

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 79 of 2010

Md. Abdur Razzaque and others

...Convict-petitioners

-Versus-

The State

...Opposite party

No one appears.

...For the convict-petitioners

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan, A.A.G

...For the State

Heard on 31.07.2024

Judgment delivered on 01.08.2024

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 13.09.2009 passed by the Sessions Judge, Joypurhat in Criminal Appeal No. 28 of 2007 affirming the judgment and order of conviction and sentence dated 9.05.2007 passed by the Additional District Magistrate, Joypurhat in G.R. Case No. 113 of 2003 (Kalai) arising out of Kalai P.S. Case No. 06 dated 25.08.2003 convicting the petitioners 1. Arfan Ali and 2. Mohir Uddin under sections 143/324 of the Penal Code, 1860 and sentencing them under Section 143 of the Penal Code, 1860 to suffer imprisonment for 6(six) months and under Section 324 of the Penal Code, 1860 to suffer imprisonment for 2(two) years and fine of Tk. 5000, in default, to suffer imprisonment for 6(six) months and convicting the petitioners 3. Asraf Ali, 4. Md. Abdur Razzaque and 5. Akabbor Ali under Sections 143/ 324/34 of the Penal Code, 1860 and sentencing them under Section 143 of the Penal Code, 1860 to suffer imprisonment for 6(six) months and under Sections 324/34 of the Penal Code, 1860 to suffer imprisonment for 2(two) years and fine of Tk. 5,000, in default, to suffer imprisonment for 6(six)

months 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 on 18.08.2003 at 8.00 pm P.W. 3 Ansar Ali after dinner went to the pond of Moku Fakir of village Chechuria to guard the pond. On that day at 11.30 pm while the informant P.W. 1 Ahsan Habib was sleeping in his house situated at village Jominpur at 11.30 pm one Abdul Mazid of village Chechuria came to his house and informed that his brother was lying on the village road sustaining injuries. After that, he along with the witnesses (1) Abdus Samad, (2) Abdul Quddus, (3) Md. Antaz Ali and (4) Most. Minara Khatun went to village Cheucuria and found that his brother was lying on the pucca road situated beside the house of Mozam and his brother was taken to Shibganj Hospital and admitted there for treatment. During treatment in hospital, he came to know from his brother that on 18.08.2003 at about 11.00 pm while he was guarding the pond of Moku Mia, the accused (1) Abdur Razzaque, (2) Arfan Ali, (3) Mohir Uddin, (4) Asraf Ali and (5) Akabbor Ali along with 2/3 unknown persons attacked him when he focused the torch to them and due to previous enmity, the accused No. (1) Abdur Razzaque, accused No. (2) Arfan Ali, accused No. (3) Mohir Uddin and accused No. (4) Asraf Ali dealt knife blows on both hands of his brother and sustaining injuries, he went to the pucca road situated in front of the house of Mozam. He claimed that after the occurrence a shalis took place and the accused persons admitted their guilt but no steps were taken by them regarding the occurrence which delayed in lodging the FIR.

P.W. 7 S.I Md. Anwar Alam Azad took up the investigation of the case. During the investigation, he visited the place of occurrence, prepared the sketch map and index, seized the alat, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and collected the medical certificate of P.W. 3 Ansar Ali. After completing the investigation, he found the

prima facie truth of the allegation made against the accused persons and submitted charge sheet on 30.09.2003 against them under Sections 143/323/326/307/34 of the Penal Code, 1860.

During the trial, the charge was framed against the accused persons under Sections 143/ 326/ 307/34 of the Penal Code, 1860 which was read over and explained to them and they pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 7(seven) 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 the trial, the Additional District Magistrate, Joypurhat by judgment and order dated 09.05.2007 convicted the accused persons and sentenced them as stated above against which the accused persons preferred Criminal Appeal No. 28 of 2007 before the Sessions Judge, Joypurhat. The appellate Court below after hearing the appeal by impugned judgment and order dated 13.09.2009 affirmed the judgment and order passed by the trial Court against which the convict-petitioners obtained the instant Rule.

P.W. 1 Ahsan Habib is the informant of the case. He stated that on 18.08.2003 at 11.00 pm the occurrence took place beside the pond of Moku Fakir of village Chechuria. While his brother Ansar Ali was admitted to the hospital, he heard from him that on the date and time of occurrence, his brother Ansar Ali was guarding the pond of Moku Fakir. The accused Abdur Razzaque, Arfan, Mohi, Asraf and Akabbor came to the place of occurrence. He focused the torch and tried to recognize the accused persons. The accused Abdur Razzaque, Arfan, and Mohir caused grievous injuries on both his hands by knife. At that time, to save his life, he came to the pucca road situated in front of the house of Mozam and raised a hue and

cry. When he attempted to sleep one Abdul Mazid came to his house and informed that his brother was lying at the place of occurrence in an injured condition. At that time, he along with Antaz, Quddus, Minara and Abdus Samad went to the place of occurrence and found his brother in injured condition and the victim was taken to Shibganj Hospital for treatment. After that a shalis took place and the accused persons admitted their guilt but subsequently, no compromise was made and he lodged the FIR. He proved the FIR as exhibit 1 and his signature as exhibit 1/1. During cross-examination, he stated that after 6 days, he heard about the occurrence from his brother when he was in hospital. After the occurrence, a shalis took place and his brother was in the hospital. He heard the names of 5/8 persons from his brother. The place of occurrence is situated two kilometres away from his house. He saw that his brother was lying on the pucca road situated in front of the house of Mozam and saw the injuries on his body. The victim was taken to Shibganj Hospital which is situated 15 kilometers away from his house. The victim was taken to hospital at 1.15 am. The blood stain lungi and Genji were seized by the police. He also filed cases against the accuse-persons and the case was dismissed. He denied the suggestion that due to previous enmity, he filed the case. After 13 days, the victim came back to his house.

P.W. 2 Abdus Samad stated that the informant and the accused persons were known to him. The accused Abdur Razzaque, Arfan, Mohiruddin and Akabbor are present in Court. The occurrence took place on 18.08.2003 at 11.00 pm in the village Chechuria. 4/5 persons came to his house and informed him that the accused persons caused injuries to Ansar. Thereafter, he went to the place of occurrence. He found the victim Ansar Ali lying beside the road of Chechuria village sustaining injuries on his hands. He along with the victim went to the hospital and after that, he came back to his house. The victim Ansar was a guard of the pond of Moku Fakir.

On the next day, when he went to the hospital, the victim Ansar informed him that the accused persons present in Court caused injuries to him. During cross-examination, he stated that he is the husband of the sister of the victim. Ahsan Ali, Quddus and Minara informed him about the occurrence. He went to the place of occurrence at midnight and started to hospital. It takes three hours to reach the hospital. He went along with the informant to the hospital. On the next day at 10/12, he went to the hospital. He saw that the victim was lying on the pucca road. House of Mozam was situated to the west. He did not say to the police that the accused Mohin and Arman caused injuries to the victim. He denied the suggestion that he deposed falsely.

P.W. 3 Ansar Ali is the victim. He stated that informant Ahsan Habib is his brother. On 18.08.2003 at 8 pm after dinner, he started from his house to guard the pond of Moku Fakir of Chechuria village. At 11 pm while he was guarding near the guard room of the pond, he focused the torch on the accused Abdur Razzaque, Mohir Uddin, Asraf, Arfan and Akabbor and due to previous enmity accused Abdur Razzaque dealt a kick on his chest. The accused Arfan dealt a chhora blow on his right hand and the accused Mohir Uddin also dealt a chhora blow on his right hand. The accused Asraf Ali was also standing at the place of occurrence keeping a knife in his hand. The accused Akabbor was also present at the place of occurrence and the accused Abdur Razzaque carried a knife in his hand. Hearing hue and cry, he rushed to the pucca road situated in front of the house of Mozam of village Chechuria and became senseless. Hearing about the occurrence his brother lodged the FIR. He had shown the mark of injuries to the Court which was also recorded by the trial Court. The injuries are oblique in nature and 5 inches in length. During cross-examination, he stated that three accused persons had beaten him. He did not say to the police that the accused persons caused injuries by hasua. After the

occurrence, he did not find the torch and he was admitted to hospital for 13 days. After 1 month, police seized the alamat. When he came back from the hospital, he heard that police seized the blood-stained lungi and genji. He denied the suggestion that the accused persons were falsely implicated in the case.

P.W. 4 Ershadul Haque stated that the informant Ahsan Habib and the victim Ansar were known to him. The accused persons Asraf, Razzaque, Arfan, Akabbar and Mohin were also known to him. On 18.08.2003 at 11 pm he was sleeping in his house. Suddenly he heard the hue and cry and opening the door saw the victim on the road situated beside his house and he found the injuries on the hands of Ansar Ali. He informed that the accused persons caused injuries while he was guarding the pond of Moku Fakir situated at village Chechuria. Thereafter, he was taken to hospital. The police seized the bloodstain Genji and lungi of the accused and prepared the seizure list. He signed the seizure list. He proved the seizure list as exhibit 3 and his signature as exhibit 3/1. He proved the blood stain check lungi as material exhibit Ka and the blood stain genji of Ansar Ali as material exhibit Kha. During cross-examination, he stated that he and the Chairman are the residents of the same village. He did not say to the police that the victim sustained hasua blow. He found the victim at 11 pm at the place of occurrence. On 25.08.2003, he signed the seizure list at about 10 am. He denied the suggestions that blood stain alamat was not seized in his presence and that he deposed falsely against the accused persons.

P.W. 5 Md. Rakib Uddin is the Chairman of Udoypur Union Parishad. The informant and the accused persons Abdur Razzaque, Asraf, Mohir, Arfan and Akabbor were known to him. The place of occurrence was situated 5/6 bigha far from his house. On 18.08.2003 at noon, he went to the place of occurrence and at that time, the victim was not there. He heard that the victim Ansar Ali was taken

to hospital. On the next day, he heard from Ansar Ali at Shibganj Thana that the accused persons caused injuries to him. On 20.08.2003 a salish took place at Nunuz Bazaar and the accused persons admitted their guilt. The accused persons wanted to give the cost of the treatment but subsequently, they did not give the cost of the treatment. Consequently, the case was filed. During cross-examination, he stated that he was a candidate for the post of Chairman. He could not say whether the accused persons were supporters of another Chairman candidate. He affirmed that the accused persons voluntarily agreed to pay the money. On 19.08.2003 at 10/10.30 he saw the victim at Shibganj Hospital and found injuries on his hands. He denied the suggestion that he deposed falsely.

P.W. 6 Dr. Wahed is the Resident Medical Officer of Shibganj Upazilla Health Complex. He stated that as per the medical certificate lying with the records of the Court Dr. Md. Golam Rabbani treated the victim Md. Ansar Ali on 19.08.2003 in the hospital. Since Dr. Golam Rabbani died, he deposed following the medical certificate. In the medical certificate, it has been mentioned that (I) One sharp cut wound at rt arm over the deltoid area. Size about. $3'' \times 1\frac{1}{2}'' \times 1''$ (L×D×B) caused by sharp weapon. Age of injury was about one hour (II) One cut wound at Lt arm over the deltoid area. The size was about $2\frac{1}{2}'' \times 1\frac{1}{2}'' \times 1''$ (L×D×B) caused by the sharp weapon. The age of injury was about one hour. Both the injury No 1 and 2 were grievous. As per the record, the victim was admitted on 19.08.2003 at 12.40 am, Rg No. 256/1. He proved the medical certificate as exhibit 2. He proved the signature of the late Dr. Golam Rabbani on the medical certificate as exhibit 2/1. During cross-examination, he stated that he did not examine the victim and at the time of occurrence, he was not serving in the said hospital. He

denied the suggestion that the medical certificate was not issued following the law.

P.W. 7 S.I Md. Anwar Alam is the Investigating Officer. He stated that on 25.08.2003 while he was discharging his duty with Kalai Thana, he was appointed as Investigating Officer. He visited the place of occurrence, prepared the sketch map and index, seized the alamat and recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898. He collected the medical certificate and after completing the investigation, he found the truth of the allegation made against the accused persons and submitted charge sheet against them. During cross-examination, he stated that in the statement recorded under Section 161 of the Code of Criminal Procedure, 1898, it was mentioned that the victim Ansar Ali sustained injury by hasua. He did not seize the torch.

No one appears on behalf of the convict petitioners.

Learned Deputy Attorney General Mr. S.M. Golam Mostofa Tara appearing along with learned Assistant Attorney General Mr. A. Monnan on behalf of the State submits that the P.W. 3 is the injured victim and he stated that the accused Arfan dealt a knife blow on his right hand and the accused Mohi Uddin dealt a knife blow on his left hand. At the time of occurrence, the accused Abdur Razzaque dealt a kick on his chest and Asraf Ali was present at the place of occurrence with a knife and accused Akabbor was also present at the place of occurrence. The evidence of P.W. 3 as regards the injury sustained by the accused Arfan and Mohir Uddin is also corroborated by the medical certificate exhibit 2 issued by Dr. Golam Rabbani, Doctor of Shibganj Upazilla Health Complex. He further submits that immediately after the occurrence, the victim was taken to the hospital and while he was admitted to the hospital, he disclosed the occurrence to the P.Ws. 1, 2, 4 and 5 who also corroborated the evidence of P.W. 3 regarding injuries sustained by the accused persons. The prosecution proved the charge against the

accused persons beyond all reasonable doubt. Therefore, he prayed for discharging the Rule.

I have considered the submission of the learned Deputy Attorney General Mr. S.M. Golam Mostofa Tara who appeared on behalf of the State, perused the evidence adduced by the prosecution, impugned judgments and orders passed by the Courts below and the records.

On perusal of the records, it appears that P.W. 3 Ansar Ali is the victim and the occurrence took place on 18.08.2003 at about 11.00 pm while he was guarding the pond of Moku Fakir situated at village Chechuria and P.W. 3 Ansar Ali is the sole eye witness of the alleged occurrence. P.W. 1 informant stated that after 6 days of the occurrence, he heard from his brother P.W. 3 Ansar Ali about the occurrence and the FIR was lodged on 25.08.2003. In the FIR, the informant stated that the accused No. 1. Abdur Razzaque, accused No. 2. Arfan Ali, accused No. 3 Mohir Uddin and accused No. 4. Asraf Ali caused injuries by knife on the hands of the victim. The Doctor found two injuries on the hands of victim Ansar Ali. P.W. 3 Ansar Ali stated that the accused Arfan dealt a knife blow to his right hand and the accused Mohir Uddin caused a knife blow to his right hand. During cross-examination, P.W. 7 the Investigating Officer stated that in the statement recorded under Section 161 of the Code of Criminal Procedure, 1898, it has been mentioned that the victim sustained injuries by hasua.

After the occurrence, P.W. 3 disclosed the occurrence to P.Ws. 1, 2, 4 and 5. None of them stated that the accused Arfan and Mohir Uddin caused injuries by knife on the hands of the victim. The evidence of P.W. 3 that the accused Arfan dealt a knife blow on his right hand and accused Mohir Uddin dealt a knife blow on his right hand is not corroborated by P.Ws. 1, 2, 4 and 5 who heard about the occurrence from the victim P.W. 3 Ansar Ali. Even, P.W. 2 Abdus Samad who is the husband of the sister of the victim Ansar

Ali stated that he did not disclose to the I.O that the accused Arfan and Mohir Uddin caused injuries on the victim.

In the FIR, it has been mentioned that the accused Abdur Razzaque, Arfan Ali, Mohir Uddin and Asraf Ali caused knife blows on the hands of the victim P.W. 3 but the doctor only found two injuries on the hands of the victim which has been mentioned in the medical certificate (exhibit 2). The occurrence took place at 11.00 pm in village Chechuria and the accused persons and the victim P.W. 3 are the residents of village Jominpur.

It reveals that the accused Arfan Ali and Mohir Uddin are the sons of accused Abdur Razzaque and accused Akabbor Ali is the son of Asad Ali who is also the brother of accused Abdur Razzaque. The evidence of P.W. 3 that he sustained injury on his right hand is not corroborated by the medical certificate exhibit 2. In the medical certificate (exhibit 2) it is mentioned that P.W. 3 sustained injuries on his both hands. The FIR is the initial version of the prosecution case. The informant lodged the FIR hearing about the occurrence after 6 days from P.W. 3 victim Ansar Ali. The statement made in the FIR that the accused Abdur Razzaque, Arfan Ali, Mohir Uddin, and Asraf Ali dealt knife blows is not corroborated by any of the witnesses including victim P.W. 3 and Investigating Officer P.W. 7 S.I Md. Anwar Alam. P.W. 3 only stated that the accused Arfan Ali and Mohir Uddin caused injuries on his right hand. The evidence of P.W. 3 that he sustained knife injuries on his right hand by the accused Arfan Ali and Mohir Uddin is not corroborated by P.Ws. 1, 2, 4 and 5.

Furthermore, there is also a contradiction in the evidence of P.W. 3 and the Investigating Officer P.W. 7 regarding the weapon used at the time of occurrence. P.W. 3 stated that he sustained injuries by knife but P.W. 7 Investigating Officer stated that in the statement recorded under Section 161 of the Code of Criminal Procedure, 1898, it has been mentioned that the victim sustained

injuries by hasua. The occurrence took place at 11.00 pm and the torch by which the victim P.W. 3 recognized the accused persons was not proved in the case. Although the blood stain cloth and the genji were proved as material exhibits Ka and Kha, the blood stain soil of the place of occurrence was not seized and proved by the prosecution.

In the FIR, it has been stated that on the date of occurrence at about 11.00 pm one Mazid came to his house and informed that his brother P.W. 3 Ansar Ali was lying on the road situated in front of the house of Mozam and thereafter, he went to the place of occurrence along with Abdus Samad, Quddus, Md. Antaz Ali and Minara, Abdul Mazid and Mozam but they were not examined by the prosecution. Non-examination of those witness gives rise to an adverse presumption under Section 114(g) of the Evidence Act, 1872 against the prosecution.

In view of the above evidence, facts and circumstances of the case, findings and proposition, I am of the view that the prosecution failed to prove the charge against the convict-petitioners beyond all reasonable doubt. Both the Courts below failed to assess and evaluate the evidence of the prosecution witnesses in its true perspective and illegally passed the impugned judgments and orders of conviction and sentence.

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-petitioners Md. Abdur Razzaque, Arfan Ali, Mohir Uddin, Asraf Ali and Akabbor Ali are hereby set aside.

Send down the lower Court's records at once.