

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

PRESENT:

**Mr. Justice Syed Mahmud Hossain
-Chief Justice
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan**

CRIMINAL APPEAL NO.02 of 2012

(From the judgment and order dated 07.05.2007 passed by the High Court Division in Criminal Appeal No.379 of 2000)

Shafiqul Islam. :**Appellant.**

-Versus-

The State. :**Respondent.**

For the Appellant. : Mr. Md. Nawab Ali, Advocate-on-Record (died).

For the Respondent. : Mr. Biswajit Devnath, Deputy Attorney General, instructed by Mr. Md. Shamsul Alam, Advocate-on-Record.

Date of Judgment : **The 13th January, 2021.**

J U D G M E N T

SYED MAHMUD HOSSAIN, C.J: This criminal appeal, by leave, is directed against the judgment and order dated 07.05.2007 passed by the High Court Division in Criminal Appeal No.379 of 2000 dismissing the appeal and affirming the conviction and sentence pursuant to the judgment and order dated 14.02.2000

passed by the learned Additional Sessions Judge, First Court, Jessore in Sessions Case No.35 of 1998 convicting the appellant and another two accused under sections 302 and 34 of the Penal Code and sentencing them to suffer rigorous imprisonment for life along with fine of Tk.5000/- each, in default, to suffer rigorous imprisonment for further 3 (three) years.

The facts, leading to the filing of this civil appeal, in a nutshell, are:

The prosecution case, in brief, is that one Md. Shahjahan orally informed the Officer-in-Charge of Sharsha Police Station on 22.12.1996 at about 9.45 hours that his eldest son Md. Rowshan Ali was missing since 21.12.1996 and his dead body was found on the morning of 22.12.1996 in the date-garden of Nuru Mollah. It was told that victim Rowshan Ali took some sleeping tablets at the night of occurrence and went to the date garden and died there. Accordingly, Sharsha Police Station U.D Case No.39 of 1996 dated 22.12.1996 was started. During inquest of dead body of Rowshan Ali some injuries

were found on different parts of his body and it was presumed that the victim was beaten to death. Meanwhile, Shahjahan Ali, father of deceased Rowshan Ali, handed over accused Md. Shafiqul Islam to the Police Station on 25.12.1996 and informed that accused Shafiqul Islam called away victim Rowshan Ali from his house in the evening of 21.12.1996 and thereafter victim Rowshan Ali did not come back home at that night and in the following morning Rowshan Ali was found dead in the date garden with multiple injuries. On the basis of this information a G.D. No. 978 was made on 25.12.1996 and accused Md. Shafiqul Islam was arrested under section 54 of the Code of Criminal Procedure and forwarded to the Court. On 26.12.1996, post-mortem report of deceased Rowshan Ali was received by the Investigation Officer from Jessore General Hospital wherein the doctor opined that the death was due to shock and intracranial haemorrhage resulting from the injuries which were *ante-mortem* and homicidal in nature. On interrogation, accused Shafiqul Islam, Md. Nasir and Md. Nuruzzaman disclosed that in the evening of occurrence that they called away victim Rowshan Ali

from his house and accordingly a regular F.I.R was lodged.

Police after investigation submitted charge-sheet against accused Shafiqul Islam, Abdul Khaleque and Nasir under sections 302/34 of the Penal Code. Accused Hamjer Ali, Nuruzzaman and Rejaul were not sent up on the charge sheet.

The case record was sent to the Court of Sessions Judge, Jessore for holding trial. On 09.07.1998, charge was framed against accused Shafiqul Islam, Abdul Khaleque and Nasir under sections 302/34 of the Penal Code and the charge was read over to them who pleaded not guilty and claimed to be tried.

The learned Additional Sessions Judge, First Court, Jessore, upon hearing the both the sides, by the judgment and order of conviction and sentence dated 14.02.2000 convicted the appellant and other two accused under sections 302 and 34 of the Penal Code and sentenced them to suffer rigorous imprisonment for life along with a fine of Tk.5000/-

each, in default, to suffer rigorous imprisonment for further 3 (three) years.

Being aggrieved by and dissatisfied with the aforesaid judgment and order of conviction and sentence passed by the trial Court, the appellant Shafiqul Islam preferred Criminal Appeal No.379 of 2000 before the High Court Division. The learned Judges of the High Court Division by the impugned judgment and order dated 07.05.2007 dismissed the appeal and affirmed the conviction and sentence passed by the trial Court.

Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the appellant Shafiqul Islam filed Criminal Petition for Leave to Appeal No.81 of 2010 before this Division and obtained leave on 16.10.2011 resulting in Criminal Appeal No.02 of 2012.

This criminal appeal was filed by Late Md. Nowab Ali, learned Advocate-on-Record. After his death notice was issued upon the appellant intimating him about the death of his learned

Advocate-on-Record but he did not appoint any learned Advocate-on-Record.

Since none appears to press this appeal on behalf of the appellant and this is a long pending case, we have taken up the appeal for hearing on our own. Leave was granted on the following submissions of the learned Advocate:

"The High Court Division without proper application of its mind believed P.W.5 as an eye witness of the occurrence in failing to notice that in the FIR which was lodged after 15(fifteen) days of the occurrence the informant did not allege that he (P.W.5) was an eye witness of the occurrence. Learned Advocate-on-Record took us to the evidence of P.W.4, the father of the victim, who made a GD entry over the incident, in which, he did not allege that the petitioner was involved in the murder of the victim or that he was in any way suspected as an assailant of the victim.

There are inconsistent statements of P.Ws.4 and 5 as regards their identification of the petitioner by the torch light at the time of incident and also the alleged story of apprehension of the petitioner on the spot. According to the learned Advocate-on-Record, this story was subsequently introduced, inasmuch as, if the petitioner was apprehended on the spot as an assailant of the victim, there was no reason for filing initially a UD case and then a GD entry without mentioning the name of the petitioner.

The learned Judges of the High Court Division erred in law in taking the confessional statement as true and voluntarily, and convicted the petitioner

relying upon it in failing to consider that it was totally exculpatory in nature which could not be the basis for conviction of the petitioner. In view of the above, the learned Advocate-on-Record gave emphasis that the conviction is based upon totally unreliable and concocted story and therefore, in all fairness, it is argued, the petitioner is entitled to get the benefit of doubt but the High Court Division did not advert its mind in that regard."

Mr. Biswajit Debnath, learned Deputy Attorney General, appearing on behalf of the State-respondent, on the other hand, submits that the confessional statement made by the appellant is true and voluntary and that the trial Court as well as the High Court Division rightly relied on the confessional statement of the appellant and convicted him under section 302 of the Penal Code. He further submits that there is no ground for disbelieving the evidence adduced by P.Ws.4 and 5 and that they are most natural witnesses and their evidence should not be discarded as there is valid reason whatsoever. Learned Deputy Attorney General, however, failed to reconcile the statement made in the U.D. Case, the FIR and the subsequent prosecution story as unfolded during investigation. When we have brought this to the notice of the

learned Deputy Attorney General that the appellant appears to be a child at the time of framing of charge and that the Court did not make any endeavour to determine the age of the child when he was produced before the Court, the learned Deputy Attorney General could not give us satisfactory explanation.

We have gone through the submissions on which leave was granted, considered the submissions of the learned Deputy Attorney General, perused the impugned judgment and the material on record.

The present appeal centering on the death of the deceased Rowshan Ali arose out of the Sharsha P.S. U.D. Case No.39 of 1996 dated 22.12.1996 which was converted into a regular case after lodgement of a regular F.I.R. on 05.01.1997 on the basis of post-mortem report under section 302 of the Penal Code.

During inquest on dead body of deceased Rowshan Ali some injuries were found on different parts of his body and it was presumed that the victim was beaten to death. Meanwhile, Shajahan Ali, father of the deceased Rowshan Ali, handed over accused Md.

Shafiqul Islam to the police station on 25.12.1996 and informed that accused Shafiqul Islam called away the deceased Rowshan Ali from his house on the evening of 21.12.1996 and thereafter deceased Rowshan Ali did not come back home on that night and on the following morning Rowshan Ali was found dead in the date-garden with multiple injuries. On the basis of this information, a G.D. No.978 was made on 25.12.1996 and accused Shafiqul Islam was arrested under section 54 of the Code of Criminal Procedure and forwarded to the Court. On 26.12.1996, post-mortem report of deceased Rowshan Ali was received by Investigating Officer from Jessor General Hospital wherein the doctor opined that the death was due to shock and intracranial haemorrhage resulting from the injuries which were ante mortem and homicidal in nature. On interrogation accused Shafiqul Islam, Md. Nasir and Md. Nuruzzaman disclosed that in the evening of occurrence, they called away deceased Rowshan Ali from his house and accordingly, FIR was lodged.

Police investigated the case and submitted charge-sheet against the appellant Md. Shafiqul Islam and co-convicts, Abdul Khaleque and Nasir under sections 302/34 of the Penal Code.

The prosecution examined as many as 10 P.Ws. which were cross-examined by the defence.

The star witness of the prosecution case is P.W.5, Abdul Wahab, who was corroborated by the father of the deceased P.W.4 Md. Shahjahan.

P.W.4, Md. Shahjahan, the father of the deceased Rowshan Ali in his deposition, stated that on the night of occurrence accused Nasir and Shafique called his son Rowshan Ali and took him away for drinking date juice and his son did not come back home on that night. After some time, P.W.5 Abdul Wahab went to the field to answer the call of nature and on coming back he told P.W.4 that he heard the cry of victim Rowshan Ali in the field. Then P.W.4 himself, his wife, his sister and uncle along with Abdul Wahab (P.W.5) went to the date-garden with torch-light and saw accused Nasir, Shafiqul and Khaleque standing in the date-garden with a dao in

the hand of accused Khaleque and found victim Rowshan Ali lying on the ground. Wahab focused his torch and the accused persons fled away to the west side but P.W.4 along with P.W.5 Wahab caught hold of accused Shafiqul on the spot and found victim Rowshan Ali dead with multiple injuries. On interrogation by the local people Shafiqul admitted that he caught hold of the legs of victim Rowshan Ali and accused Nasir killed Rowshan Ali by strangulation. P.W.4 along with others handed over accused Shafiqul to the Police Station. In cross-examination, P.W.4 stated that appellant Shafiqul admitted his guilt to the villagers and made a confessional statement to the Magistrate regarding the commission of murder of victim Rowshan Ali. In cross-examination, he stated that he could not tell with certainty whether he said that the people of the locality apprehended accused Shafiqul on 25.12.1996. In cross-examination, he denied that he could not disclose the cause of death to the police on the following day of the occurrence. He also stated that he disclosed the names of the 3 accused who committed the murder.

P.W.5, Abdul Wahab in his deposition stated that he went to answer the call of nature at about 9.30 p.m. when he heard a hue and cry and some mans in nearby date-garden. Coming back home he told the same to his neighbours Shajahan, Kahsem and others and proceeded towards the place of occurrence with torch light and saw accused Shafique caught hold of legs of victim Rowshan Ali, who was lying on the ground. Accused Nasir and Khaleque fled away while accused Shafiqul was caught by the P.Ws. Accused Shafiqul was handed over to the nearest police box (ফাঁড়ি)। In cross-examination, he stated that when they handed over accused Shafiqul to the nearest police box (ফাঁড়ি) it was about 11.30 p.m. He further stated accused Shafiqul admitted before the public about his guilt and disclosed about the entire occurrence. In cross-examination it was suggested that no such occurrence took place as alleged.

P.W.6, S.I. Md. Abdur Rashid stated in cross-examination that on 22.12.1996, he was posted at Sharsha Police Station as Sub-Inspector of Police. On that date at about 9.45 P.W.4 Md. Shahajan made oral information that his son deceased Rowshan Ali died in the date-garden behind his house and that

the dead body was lying there. On the basis of aforesaid information Sharsha Police Station U.D. Case No.39 dated 22.12.1996 was lodged and Sub-Inspector Shawkat Ali was entrusted with the investigation. On 05.01.1997 at about 5.15 p.m. S.I. Shawkat Hossain lodged ejhar as the informant and submitted it to the Officer-in-Charge. On getting the FIR, this witness started Sharsha P.S. Case No.12 dated 05.01.1997 under section 302 of the Penal Code. The officer-in-charge handed over the investigation to him. He visited the place of occurrence and prepared sketch map during investigation. He arrested appellant Shafiqul and Nasir and produced them before the Magistrate for recording their confessional statements under section 164 of the Code of Criminal Procedure and they confessed before the Magistrate. He recorded the statements of 6 witnesses under section 161 of the Code of Criminal Procedure. Subsequently, he was transferred and he handed over the case docket to the Officer-in-Charge and Sub-Inspector Abdur Rab completed the remaining investigation. In cross-examination, this witness admitted that the father of the deceased who lodged the U.D. Case stated that his son took sleeping pills. He denied that in the

ejhar, it has been stated that the accused including the appellant called away the deceased from the house but in the U.D. case that was not stated. He further admitted that Shafiqul was arrested on 25.12.1996 by the police under section 54 of the Code of Criminal Procedure. Subsequently, this witness (P.W.6) arrested Shafiqul in connection with the present case. He first visited the place of occurrence on 06.01.1997. The place of occurrence was about half kilometre off from the house of P.W.4. Nuru Mullah was the owner of the date-garden but he was not made witness in the case. He also admitted in cross-examination that none of the witnesses stated that they saw killing of the deceased Rowshan Ali. None of the witnesses stated that Shafiqul was apprehended by the people. He further admitted that none of the witnesses stated that the victim was called away from the house.

P.W.7, S.I. Abdur Rab completed investigation of the case and submitted charge-sheet against the 3 accused including the appellant.

P.W.8, Mohibul Haque, Magistrate 1st Class, recorded the confessional statement of convict-appellant Shafiqul Islam. In his deposition, he

stated that accused Shafiqul was given sufficient time to think over the matter as well as consequence of making confession and thereafter, he recorded the confessional statement of the accused Shafiqul observing all the provisions of law and the said confessional statement is voluntary and true.

Having considered the materials on record, we are surprised and record our total dissatisfaction about the judgments delivered by both the trial Court and the High Court Division. None of the Courts below properly assessed the evidence of the P.Ws. made in examination-in-chief and in the cross-examination. None of the Courts below also considered the FIR which was lodged by P.W.1. A.S.I. Mir Shawkat Hossain of Sharsha Police Station on 05.01.1997. In the FIR, it was stated that on 22.12.1997 at about 9.45 a.m. P.W.4 Shahjahan verbally informed that his eldest son Md. Rowshan Ali aged about 16 years could not be traced on the night following 21.12.1996. On the following day (22.12.1996) he was found dead in the dates-garden of Nuru Mullah. In the FIR, it was further stated that hearing hue and cry people came to the place of occurrence and on their query, P.W.4 informed them

that on the night following 21.12.1996 deceased Rowshan Ali either took sleeping pills or tablets made in Sreepur and went out of the house at 11.30 p.m. and died in the date-garden. Initially Sub-Inspector Md. Abdur Rshed recorded Sharsha Police Station U.D. Case No.39 of 1996 on 22.12.1996 on the verbal statement of P.W.4 Md. Shajahan, the father of the deceased. In the FIR, it was further stated that during inquest it was found that the deceased sustained injuries on his body and he did not die by taking sleeping pills. Neither the parents of the deceased nor their neighbours and relatives could furnish the actual cause of death. On 25.12.1996, the people of the locality apprehended the appellant and handed him over to the police station. In the FIR, it was further stated that the appellant at that time was suspected as the assailant of the deceased and accordingly, a G.D.No.978 dated 25.12.1996 was started and the appellant was arrested under section 54 of the Code of Criminal Procedure. The FIR was lodged on 05.01.1997 although the occurrence took place on the night following 21.12.1996.

Having gone through the record, we find that the High Court Division without proper application of its mind believed P.W.5 Abdul Wahab, as an eye-witness to the occurrence, although in the FIR which was lodged after 15 days of the occurrence or in the GD or in the verbal complaint made by P.W.4 on 22.12.1996 it was not alleged that P.W.5 was an eye-witness to the occurrence. Let us turn to the evidence of P.W.4 Md. Shahjahan, the father of the deceased upon whose oral complaint the U.D. Case No.39 of 1996 dated 22.12.1996 was lodged over the incident in which he did not allege that the appellant was involved in the murder of the victim or that he was in any way suspected as an assailant of the victim.

Having gone through the evidence adduced by P.Ws.4 and 5, we find that there are inconsistent statements as regard identification of the appellant by the torch light at the time of incident and the alleged story of apprehension of the appellant on the spot is totally false. Curiously enough, a new story was cooked up subsequently and if the appellant was apprehended on the spot as an assailant of the victim, there was no reason for

filing initially a U.D. case and then a G.D. entry without mentioning the name of the appellant as the assailant. Therefore, the evidence of P.W.4 and P.W.5 is a downright falsehood.

We have considered the confessional statement made by the appellant under section 164 of the Code of Criminal Procedure. The High Court Division accepted the confessional statement as true and voluntary and convicted the appellant relying on it. The confessional statement of the appellant runs as follows:

“The statement of মোঃ শফিকুল ইসলাম
Aged about 16 years made in the বাংলা language
My Father’s name is মোঃ চন্দালী মোড়ল
I am by caste মুসলিম
My home is at Mouza বৃত্তিআচড়
and by occupation ছাত্র
Police Station যশোর
I reside at বৃত্তি আচড়া

আমি গত ইং ২১/১২/৯৬ তারিখ অনুমান রাত ৮.০০ টার সময় বাড়ি হতে গ্রামের দোকানদার হারুনের দোকানে যাই। দোকানে রওশন এর সাথে আমার দেখা হয়। আমরা দুইজনে বসা ছিলাম। কিছুক্ষন পরে নাসির পিতা আঃ খালেক উক্ত দোকানে আসে। রওশন বিড়ি ও কলা কিনে আমাকে একটি কলা দেয়। রাত ৮.৩০ টার সময় আমরা ৩ জন বাড়ির দিকে আসিতে থাকি। কিছুদুর আসার পর নাসির আমাকে বলে যে, নুরু মোল্যার খেজুর বাগান হতে খেজুরের রস হইতে চল। নাসিরের কথামত আমরা খেজুর বাগানে যাই। আমি রসের ভার খুলিয়া নামাইলে নাসির আমাকে বলে যে, রওশনকে ধর। সাথে সাথে রওশন নাসিরের গলা চাপিয়া ধরিয়া মাটিতে ফেলিয়া দেয়। ঐ সময় নাসিরের বাবা আঃ খালেক আসে। খালেক আমাকে রওশনকে চাপিয়া ধরিতে বলে। আমি ভয়ে রওশনকে মাটিতে চাপিয়া ধরি। খালেকও চাপিয়া ধরে। নাসির তখন রওশনের গলা চাপিয়া মারিয়া ফেলে। নাসির ও তার বাবা খালেক বলে যে, এই কথা (অপাঠ্য) কাউকে বললে আমাকে ও মারিয়া ফেলিবে।

স্বাঃ/ শফিকুল ইসলাম

আসামীকে তার প্রদত্ত জবান বন্দি পড়ে শোনানো হয়। তার স্বীকারোক্তি আমার নিকট সত্য ও সেচ্ছা প্রনোদিত বলে আমার মনে হয়।”

Having gone through the confessional statement, we find that this statement is totally contrary to the statement made in U.D Case No.39 of 1996 dated 22.12.1996 and G.D.No.978 dated 25.12.1996. P.Ws.4 and 5 in no uncertain terms stated that the appellant was apprehended by both of them on the very night of the occurrence. But their evidence was belied by the statement made in U.D. case and G.D. lodged by P.W.4. If the confessional statement of the appellant made under section 164 of the Code of Criminal Procedure is considered in conjunction with other evidence on record then it cannot be said that his confessional statement is true and voluntary. The confessional statement reveals that the age of the appellant was 16 years and he stated that he was a student. In the confessional statement the appellant stated to have grabbed the deceased out of fear of Nasir. The confessional statement further reveals that deceased Rowshan Ali was strangulated to death by accused Nasir. What is surprising to note here is that in the statement under section 342 of the Code of Criminal Procedure which was recorded on 27.10.1999 the age of the appellant was shown as 42 years. This anomaly has not been dispelled by any of the Courts. If the appellant's age is below 16

years at the time of framing charge his trial is vitiated by the provisions of Children Act,1974.

Having considered all aspects of the case, we are of the view that this confessional statement is neither true nor voluntary. Therefore, there is no evidence on record to connect the appellant in the alleged offence. Incurable inconsistencies made in the F.I.R., evidence adduced by the prosecution and confessional statement recorded under section 164 of the Code of Criminal Procedure lead to the irresistible conclusion that the prosecution has miserably failed to prove its case beyond all reasonable doubt.

Accordingly, this criminal appeal is allowed and the appellant is acquitted of the charge levelled against him who has already been released from jail custody by the advance order dated 31.01.2021.

CJ.

J.

J.

13th January,2021.

/Jamal/B.R.