and the blood stain cloth as material exhibit I. During cross-examination, he stated that the occurrence took place at 243/3 Free School Street, Kathal Bagan but inadvertently in the FIR it has been written as 243. He denied the suggestion that he did not visit the place of occurrence or he submitted a false report without any investigation.

P.W. 8 Metropolitan Magistrate Md. Zahangir Alam stated that on 22.01.2003 based on the order passed by CMM, Dhaka he conducted the T.I. Parade at Dhaka Central Jail. Witness Safura identified accused Sumon. Harun and Rina Akter identified Sumon and Alamin. He proved the report of the T.I. Parade as exhibit 2 and his signature on the report as exhibit 2/4. He stated that at the time of the T.I. Parade, twenty accused persons were present. At that time, the neutral Advocate Sultan Ahmed was also present there.

No one appears on behalf of the convict-petitioner.

Learned Assistant Attorney General Mr Sultan Mahmood Banna appearing on behalf of the State submits that P.Ws 2, 3 and 4 are the direct witnesses of the occurrence and during T. I Parade, they also identified the accused Al-Amin and the prosecution witnesses proved the charge against the convict-petitioner beyond all reasonable doubt and both the Courts below on correct assessment and evaluation of the evidence passed impugned judgments and orders of conviction and sentence. He prayed for discharging the Rule.

I have considered the submissions of the learned Assistant Attorney General Mr. Sultan Mahmood Banna who appeared on behalf of the State, perused the evidence, impugned judgments and orders passed by the Courts below and the records.

On perusal of the evidence, it appears that P.W. 2 and 3 are the victims and P.W. 4 is also the direct witness of the occurrence. They stated that P.W. 2 Md. Harunur Rashid sustained a gunshot injury on the abdomen and two legs by Al-Amin and P.W. 3 sustained injury on her mouth and they were taken to Dhaka Medical College Hospital. P.W. 4 stated that she disclosed the occurrence to P.W. 1 at Dhaka Medical College Hospital. P.W. 1 stated that after hearing about the occurrence from his daughter P.W. 4, he lodged the FIR. During the T.I. Parade P.W. 3 identified the accused Sumon. P.W. 8 stated that Safura identified Sumon and Harun and Rina Akter identified Sumon and Al-Amin during T.I. Parade which is also corroborated by P.Ws. 2, 3 and 4.

It is found that immediately after the occurrence, the police came to the place of occurrence and recovered 3 bullets and bloodstained cloth. P.W. 1 proved the medical certificate of P.W. 3 Safura Begum. The doctor who issued the medical certificate of P.Ws. 2 and 3 is not examined in the case. P.W. 1 illegally proved the medical certificate of P.W. 3. To prove the charge under Sections 326 and 307 of the Penal Code, 1860 medical certificate of a victim is indispensable. In the absence of the medical certificate of the victim, it cannot be said that P.Ws. 2 and 3 sustained grievous injury by gunshots.

The above view of this Court lends support from the decision made in the case of *The State Vs. Abul Basher Tipu and others* reported in 3 ALR (AD) 211 in which it has been held that;

“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 the accused Hashim and Nazrul of the charge brought against them under section 326 of the Penal Code.”

Because of the above evidence, facts and circumstances of the case, findings, observation and the proposition, I am of the view that the prosecution failed to prove the charge against the convict-petitioner and both the Courts below committed serious illegality in convicting the petitioner under Sections 326 and 307 of the Penal Code, 1860 without proof of medical certificate of P.Ws. 2 and 3.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgments and orders passed by the Courts below against the convict-petitioner Al-Amin are hereby set aside.

Send down the lower Court's records at once.