



Dying declaration can form the basis of conviction

High Court Division (Criminal Appellate Jurisdiction) The Supreme Court of Bangladesh

Rashid Ahmed & others **Before Justice Gour Gopal Saha** Judgment: January 6, 2002

Result: Appeal allowed

Background

Gour Gopal Saha J: This appeal at the instance of the State is directed against the judgment dated 24-4-87 passed by the 1st Court of Additional Sessions Judge, Chittagong in ST Case No. 86/86 acquitting the accused respondents of charges under sections 148/302/34 of the Penal Code.

The prosecution case, briefly stated, is that at about 5-00 PM on 12-6-86 after prayer time victim Abdul Mabud Master was coming home from Kuddukhali Launch Ghat by 'Ferdousi Road' and when he came near the house of the accused persons, accused Rashid Ahmed and 17 others, being armed with deadly weapons like knife, kiris, lathis, etc suddenly attacked him and started inflicting indiscriminate blows on him on different parts of the body. It has been alleged that accused Ashraf Ali gave two kiris blows aiming at the head of deceased Abdul Mabud Master but the victim managed to save his head by his hand, resulting in injury to his left palm. Immediately thereafter accused Rashid Ahmed gave a knife blow on his abdomen, causing a fatal bleeding injury. At about this time, accused Shah Alam gave victim Abdul Mabud Master a knife blow on the left side of the abdomen, causing another fatal injury. At about the same time accused Nurul Haque gave a kiris blow on the left side of the back of deceased Abdul Mabud Master, causing another fatal injury. On receiving these injuries, deceased Abdul Mabud Master fell on the ground when accused Ashraf Ali, Jafar Ahmed, Fazal Ahmed and Azizul Haque assaulted him with lathies, causing injuries on various parts of the body. On the cries of the victim PW 2 Harunur Rashid, PW 5 Kamal Uddin, PW 6 Joynal Abedin, PW 7 Ambia Khatoon and others rushed to the scene and saw the accused persons assaulting deceased Abdul Mabud Master. Abdul Mabud Master was then carried home in a seriously injured condition and thereafter he was removed to hospital where he succumbed to his injuries. The first information report was drafted on the dictation of victim Abdul Mabud Master when he was undergoing treatment at Banskhali Hospital in a critical condition. Victim Abdul Mabud Master put his signature in the first information report and sent the same to the local thana through his maternal uncle Tahir Ahmed.

Upon the aforesaid allegations the 15 accused respondents were put on trial before the 1st Court of Additional Sessions Judge, Chittagong in ST Case No. 86/86 to answer charges under sections 148/302/34 of the Penal Code, to which the accused pleaded not guilty. After hearing the trial the learned Additional Sessions Judge by his impugned judgment dated 24-3-87 acquitted all the accused persons of the charges levelled against them. Being aggrieved by his aforesaid impugned judgment and order the State preferred the present appeal before this Court. No one appears to oppose the appeal on behalf of the accused respondents.

Point for determination

The only point for determination in the appeal is whether the learned Additional Sessions Judge was justified in acquitting the accused-

The learned Assistant Attorney General (AAG) appearing for the State has placed before us the First Information Report (FIR) of the case, the charges framed at the trial against the accused persons, the evidence on record as well as the impugned judgment.

Victim Abdul Mabud Master is the maker of the first information report in the case. This FIR was dictated by the victim himself while lying in the hospital bed in a critical condition. In the FIR victim Abdul Mabud Master gave all the necessary details of the occurrence, describing the individual part played by the accused persons in assaulting him. He also clearly stated in the FIR that the accused persons tried to finish him in a calculated manner to



fid-fad their ancient grudge against him. In this case, the FIR is a matter of special importance because the maker of the FIR died shortly after having made it. In the facts of the case the FIR is clearly admissible in evidence under Section 32 of the Evidence Act. This may also be treated as a dying declaration in view of the fact that victim Abdul Mabud Master himself dictated the ejahar (FIR) at a time when his physical condition was really critical. In fact he was waiting for the inevitable to come, which did come shortly after it was dictated by victim Abdul Mabud Master

The law on dying-declaration is well settled by now. If the Court can unhesitatingly accept it and act upon it, a dying declaration by itself can form the basis of conviction under given circumstances. To find out the truth or

falsity of a dying declaration, the Court is, of course, called upon to consider it in all its physical environments and attending circumstances to find out how far it fits in with the expected realities that can safely be deduced from the facts of the case. The Court has also to consider the usual tendency of the people in the countryside to implicate innocent persons along with the real culprits, which makes it difficult to lay down any rigid rule that a person who is under an apprehension of death, would suddenly develop a clean conscience and purity of mind to shed off the age-old habits and deeprooted rancours and enmities. In the instant case, the first information report lodged by victim Abdul Mabud Master clearly amounts to a dying declaration, being made by victim himself lying on his death-bed in the hospital. This dying statement contains all the broad details of the occurrence and the specific role played by the individual accused persons in assaulting him. The dying declaration by victim Abdul Mabud Master has been amply corroborated by a number of eyewitnesses. In the facts of the case, the dying declaration by the victim can unhesitatingly be accepted by the Court as it rings intrinsically true and unblemished. Moreover, the evidence of the two doctors -PW 3 and 4- fully corroborate the prosecution case. We, therefore, find that the prosecution has been able to prove its case against the accusedrespondents by most consistent, cogent and overwhelming evidence. The learned Additional Sessions Judge is thus found to be manifestly wrong in acquitting the accused-persons against the overwhelming weight of the evidence on misreading of the material evidence on a massive scale and on wholly illogical and irrational considerations, occasioning failure of justice. In arriving at this conclusion, we are not unmindful of the settled law that an order of acquittal passed by a competent Court should not be readily interfered with, unless it is found necessary in the interest of justice. This is a unique case in which we are constrained to find that the impugned order of acquittal is not only against the overwhelming weight of the evidence but also it is shockingly unconscionable and perverse, occasioning failure of

Decision

In the result, the appeal is allowed and the impugned order of acquittal acquitting the accused-respondents of the charges under sections 148/302/34 of the Penal Code is set aside. We find accused Ashraf Ali, son of Sayed Ahmed, Rashid Ahmed, son of Syed Ahmed, Shah Alam, son of Sona Miah, Nurul Haque, son of Syed Ahmed and Md Kalu, son of Abdul Latif guilty under section 304 Part 1 of the Penal Code and they are thereby sentenced to rigorous imprisonment (RI) for 10 (ten) years and to pay a fine of Taka 5,000 each, in default, RI for a further period of one year. We also find accused Fazal Ahmed, son of late Rashid Ahmed, Azizul Huque, son of Nur Ahmed Master, Ashraf Ali, son of Gura Miah and Jafar Ahmed, son of Abdul Latif guilty under section 326 of the Penal Code and they are sentenced to RI for two years and to pay a fine of Taka 2,000.00 each, in default, RI for a further period of six months. The remaining accused-respondents namely, Sabar Ahmed, son of Abdul Latif, Jahangir Alam, son of late Basarat Ali, Ahmed Safa, son of Syed Ahmed, Abul Kalam, son of Amin Sarif, Gura Mia, son of late Samiuddin and Abdul Latif, son of late Samiuddin are acquitted of the charges levelled against them. They are discharged from their bail bonds. The convicted accused respondents are hereby directed to surrender immediately to their bail bonds to serve out the remaining portion of the sentences imposed upon them.

Sk. Rezaul Karim, Assistant Attorney General, for the appellant. No one appears for the respondents.

Children becoming victims of police brutality

In Narayangonj, police went to arrest a Jubodal leader. Though he escaped

arrest, police brought his wife and child into custody. Is not it violence against

women and children? Grandma appealed in the newspaper not to torture

In another incident, a photograph of a police who was about to beat a little

boy was published in the Prothom Alo day after hartal (Sunday, 2 Septem-

ber 2002). The photograph made me frightened. I didn't know what was the

receive such a big punishment? In article 37(a) of the Convention on the

Rights of the Child (CRC), it has been stated that State Parties shall ensure

that no child shall be subjected to torture or other cruel, inhuman or degrad-

ing treatment or punishment. As a signatory of CRC, is Bangladesh ensuring

that? Who gave police this right to harass children without having any

Rape accused should prove his innocence

In our patriarchal society the victim of rape gets hardly any sympathy from

the members of the society. She becomes shameful for her existence on the

earth. Parents and other family members do not stand by her. No body wants

to realise it was not her fault. If the victim is married, the husband does not

accept her anymore. She becomes alone in the society and sometimes the

'Panchaet", ostracise her from the society. Sometimes, she is even pro-

voked to commit suicide. Bearing all these sufferings when she goes to the

court to get justice, then begins a new episode of humiliation. It is a matter of

regret that the victim is told to prove that she is being raped. She has to

describe the incident in the court. How shameful for a victim it is! Here we

find the loopholes of our law. Why she has to prove that she is raped by the

accused? Why she has to describe the incident? The system should be such

that the rapist has to prove his innocence. It is debatable that a woman may

file a case to tarnish reputation of an innocent person. For the sake of

debate, I accept this argument but is it acceptable in the case of a child who

is raped? So, the law should be amended and not the victim but the accused

aible for that little boute com

LAW letter

her daughter-in-law and her child.

Oli Md. Abdullah Chowdhury

L.L.B (First Year),

Sylhet Law College,

LAW week



Politicisation of police should be stopped

Politiciasion of police should be stopped in order to ensure rule of law in the society. The speakers and the participants in a seminar named "Police Reform and the Concern of People" unanimously came to this conclusion. The seminar organized by "Center for Strategic and Peace Studies (CSPS)" was held in the CIRDAP auditorium on 29 August. The speakers argued that police will be treated as the "Necessary evil" and the budget for police should be treated as "Investment". The other recommendations that were made by the participants were, introduction of ethics in the syllabus of the police training, termination of political appointment, amendment of section 54 and 17 of the Code of Criminal Procedure, separation of judiciary from executive, appointment of an additional OC in every thana, establishment of police intelligence department, separate pay scale for police, police force would be under the local government, setting up a separate police commission under the judiciary, elimination of cadre and non cadre debate of the police and amendment of police Act 1861. -Law Desk.

Social mobilisation against human trafficking

Social mobilisation against trafficking of women and children is in full swing in the border area of the northern region of the country. Three local non-governmental organizations named. "Manabkalvan Parishad". "Shamaj Unnayan Proshikhhon Kendra" and "Center for Rights and Development" have organized this mobilisation programme. The initiatives were taken with the help of International Labour Organization (ILO) and the International Programme on the Elimination of Child Labour (IPEC). Against the backdrop of the occurrence of 9 trafficking that took place during the last 9 months, a sudden reawakening has dawned on the entire northern area to combat with this social device. A total of 60 vigilance teams; comprising representatives from all walks of life have been set up in Rangpur, Dinajpur and Panchagarh districts. Each vigilance team consists of 20 people, both male and female. Besides, three civilian committees have been formed in each district headed by the Deputy Commissioner of the respective district. -The Financial Express, 03 September.

Anti crime drive fails

The ongoing anti crime drive by Dhaka Metropolitan Police has reportedly failed to curb the crimes in the capital city. Crimes like murder, extortion, and mugging continued in the city despite the increasing police force. About 43 rapid action check posts had been set up at vulnerable crime zones. The authority had also deployed BDR personnel and additional police force to bring the law and order situation under control, as part of the drive. A national committee was also formed to oversee the improvement of the drive. But a section of dishonest law enforcers reportedly protected some of the notorious criminals helped them to escape arrest. There were also instances that mugger caught and handed over to police by the people had been released. The situation had improved slightly after launching the drive. But it had short lived as the situation started to deteriorate again within a few days due to lack of proper planning, chain of command and determination on the part of law enforcing agencies. -News Today, 28 August.

Violation of law by DCC

The Dhaka City Corporation is reportedly violating the Natural Water Bodies Protection Act, 2000 by filling up a portion of a canal of the river Buriganga. The law was passed by the parliament on 18 September 2000. Filling up of any river, canal, beel, haor and other natural body in the master plans of the city corporations and pourasabhas across the country was strictly prohibited by the said Act. The DCC is filling up a part of a canal of the Buriganga at Mohammadpur boatghat on the western side of the Rayerbazar Martyred Intectuals Monument to set up a park and play ground. -Law Desk

More than hundred murdered last month

At least 147 people including a journalist were killed across the country in incidents of violation of human rights, political unrest and other crimes. The survey was conducted by "Odhikar" a human rights NGO. The report was prepared on the basis of its investigation and data collection from newspapers. Among the victims 10 peopl died in police custody, 14 women were killed for dowry, 43 children were killed in different incidents. About 8 killings took place in the border area, of them 6 were killed

by Indian Border Security Force (BSF). -The Daily Star, 01September Violence against children on the rise

About 56 children were murdered and 49 were raped during the month of August across the country, a survey conducted by Bangladesh Shishu Adhikar Forum (BSAF) reveals. A total of 541 children subjected to violence during the period. Among the victims 47 were kidnapped and 19 were trafficked. More than 76 children fell victim to unnatural death, 13 to acid throwing, and 13 to other kinds of torture while 10 were murdered after rape. -UNB, 02 September.

Negligence in keeping court records

Records of 20 thousands cases are not kept in the record room in the District Magistrate Court of Jhalokhathi. It is the duty of the court clerk to send records of cases to the officials of the record room within 30 days after disposal. But the rule has not been followed since 1973 resulting in harassment of the litigants. Lack of "concised" form in the court was one of the reasons of the negligence. -Daily Ajker Kagoj, 02 September.

Proposal on four-tier local government final

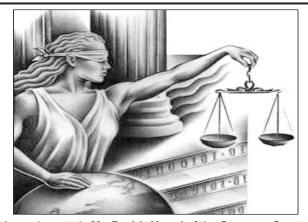
A draft proposal has been finalised to found four-tier local government in the country. This proposal will be submitted to the 7th meeting of the ministerial committee on local government. The four tiers of this local government as proposed are Gram Sirkar, Union Parishad, Upazila Parishad and Zila Parishad. As per the proposal each of the 9 units of union parishad will be regarded as a gram sirkar unit. The elected member of the unit will be the head of the gram sirkar. The female member of union parishad will be adviser of three gram sirkar units. The 13 members of gram sirkar will be chosen from different caste and profession on the basis of mutual understanding and in case of failure the UNO will nominate the members. Gram sirkar will be the supplementary organ of union parishad. Every union parishad will have at least one graduate secretary. The chairman of upazila parishad will enjoy the status of a deputy-secretary. The upazila parishad will work as a unit of the government in development and calamity management activities. There will be no courts in upazila. To avoid conflicts, power to select projects worth Tk. 1 crore or more will be vested in the local Member of Parliament. The local MP will be the adviser of every upazila. The MPs will also take charge of their concerned district councils for one year in turn. The proposal on local government will be rendered to the Prime Minister after approval of the ministerial committee and after approval of Cabinet Committee it will be submitted to the Parliament as a bill. - Daly Ittefaq, 29

Child-workers getting education and vocational training

About 2412 out of 3709 child-workers are getting education and vocational training under Gangachora Thana of Rangpur district. They were mainly working in the bidi (cigarette) factories. With the target of eliminating child labour from the 12-bidi factories within the Thana, a total of 73 children have so far been withdrawn from the factory. Moreover a factory named "Shahi Biri Factory" has been declared to be free from child labour recently. "Chhinnomukul Bangladesh (CB), a local NGO, has taken the initiatives with the help of International Labour Organization (ILO) and the International Programme on the Elimination of Child Labour (IPEC). CB has succeeded to bring the childr-workers to school by making their parents aware of the danger of working in bidi factories. Besides, the CB is extending micro-credit facility to the parents of the students being enrolled with their school. It is also providing health facilities among them. - The Financial Express, 02 September

READER'S queries

Your Advocate



Your advocate is Mr. Probir Neogi of the Supreme Court of Bangladesh. His professional interests include civil law, constitutional law and banking law. Send your legal and human rights queries to the Law Desk, The Daily Star. A panel of lawyers will address your problems.

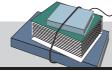
Q: I have entered into a rented house in this month of September. My previous experience in this respect is not well enough. To avoid any kind of bitterness or complications in the future, I want to make an agreement with the owner of the house. What kind of agreement that should be? How such agreements are usually made? What will be the terms and conditions of that agreement? If any party violates the terms and conditions of the agreement what would be the consequence?

Nayapaltan, Dhaka. Your Advocate: Matters relating to rented house, in other words, rights and obligations of the landlord and tenant, and remedies available to them are governed and provided by the Premises Rent Control Act, 1991. But this Act has not contemplated any mandatory provision for execution of agreement for creating tenancy nor let down any procedure for such agreement. The kind of agreement and procedure for its execution you want to know are contemplated in and governed by the provisions of section 107 of the Transfer of Property Act, sections 17 and 18 of the Registration Act, some provisions of the Contract Act and the Stamp Act. According to all the relevant provisions of the said Acts together, an agreement for a term not exceeding one year on monthly rental basis will be an unregistered but duly stamped deed of agreement between the landlord and the tenant. All relevant terms and conditions agreed upon by both the parties such as duration of the agreement, monthly rent, time for payment of rent, provision for renewal and termination of the agreement etc. are usually incorporated in this type of agreements. But no terms and conditions will be in conflict with any of the provisions the existing laws of the country. If any term or condition in contravention of any law is incorporated in the agreement, that will not take effect. As for example, section 7 of the Premises Rent Control Act provides that unreasonable or illogical increase of rent shall not be recoverable in spite of any agreement to that effect. In case of breach of agreement consequence will follow the provisions of the said Acts, mainly the Premises Rent Control Act. Section 18 of the Premises Rent Control Act provides safeguards against eviction of the tenant by the landlord. Besides, the said Act has provided provisions in details in respect of restrictions on increase of rent; prohibition of taking salami, security money or advance rent exceeding one month; deposit of rent by the tenant to the rent controller in case of refusal of the landlord to accept the same; penalties for recovering excess rent, disturbance of easements, failure to grant receipts for the rent paid etc.

Corresponding Law Desk

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LAW lexicon



An admission is a statement suggesting an inference as to the fact in issue or relevant fact by a party to the proceeding or his agent or by a person having interest in the subject matter of the proceeding or by a person incurring proprietory or pecuniary liability or by a person specially referred to for information by a party. Sections 17-23 and 31 of the Evidence Act, 1872 deal with the relevancy of admission in judicial proceedings

Contession

Voluntary admission of guilt by an accused is confession. It may be made to a magistrate or any other person. When a confession is made to a Magistrate and the statement is recorded in compliance with the provisions of section 164 of the Code of Criminal Procedure, it is called a judicial confession. When a statement is made not to a Magistrate but to any other person except a police officer, it is called extra-judicial confession. Both are receivable in evidence after being duly proved. But a statement by an accused to a Police Officer admitting his guilt is not relevant and receivable in evidence. Sections 24-30 of the Evidence Act contemplate provisions of relevant confessions.

Dying declaration

Dying declaration is the statement of a mortally injured person who is aware he/she is about to die, telling who caused the injury and possibly the circumstances. Dying declaration is received in evidence against the person thus accused, on the ground that a dying person has no reason not to tell the truth. Section 32 clause (1) of the Evidence Act regards dying declaration as relevant fact subject to the following conditions: (i) the person making the declaration must be dead, (ii) his statement must refer to the cause of his death or circumstances resulting in death and (iii) his death or circumstances resulting in death must be the subject of a proceeding.

Alibi means the proof offered by one accused of a crime that he was in a different place from that at which the crime was committed at the time it was committed. This is a Latin word, which signifies 'elsewhere'. When a person, charged with a crime, proves that he was at the time alleged, in a different place from that in which it was committed, he is said to prove an alibi, the effect of which is to lay a foundation for the necessary inference, that he could not have committed it.

Cy-pres means "As near as may be". It is a technical word used in the law of trusts or of wills to refer to a power that the courts have to, rather than void the document, to construct or interpret the will or a trust document "as near as may be" to the actual intentions of the signatory, where a literal construction would give the document illegal, impracticable or impossible effect.

Ex aequo et bono

Ex aequo et bono is a Latin term which means "in justice and fairness". Something to be decided ex aequo et bono is something that is to be decided by principles of what is fair and just. Most legal cases are decided on the strict rule of law. For example, a contract will be normally upheld and enforced by the legal system no matter how "unfair" it may prove to be. But a case to be decided ex aequo et bono, overrides the strict rule of law and requires instead a decision based on what is fair and just given the circum-

Source: Law of Evidence by Dr. Rafiqur Rahman, the 'Lectric Law Library's Legal Lexicon & Duhaime's



LAW quotations

"Law and order exist for the purpose of establishing justice, and ... when they fail to do this purpose they become dangerously structured dams that block the flow of social progress."

Martin Luther King, Jr. (1929-1968), U.S. clergyman, civil rights leader.

"An unjust law is itself a species of violence. Arrest for its breach is more so."

Mohandas K. Gandhi (1869-1948), Indian political and spiritual leader.

Z.A. Parvaje Bhuiyan & M. Rahman

A judge enters the courtroom, strikes the gavel and says, "Before I begin this trial, I have an announcement to make. The lawyer for the defense has paid me Tk. 15,000 to swing the case his way. The lawyer for the plaintiff has paid me Tk. 10,000 to swing the case his way. In order to make this a fair trial, I am returning Tk. 5,000 to the defense."

take for a lawyer?

LAWSCAPE

has to prove his innocence.

University of Chittagong.

LLB (Hons), 1st year

If an apple a day keeps the doctor away, how many dozens of apple does it