

03.04.2023
S/L. 3 & 4
Court No.12
Suvayan/
Sourav

CRA 564 of 2009

In the matter of: **Abdul Malek**

....Appellant.

With
CRA 567 of 2009

In the matter of: **Nazrul Haque**

....Appellant.

Mr. Milon Mukherjee, Sr. Adv.
Mr. Kazi M. Rahman
Mr. Dattatreya Dutta

...for the appellant.

Mr. Saswata Gopal Mukherjee, PP
Mr. Narayan Prasad Agarwala
Mr. Pratik Bose

...for the State in
CRA 567 of 2009.

Mr. Saswata Gopal Mukherjee, PP
Mr. Pravas Bhattacharya
Mr. M. F. A. Begg

...for the State in
CRA 564 of 2009.

1. Heard Mr. Milon Mukherjee, learned Senior Counsel appearing for the appellants and Mr. Pravas Bhattacharya, led by Mr. Saswata Gopal Mukherjee, learned Public Prosecutor and Mr. Narayan Prasad Agarwala, led by Mr. Saswata Gopal Mukherjee, learned Public Prosecutor appearing for the State in CRA 564 of 2009 and CRA 567 of 2009 respectively.

2. Judgment of conviction dated 02.07.2009 and order of sentence dated 03.07.2009 passed by learned Additional Sessions Judge, Fast Track, 6th Court, Malda in Sessions Trial No. 24 of 2009 arising out of Sessions Case No. 39 of 2009 is challenged in both the aforesaid appeals.

3. With consent by learned Counsel for both the parties, both the appeals are taken up together for disposal by this common judgment.

4. Altogether, four persons were tried for offence under

Sections 448/323/324/307/304/354/34 IPC. They are Azhar Ali, Nazrul Haque, Abdul Malek and Lokman Ali. Nazrul Haque, Abdul Malek and Lokman Ali are the sons of Azhar Ali.

5. The occurrence happened at about 11.00 a.m. on 06.09.2006. Sahabuddin Haque (P.W. 1) is the informant. The gist of the prosecution case is that Azhar Ali was hurling abuses standing in front of the house of the informant. The father of informant protested to such action of Azhar Ali. Azhar Ali threatened the father of the informant (P.W. 1) to kill him. All of a sudden, three sons of Azhar Ali, namely, Nazrul Haque, Abdul Malek and Lokman Ali came over the spot. They started assaulting the father of the informant (P.W. 1). Moinul Haque (deceased), who happens to be the brother of P.W. 1 intervened to save his father. Other two brothers of P.W. 1 named, Enamul and Ekramul also intervened to save their father and brother Moinul (deceased). The accused persons, thereafter, entered into the house of the informant (P.W. 1) while assaulting father of P.W. 1 Moinul, Ekramul and Enamul with weapons like 'da' (sickle), 'lathi' and iron rod. When mother of P.W. 1, named, Hameda Bibi came to save her husband and sons, she was also kicked by Abdul Malek and her wearing apparel was torn by him. Wife of P.W. 1, named, Maneza was also assaulted by Nazrul Haque. After a while, the accused persons left the spot. Thereafter, P.W. 1 and others took his father and brothers Moinul and Ekramul to Harishchandrapur Hospital. His brother, Moinul was referred to Malda Sadar Hospital on the same day. Moinul, subsequently died in Sadar Hospital at Malda on 09.09.2006.

5.1. The FIR was lodged by P.W. 1 on 09.09.2006. P.W. 3 is

the scribe of the FIR. P.W. 2 is the Inspector of Police who received the FIR and registered the P.S. Case. P.W. 17 is the I.O. of the case who took up charge of investigation on 19.09.2006 after death of the I.O., Sub-Inspector of Police, B. Dasgupta. He examined the witnesses and after all necessary formalities filed charge-sheet against the accused persons for offence under Sections 448/323/324/307/304/354/34 IPC.

6. Prosecution has examined 17 witnesses to prove the charges against the accused persons (including the appellants).

P.W. 1 is the informant. P.W. 3 is the scribe of the FIR. P.W. 2 is the Inspector who received the FIR and lodged the P.S. case. P.W.s 6 to 14 and P.W. 16 are the eyewitnesses to the occurrence, out of whom P.W.s 9 and 12 are co-villagers but all other witnesses are relations of the informant (P.W. 1). P.W. 15 is the Police Officer who held inquest over the dead body of Moinul Haque (deceased). P.W. 4 is the Medical Officer who conducted postmortem over the dead body of the deceased Moinul Haque. P.W. 5 is the Medical Officer who examined injured Moinul (since deceased), Azad Ali (father of P.W. 1), Enamul Haque and Ekramul Haque (brothers of P.W.1) on 06.09.2006. P.W. 17 is the I.O.

6.1. Defence plea is one of complete denial and false implication.

7. Learned Trial Court having relied on eyewitness accounts of the aforesaid witnesses as introduced (Supra) and the corroborative evidence of the Medical Officers, P.W.s 4 and 5 acquitted Azhar Ali and Lokman Ali of all the charges and Nazrul Haque and Abdul Malek of charges under Sections 448/323/324/354/34 IPC.

Learned Trial Court however convicted Nazrul Haque under Section 304(Part-I) IPC and sentenced him to suffer imprisonment for life and to pay fine of Rs. 35,000/- in default to suffer S.I. for one year more. Learned Trial Court further convicted Abdul Malek under Section 307 IPC and sentenced him to suffer R.I. for 7 years and to pay fine of Rs. 5,000/- in default to suffer S.I. for six months more. Hence, both the aforesaid appeals, one by Nazrul Haque, i.e., CRA 564 of 2009 and another by Abdul Malek, i.e., CRA 567 of 2009.

8. Mr. Mukherjee, learned Senior Counsel appearing for the appellants submits that there has been delay in lodging of the F.I.R. and receipt of FIR by the Magistrate and according to him, the FIR has been antedated and antetimed. In view of such fact, it is submitted by Mr. Mukherjee, that entire prosecution case is put to doubt regarding the place and time of occurrence and manner of assault etc. Mr. Mukherjee, relies on the case of **Mehraj Singh Vs. State of U.P. (1994) 5 SCC 188**, and **Thanedar Singh Vs. State of M.P. (2002) 1 SCC 487** to substantiate his contentions on the aforesaid points. It is further submitted by Mr. Mukherjee that the Medical Officer P.W. 5 referred deceased Moinul to District Headquarter Hospital, Malda at about 2:00 p.m. on 06.09.2006, but he was admitted in the District Headquarter Hospital, Malda on 08.06.2006 at 2:00 p.m. but there is no explanation as to where he was for the two days of interregnum period. Such a fact raises grave doubt regarding the cause of death of the deceased as a result of assault by Nazrul Haque (appellant). Mr. Mukherjee, also draws our attention to material contradictions in the evidence of eyewitnesses and submits that in view of such material contradictions, those

witnesses cannot be believed. It is submitted by Mr. Mukherjee, that all the witnesses being related they have tried to rope in entire family of Azhar Ali (since acquitted) but the learned Trial Court having acquitted two of the accused persons namely, Azhar and Lokman on the self-same set of evidence, it could not have recorded the judgment of conviction taking a different view so far as Nazrul Haque and Abdul Malek are concerned. It is also submitted by Mr. Mukherjee that in absence of proof of bed-headed ticket specifying the nature of injuries of injured Ekramul, the appellant namely, Abdul Malek could not have been convicted for offence under Section 307 IPC.

Per Contra, Mr. Pravas Bhattacharya and Mr. Narayan Prasad Agarwala, learned Counsels for the State support the impugned Judgement and submits that the finding recorded by the learned Trial Court is justified in view of the nature of clinching evidence of the eyewitnesses and the appeals filed by the appellants be dismissed.

9. Coming to the question of complicity of the appellants in the offence under consideration, we propose to take up first the evidence adduced on record before the Trial Court so far as complicity of Nazrul Haque in offence under Section 304(Part-I) IPC is concerned.

9.1. So far as the aforesaid question is concerned, we find from the inquest report (Ext. 5/1) that P.W. 15, the Police Officer who conducted inquest over the dead body of Moinul Haque could not find any external injury on the dead body of the deceased so also the witnesses who have signed the inquest report. The Medical Officer

(P.W. 5) who examined Moinul Haque (deceased) at the first instance, on 06.09.2006 at about 2.20 p.m. only found a small bruise over his head. He has further testified that he did not find any large external injury, but patient was unable to stand and there was retention of urine; he was restless and in semi-conscious condition. He was referred to District Headquarter Hospital, Malda for better treatment.

9.2. From the evidence of P.W. 4, the Medical Officer who conducted postmortem, it is found that Moinul (deceased) was admitted to Malda District Hospital at 2.20 p.m. on 08.09.2006 and died at 10.55 p.m. on 09.09.2006.

9.3. From the evidence of P.W.s. 4 and 5, it is clear that P.W. 5 referred Moinul (deceased) for better treatment to District Headquarter Hospital, Malda at about 2.20 p.m. on 06.09.2006 but he took admission in District Headquarter Hospital, Malda as an indoor patient at 2.20 p.m. on 08.09.2006 (after about 48 hours of the referral). None of the witness has whispered a word as to where Moinul Haque was there during the interregnum period from 2:20 p.m. on 06.09.2006 to 2.20 p.m. on 08.09.2006. Such a gap in admission of Moinul (deceased) in the District Headquarter Hospital, to which he was referred, create a grave doubt in our mind in view of silence by the witnesses as to what happened to him (deceased Mainul) during the interregnum period or whether he had received the fatal injury during that period (gap of 48 hours).

9.4. The postmortem report vide Ext. 2 and the evidence of P.W. 4 (the Medical Officer who conducted the postmortem) shows that he (P.W. 4) did not find any external injury but in course of internal examination, however, he found bruise over side back and

mid portion of scalp, fracture of parietal and frontal bone, Meningial and brain hemorrhage were detected.

9.5. In the post mortem report the cause of death is opined to be effect of the head injury which is ante-mortem in nature. But in course of examination before the Court, P.W. 4 has testified that the injuries were homicidal in nature (though such opinion is absent in post mortem report). According to P.W. 4, the injury might have been caused by hard and blunt substance.

10. Coming to the next suspicious feature in the prosecution case is the delay in receipt of FIR by the competent Magistrate. From the record of the case, it is found that the FIR was lodged on 09.09.2006 which was a Saturday but the FIR was received by the Magistrate on 11.09.2006 as found from the record from the signature put by the Magistrate.

10.1. The occurrence having happened on 06.09.2006, the FIR was lodged after three days and explanation was given by P.W. 1 in his evidence to the effect that they were busy in treatment of Moinul (deceased) and others. Such an explanation by the informant (P.W. 1) does not commend to us and cannot be countenanced by logic inasmuch as whereabouts of Moinul for two days is not known though he was stated to be serious and P.W. 1 has not elaborated as to what treatment they were giving to Moinul Haque till his admission in District Headquarter Hospital, Malda on 08.09.2006. Further Azad Ali (father of P.W.1), Enamul and Ekramul (brothers of P.W.1) had not sustained serious injuries demanding time of P.W.1 to look after them.

10.2. Though there was delay in lodging of the FIR and delay

in sending the FIR to competent Court, we find that 09.09.2006 was a Saturday and the FIR has been received by the competent Magistrate on 11.09.2006. There is no cross-examination of the I.O. (P.W. 17), on this aspect as to how the delay was caused. It is argued by Mr. Mukherjee, learned Senior Counsel for the appellants that the I.O. who had sent the FIR to the Magistrate having died and he having not been examined in Court, it was not possible for the defence to put such question to the I.O. Such an explanation by the defence is quite acceptable in view of the fact that P.W. 17 took charge of investigation only from 19.09.2006 and P.W. 2 only received the FIR and registered the P.S. Case.

10.3. Taking into consideration all the aforesaid aspects, we are constrained to hold that there is not only delay in lodging of F.I.R. but there is also delay in sending the FIR to the competent Magistrate, which cast a doubt on the veracity of the evidence of the witnesses regarding the place and time of occurrence and the prosecution narratives as unfolded in their evidence. We are also substantiated in our aforesaid view inasmuch as learned Trial Court has acquitted all the accused persons so far as offence under Section 448/323/324/354/34 IPC is concerned. The place of occurrence according to the prosecution witnesses is the house of the informant (P.W. 1) where the appellants and other accused persons are alleged to have barged in running after father of P.W. 1 and the occurrence is alleged to have happened.

11. Coming to the evidence of the witnesses, we find that P.W.s 1, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 16 out of whom P.W. 12 has been declared hostile are the occurrence witnesses. According to

P.W. 7, the neighbouring witnesses named Motiur Rahaman, Mojid, Masoor, Altaf, Nausad and Joinal were present near the spot at the time of occurrence, but none of them though non-interested witnesses has been examined. All the aforesaid witnesses i.e. P.W.1, P.W.s 6 to 11, 13 and 14 and P.W. 16 with variations regarding the assault have testified that it was Nazrul Haque who assaulted deceased Moinul on his head with an iron rod. When the evidence of the aforesaid witnesses is read in conjunction with the evidence of the I.O. (P.W. 17), it is found that Enamul Haque (P.W. 6) had not stated before the I.O. (P.W.17) that Abdul Malek assaulted him with a 'da' on his head and further he did not tell that the appellant Nazrul Haque assaulted Moinul with iron rod. Samsul Hoque (P.W. 7) did not tell before the I.O. (P.W. 17) that the accused persons assaulted the victims. He (P.W.7) also did not tell before the I.O. (P.W.17) regarding the weapons used by individual accused persons. Maniza Bibi (P.W. 8) did not tell before the I.O. (P.W. 17) that Abdul Malek assaulted her father-in-law with 'da', she did not tell before the I.O. (P.W.17) that Nazrul assaulted Moinul with a crowbar on his head. Kamrujjaman (P.W. 9) did not tell before the I.O. (P.W.17) that he went to the house of the informant to collect money and he did not tell him that he found 'da' in the hands of the accused persons. This witness P.W. 9 is a chance witness as he has justified his presence at the scene of occurrence by saying that he had gone to the house of the informant to collect money. That part of the evidence of P.W.9 having been contradicted, this witness cannot be believed so far as the other part is concerned. Azad Ali (P.W. 11), father of the deceased has not stated before the I.O. (P.W.17) that

Abdul Malek assaulted Enamul, Ekramul and Hamed and he has also not stated that Nazrul assaulted deceased Moinul with iron rod.

12. If we take all the aforesaid contradictions into account which are admissible under Section 145 of Evidence Act read with explanation to Section 162 Cr.P.C., we find that there is exaggeration on the part of the witnesses so far as the assault on deceased Moinul is concerned. Even if we accept the gist of the prosecution case to the extent that Nazrul assaulted the deceased Moinul with an iron rod on his head, in view of gap of two days in admission of Moinul in the District Headquarter Hospital, Malda after his referral by P.W. 5, delay in lodging of the FIR without any cogent explanation and delay in receipt of FIR by the competent Magistrate, the entire prosecution case becomes doubtful. Further there is no evidence to show that where the deceased Moinul was there for two days though he had sustained injury on his head as testified by the witnesses. It might have so happened that during those two days, he might have fallen down somewhere and received the injury which the Medical Officer, P.W. 4 has opined to be the cause of his death. We are constrained to reach such a finding especially because no external injury was found on the dead body of Moinul either by the witnesses or the police officer during inquest and also by the Medical Officer (P.W.5) who happened to examine Moinul (deceased) in injured condition at the first instance.

13. Taking into consideration the aforesaid facts, we are unable to accept the evidence as adduced by the prosecution and we are constrained to hold that the evidence so adduced by the prosecution does not inspire confidence in us. Accordingly, it is held

that appellant Nazrul Haque is entitled to be acquitted of the charge under Section 304(Part-I) IPC on the ground of benefit of doubt.

14. Coming to the case of Abdul Malek for offence under Section 307 IPC, we do not want to repeat the evidence as discussed (Supra). The prosecution witnesses have testified that Abdul assaulted Enamul, Ekramul (both injured) and Azad Ali in the transaction. P.W. 5 examined Enamul and Ekramul on the same day of the occurrence at about 2.20 p.m. P.W. 5 found an injury of 1/8" over head of Enamul and so far as Azad Ali is concerned, he found cut injury of 3"x1/4" on his head, and swelling on his left elbow. So far as Ekramul is concerned, there is no injury report in respect of him though he is also alleged to have sustained injury. The medical officer (P.W. 5) has not opined regarding the nature of injury sustained by the aforesaid victims. There is also some overwriting regarding time of admission of the patients in the injury report. The weapon of offence used in the crime was not produced before P.W. 5 by the police. The x-ray in respect of the aforesaid injured persons have not been proved and P.W. 5 candidly has testified that he has also not seen x-ray report after attending the patient on 06.09.2006.

15. In view of our discussion (Supra) regarding the suspicious features in the prosecution case and in absence of any opinion of the medical officer regarding the nature of injury sustained by Azad and Enamul, we are of the view that appellant **Abdul Malek (in CRA 567 of 2009)** is also entitled to be acquitted so far as charge under Section 307 IPC is concerned on the ground of benefit of doubt.

16. Taking into consideration all the aforesaid facts and

submissions, in fine, we hold that Nazrul Haque and Abdul Malek be acquitted of the respective charge.

17. Appellant **Nazrul Haque (appellant in CRA 564 of 2009)** is acquitted of charge under Section 304(Part-I) IPC and **Abdul Malek (appellant in CRA 567 of 2009)** is acquitted of charge under Section 307 IPC.

18. Consequently, the impugned judgment and order of sentence are set aside.

19. The appellants who are stated to be on bail, be discharged of the bail bond.

20. The L.C.R. be sent down to the concerned Trial Court along with a copy of this judgment.

21. Accordingly, the appeals being **CRA 564 of 2009** and **CRA 567 of 2009** are allowed.

22. Urgent xerox certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)