

Present:**Mr. Justice Md. Khasruzzaman****Criminal Revision No. 5506 of 2024**

Md. Shofikul Islam

...convict–petitioner

-Versus-

The State and another

..opposite parties.

Mr. Sanjoy Kumar Kundu, Advocate

...For the convict petitioner

Mr. Mohammad Abdul Karim, D.A.G. with

Mr. Md. Azgarul Islam, AAG and

Ms. Mahfuza Akhter, A.A.G.

.....For the opposite party

Judgment on 02.03.2025

The Rule was issued calling upon the opposite parties to show cause as to why the judgment and order dated 28.04.2024 passed by the learned Senior Sessions Judge, Chapainawabganj in Criminal Appeal No. 138 of 2024 allowing the appeal and thereby reversing the judgment and order of acquittal dated 30.04.2023 passed by the learned Senior Judicial Magistrate 1st Court, Chapainawabganj in C.R. Case No. 938 of 2019 (Nawabganj) convicting

the petitioner under section 353 of the Penal Code and sentencing him there under to suffer rigorous imprisonment for 2 (two) years and also to pay a fine of Tk. 25,000.00 (Twenty Five Thousand) in default to suffer simple imprisonment for 6 (six) months more and also convicting him under section 323 of the Penal Code and sentencing him there under to suffer simple imprisonment for 6 (six) months and also to pay a fine of Tk. 10,000.00 (Ten Thousand) in default to suffer simple imprisonment for 1 (one) month 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 opposite party No. 2 as Complainant filed a petition of complaint before the Cognizence Court, Chapainawabganj Sadar, Chapainawabganj accusing the present petitioner under sections 353, 355 and 506 of the Penal Code alleging *inter alia* that the convict petitioner was an Office Assistant of Nejarat

Section of the District Judgeship and at present he has been suspended from service. The complainant opposite party was a senior employee of the judgeship. In presence of Md. Yeamin Kabir, Chief Comparer of Copy Section, on 18.09.2019 an incident took place due to the rude behavior of the convict petitioner with Mr. Md. Kafil Akter, Administrative Officer in Charge. As a result of the incident, on 26.09.2019 the convict petitioner at about 12.00 noon entered into the Copy Section and began to obstacle government work by abusing and threatening the Chief Comparer and at that time, the complainant forbade the petitioner and asked him to leave the room. For this reason, the petitioner became angry with the complainant opposite party and at 2.00 p.m. when the complainant opposite party went to a hotel ran by Saidur, the petitioner grabbed the complainant's collar, abused him in foul languages, beat him, threw him on the ground and he threatened

to throw away the body. Then the witnesses rescued him and brought him to the office. Thus, the complainant filed C.R. Case No. 938 of 2019 against the petitioner under sections 353, 355 and 506 of the Penal Code.

The complainant opposite party was examined under section 200 of the Code of Criminal Procedure and after examining the complainant, the learned Magistrate took cognizance of the offence under sections 353, 355 and 506 of the Penal Code against the petitioner.

Subsequently, the case record was transmitted to the learned Senior Judicial Magistrate, Court No. 1, Chapainawabganj for trial and on 24.02.2020 charge was framed against the petitioner under sections 353, 355 and 506 of the Penal Code. But no charge was framed under section 323 of the Penal Code against the petitioner.

During trial the prosecution examined 05 witnesses to prove the case and the defence cross examined them but did not adduce any defence witness.

After conclusion of the trial, on 30.04.2023 the learned Senior Judicial Magistrate 1st Court, Chapainawabganj acquitted the petitioner of the charges levelled against him under sections 353, 355 and 506 of the Penal Code.

Being aggrieved by and dissatisfied with the judgment and order of acquittal dated 30.04.2023, the complainant as appellant preferred appeal before the Court of Sessions, Chapainawabganj on 18.03.2024 which was out of time by 318 days, and on 18.03.2024 the delay of 318 days was condoned and it was registered as Criminal Appeal No. 138 of 2024.

After hearing the appeal, the learned Senior Sessions Judge, Chapainawabganj allowed the appeal by his impugned judgment and order dated 28.04.2024 and convicted the petitioner under section 353 of the Penal Code and sentenced him there under to suffer rigorous imprisonment for 2 (two) years and also to pay a fine of Taka 25,000.00 (Twenty Five Thousand) in default to suffer simple imprisonment for 6 (six) months more and also convicted him under section 323 of the Penal Code and sentenced him there under to suffer simple imprisonment for 6 (six) months and also to pay a fine of Taka 10,000.00 (Ten Thousand) in default to suffer simple imprisonment for 1 (one) month more with a direction to run both the sentences consecutively and reversed the judgment and order of acquittal dated 30.04.2023 passed by the learned Senior Judicial Magistrate, 1st Court, Chapainawabganj in C.R. Case No. 938 of 2019 (Nawabganj).

Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence dated 28.04.2024, the convict petitioner filed this revision and obtained the Rule.

Mr. Sanjoy Kumar Kundu, the learned Advocate for the petitioner submits that the appeal was admitted for hearing though it was filed beyond the prescribed period of limitation contravening the provision of section 417(3) of the Code of Criminal Procedure, and as such, the impugned judgment and order of conviction and sentence is bad in law and thus the same is liable to be set aside.

He further submits that no charge was framed against the petitioner under section 323 of the Penal Code but the Court of Appeal convicted the petitioner under the said provision of law, and the charge brought against the petitioner does not at all come within the mischief of section 353 of the Penal Code,

and as such, the Court of Appeal committed illegality in passing the impugned judgment and order of conviction and sentence.

He also submits that the petitioner is entitled to get the benefit of section 114(g) of the Evidence Act, 1872 as the prosecution failed to examine the vital witness Saidur, the hotel owner, in whose presence the occurrence took place, and also the prosecution failed to examine two other vital witnesses who were named in the complaint petition namely (1) Md. Yeamin Kabir and (2) Md. Masud Rana and as such, the Appellate Court ought to have disbelieved the prosecution story and acquitted the petitioner.

Heard the learned Advocate for the petitioner and the learned Deputy Attorney General, perused the records along with the relevant documents.

In the present case, a question has arisen as to whether the Court of Appeal can condone the delay

in filing an appeal when it is filed under section 417 (2) of the Code of Criminal Procedure by the complainant against an order of acquittal.

It appears from the records that the complainant opposite party filed C.R. Case No. 938 of 2019 before the Cognizence Court, Chapainawabganj against the petitioner under sections 353,355 and 506 of the Penal Code on 30.04.2023 and charge was framed against the petitioner under sections 353, 355 and 506 of the Penal Code against the petitioner and the prosecution examined 5 (five) witnesses to prove the case and the defence cross examined them but did not adduce any witness.

After conclusion of the trial, the learned Senior Judicial Magistrate, 1st Court, Chapainawabganj acquitted the petitioner of the charges levelled against him on 30.04.2023.

Against the said judgment and order, the complainant as appellant filed appeal before the learned Senior Sessions Judge, Chapainawabganj out of time by 318 days and the learned Senior Sessions Judge condoned the delay and accepted the appeal on 18.03.2024. Accordingly, the said appeal was registered as Criminal Appeal No. 138 of 2024.

In the present case, sub-sections 2 and 3 of section 417 of the Code of Criminal Procedure are relevant which reads as follows:

417. (1)

(2) Notwithstanding anything contained in section 418 if such an order is passed in any case instituted upon complaint, and if the order involves an error of law occasioning failure of justice, the complainant may present an appeal-

*(a) to the High Court Division
from an original order of*

acquittal passed by any Court of Session;

(b) to the Court of Session from an original order of acquittal passed by any Magistrate.

(3) No appeal by the complainant from an order of acquittal shall be entertained by the High Court Division or a Court of Session after the expiry of sixty days from the date of the order of acquittal.

It appears from the records that the present case was registered upon a petition of complaint and as such, against an order of acquittal in a petition of complaint can be appealed by the complainant only under section 417 (2) of the Code of Criminal Procedure, and the special limitation for filing the appeal is 60 days provided in section 417 (3) of the Code of Criminal Procedure. The code of Criminal

Procedure is a general law relating to procedure, but it is a special law while prescribing a limitation for a particular purpose. Accordingly, section 417 (3) of the Code of Criminal Procedure is a special law prescribing a limitation for filing an appeal against an order of acquittal under section 417 (2) of the Code different from that prescribed in Article 157 of the Limitation Act which provides six months time for filing an appeal against an order of acquittal under the Code.

Thus as per section 29 (2) of the Limitation Act, section 5 of the Limitation Act is not applicable as section 417 (3) of the Code of Criminal Procedure is a special law prescribing a limitation.

It is admitted that the appeal was filed out of time by 318 days before the Court of Sessions Judge but the learned Senior Sessions Judge, Chapainawabganj illegally condoned the delay of 318

day in filing the appeal and thereby the appeal was registered and subsequently, the appeal was allowed and the present petitioner was convicted and sentenced. Thus, there has been a manifest illegality in the entire process of appeal which should be interfered for the prevention of gross miscarriage of justice.

Considering the facts of the case and discussions made above, I have found substance of the submissions of the learned Advocate and merit of the Rule.

In the result, the Rule is made absolute.

Thus, the judgment and order dated 28.04.2024 passed by the learned Senior Sessions Judge, Chapainawabganj in Criminal Appeal No. 138 of 2024 allowing the appeal and thereby reversing the judgment and order of acquittal dated 30.04.2023 passed by the learned Senior Judicial Magistrate 1st

Court, Chapainawabganj in C.R. Case No. 938 of 2019 (Nawabganj) convicting the petitioner under section 353 of the Penal Code and sentencing him there under to suffer rigorous imprisonment for 2 (two) years and also to pay a fine of Tk. 25,000.00 (Twenty Five Thousand) in default to suffer simple imprisonment for 6 (six) months more and also convicting him under section 323 of the Penal Code and sentencing him there under to suffer simple imprisonment for 6 (six) months and also to pay a fine of Tk. 10,000.00 (Ten Thousand) in default to suffer simple imprisonment for 1 (one) month more is set aside.

The convict petitioner is acquitted of the charges levelled against him.

Send down the records.

Communicate the judgment.