Present:
Mr. Justice Mohammad Marzi-ul-Huq
and
Mr. Justice Md. Ruhul Quddus

Criminal Appeal No.372 of 2004

Saiful Islam alias Japannya
... Appellant
-Versus-
The State
...Respondent

Mr. Z. I. Khan Panna with Mr. Md. Nurul Islam, Advocates
...for the appellant
Mrs. Syeda Rabia Begum, A. A.G.
... for the respondent

Judgment on 26.2.2012

Md. Ruhul Quddus,J:

This appeal is directed against judgment and order dated 18.6.2002 passed by the Additional Sessions Judge, Cox's Bazar in Session Trial Case No.119 of 2000 arising out of Ramu Police Station Case No.12 dated 27.4.1998 corresponding to G. R. No.36 of 1998 convicting the appellant under section 302 of the Penal Code and sentencing him thereunder to suffer imprisonment for life with a fine of Taka 5000/-, in default to suffer rigorous imprisonment for six months more.

Facts relevant for disposal of the appeal, in brief, are that the informant Nurul Alam (P.W.4) lodged an *ejahar* with Ramu police station on 27.4.1998 at 16.25 hours alleging, *inter alia*, that in course of

a hot altercation between the appellant Saiful Islam alias Japannya and his nephew the victim Saifullah, the appellant had inflicted a knife blow on his (victimûs) left chest at the courtyard of Mir Kashem (P.W.3) in village Pessardeep south. On hearing the victimûs cry, the informant and some other witnesses, namely, Islam Mia (P.W.6), Abdus Salam (P.W.7), Sayed Hossain (P.W.8) and Anwara (P.W.9) had rushed to the place of occurrence and saw the appellant to run away towards a hill situated at the eastern side of the place of occurrence. Immediately they took the victim to Ukhia Heath Complex, where the doctor declared him dead.

The *ejahar* gave rise to Ramu Police Station Case No.12 dated 27.4.1998 under section 302 of the Penal Code. After investigation, the police submitted charge sheet on 3.8.1998 against the sole appellant under the same penal section. In the charge sheet, the previous crime report of the appellant found to be nil and his age was not mentioned.

The case after being ready for trial, was sent to the Sessions Judge, Coxûs Bazar and was numbered as Session Trial Case No.119 of 2000. Subsequently it was sent to the Additional Sessions Judge, Coxûs Bazar for hearing and disposal. After observance of necessary legal formalities, the Additional Sessions Judge by his order dated 7.11.2000 framed charge under section 302 of the Penal Code against the appellant and proceeded with trial in absentia, as the appellant was

found absent from the very initiation of the case. The trial Court also appointed a State defense lawyer to defend the accused in trial.

In order to prove its case, the prosecution examined as many as twelve witnesses. After closing the prosecution, the appellant could not be examined under section 342 of the Code of Criminal Procedure as he was still absconding. The learned Additional Sessions Judge, after conclusion of trial, found him guilty of offence under section 302 of the Penal Code and passed the impugned judgment and order of conviction and sentence as aforesaid.

The appellant surrendered before the trial Court on 19.1.2004 and subsequently moved in this Court with the instant criminal appeal. Since then he is in jail custody and in the meantime has suffered more than eight calendar years.

Mr. Z. I. Khan, learned Advocate appearing for the appellant, submits that in the *ejahar* it is stated that on hearing the victimûs cry, the informant (P.W.4) and some other witnesses namely, P.Ws.6-9 rushed to the place of occurrence immediately after commission of the occurrence, but in their evidence they distorted the facts describing themselves as eyewitnesses to the infliction of fatal knife blow on the victim. These witnesses are not trustworthy, and on the basis of their evidence, any sentence for life imprisonment cannot be passed.

Mr. Khan further submits that at the time of alleged occurrence the appellant was a minor boy of twelve years, but as the trail was held in absentia, the defense could not take any step to examine and prove his age. Nevertheless, he was a minor and his trial in a usual criminal court was held without jurisdiction. He also pointed out some other discrepancies in the evidence of prosecution witnesses and referring to those, submits that those are major contradictions which cast serious doubt over the prosecution case and as such the appellant is entitled to be acquitted on benefit of doubt.

As an alternative and second line of argument, Mr. Khan submits that even if the *ejahar* story and part of the evidence of P.Ws.4 and 6-9 are taken into consideration, the allegations do not constitute an offence of murder under section 302 of the Penal Code, it can hardly be said to be an offence of culpable homicide not amounting to murder and in that view of the matter the appellant could at best be charged under section 304 of the Penal Code.

On the other hand, Mrs. Syeda Rabia Begum, learned Assistant Attorney General appearing for the State, submits that in view of the evidence on record, the allegation of inflicting fatal injury on a vital organ like left chest of the victim and thereby causing his death on the spot by the appellant is well proved. The learned Additional Sessions Judge considered the evidence and found the appellant guilty of offence

under section 302 of the Penal Code and awarded suitable punishment on him. There is nothing illegal in the impugned judgment and order of conviction and sentence that can be interfered with by this Court.

We have considered the submissions of the learned Advocates of both the sides and examined the evidence on record. The informant Nurul Alam as P.W.4 stated that on the date of occurrence at about 1 p.m he along with Islam Mia, Abdus Salam and Sayed Hossain were going from the north to south, when the victim and appellant were engaged in hot altercation at the courtyard of Mir Kashem. They approached to the place and saw the appellant to inflict a knife blow on the left chest of the victim. Consequently the victim fell down and the appellant ran away towards a hill situated at the east. Immediately they had shifted the victim to Ukhia Hospital, where the doctor declared him dead. Thereafter, they went to Ramu Police Station and lodged the *ejahar.* After lodgment of the *ejahar,* police prepared an inquest report, where the informant identified the dead body. The police also seized the blood stained wearing apparels of the victim, prepared a seizure list and obtained signatures of the witnesses thereon. The informant proved the ejahar, inquest report, seizure list and his signatures thereon. He also proved the blood stained vest and *lungi* of the victim and those were marked as material exhibits. In cross-examination he denied any land dispute between the father of appellant and that of the victim.

P.W.6 Islam Mia stated that on hearing hue and cry from the *Tong Ghar* situated at the courtyard of Mir Kashem, he along with others rushed to there and saw the appellant to run towards the east with a blood stained knife in his hand. The victim was lying down on the ground in bleedingly injured condition. The persons present there told him that the appellant had dealt him with a knife and fled away. The witnesses, namely, Abdus Salam, Syed Hossain, Anwara, Nurul Alam (informant), Abbas Uddin and others were present there.

P.W.7 Abdus Salam deposed in chorus with P.W.6 as mentioned above. P.W.8 Sayed Hossain, a *Moazzin* of a nearby mosque stated that on the date and time of occurrence, he was going to the mosque for reciting *azan*, when saw the appellant and victim to quarrel. All on a sudden the appellant had dealt the victim with a knife on his left chest and fled away towards the jungle of a hill situated at the east holding the blood stained knife in hand. In cross-examination he stated the victim was his brother-in-law and the appellant is his nephew. He also denied any rivalry between the families of the appellant and victim in response to a suggestion put by the defense. P.W.9 Anwara Begum stated that on the date and time of occurrence, she went to bring water from a well of the mosque and saw the appellant to deal the victim with a knife on his left chest in course of hot altercation. Immediately after, the informant and some others rushed to there, when the appellant fled away towards the jungle of a hill at the east.

P.W.5 Zahirul Islam, a constable of police who escorted the dead body from Ukhia Health Complex to Coxûs Bazar Sadar Hospital for holding post-mortem, proved the medical clearance certificate (MCC) and the *challan* of dead body and his signatures thereon. P.W.12 Doctor Md. Shahjamal stated that at the relevant time he was posted to Coxûs Bazar hospital as a Residential Medical Officer. Two constables namely, Serajul Islam and Zahirul Islam escorted the dead body to the hospital for holding post-mortem. After examining the inquest report, he conducted post-mortem on the dead body and found one penetrating injury below left nipple on the chest of the victim. He opined that the death had resulted from the said injury, which was antemortem and homicidal in nature. He proved the post-mortem report and his signature thereon.

P.W.11 Niamutul Karim, one of the Investigating Officers who submitted the charge sheet, stated that on 27.4.1998 he was posted to Ramu Police Station. After lodgment of the *ejahar,* Sub-Inspector Showkat Hossain was assigned with the investigation, who had prepared inquest report, sketch map with index etc. and examined some of the witnesses under section 161 of the Code of Criminal Procedure. Thereafter, he (P.W.11) also recorded statements of some witnesses under section 161 of the Code and finding prima-facie truth in the allegations submitted charge sheet against the appellant. He proved the seizure list, charge sheet and his signatures thereon. He also

proved the sketch map, index and the signatures of the first investigating officer thereon. In cross-examination he stated that he did not examine the companions of the victim, who were playing card with him just before the occurrence. He further stated that the prosecution witnesses, namely, Abdul Salam, Sayed Hossain, Islam Mia and Anwara stated him that they saw the appellant to run away with a knife in hand.

P.W.1 Mohd. Alam stated that on hearing hue and cry, he went to the house of occurrence and saw many people there. On inquiry he came to know that the victim Saifullah was killed, but he could not say as to who killed him. At this stage he was declared hostile by the prosecution and the defense declined to cross-examine him. P.W.2 Mst. Nurussafa Begum, wife of Mir Kashem stated that somebody fled away towards the hill after killing the victim Saifullah, but she could not say as to who had killed him. At this stage, she was also declared hostile and the defense declined to cross-examine her. P.W.3 Md. Mir Kashem, owner of the house of occurrence stated that nobody killed the victim Saifullah. In cross-examination he stated that actually the victim Saifullah was killed, but he could not say how he was killed. P.W.10 Md. Hossain Member was tendered by the prosecution. In cross-examination by the defense he could not make any reply as to how the victim Saifullah was killed, but admitted that he heard about quarreling

between two persons and inflicting of knife injury by one of them to another.

This set of witnesses comprising P.Ws.1-3 and 10 were hearsay witnesses and did not disclose in their evidence from whom they heard about the occurrence. Two of them were declared hostile. Under the attending circumstances and from the trend of their depositions they appear to have concealed the appellantôs involvement in the occurrence. However, we are not going to consider their evidence as they were hearsay witnesses.

This appeal was filed long back in 2004. Till today the appellant has not taken any step to determine his age by proper medical and scientific examination. Therefore, we do not accept the submission of his learned Advocate that he was a minor and in that count the trial was held without jurisdiction.

Record shows that the *ejahar* was filed after 3.25 hours of the alleged occurrence. After commission of the occurrence at about 13 hours, the informant and other witnesses had taken the victim to Ukhia Health Complex and after the doctor declared him dead, rushed to the police station and recorded the *ejahar* within the shortest possible time. This short span of time does not indicate any possibility of embellishment in the *ejahar*. The *ejahar* versions that the informant and other eye witnesses saw the appellant to run towards the eastern hill

with a blood stained knife in his hand and also saw the victim lying on the ground in bleedingly injured condition, have been proved by the evidence of the informant. His (informantûs) evidence was sufficiently corroborated by that of P.Ws.6-9 in material particulars. The victimûs death resulted from one fatal injury below left nipple on his chest, which has been proved by the evidence of Doctor Md. Shahjamal (P.W.12).

Even if we accept the submission of Mr. Khan that P.Ws.4, and 6-9 were not eyewitnesses to the occurrence, the Court can believe their evidence in part. Under the facts and circumstances of the present case, there is no reason to disbelieve their evidence to the extent that there was a hot altercation between the appellant and the victim. On hearing his cry, they rushed to the place of occurrence and saw the appellant to run towards the eastern hill with a blood stained knife in hand and also saw the victim lying on the ground in bleedingly injured condition. If we believe this part of their evidence, it has been proved beyond reasonable doubt that the appellant in course of hot altercation with the victim had inflicted knife injury on his left chest and fled away towards the jungle of a hill situated at the eastern side, to which the victim Saifullah succumbed.

The appellant is a young man and his previous record is found to be clean. There was a hot altercation between the victim and appellant, in course of which he inflicted only one knife injury on his (victimûs) left

chest, which appears to be without any pre-plan and pre-meditation and as such the occurrence committed by him was culpable homicide not amounting to murder. In that view of the matter, we find substance in the second limb of argument advanced by Mr. Khan. It would be, therefore, just and proper to alter the conviction and reduce the sentence upon the appellant.

Accordingly, the conviction of the appellant under section 302 is altered to that under section 304 Part 1 of the Penal Code and he is sentenced to suffer rigorous imprisonment for ten years with a fine of Taka 5000/- (five thousand) only, in default to suffer rigorous imprisonment for six months more. The impugned judgment is modified to that effect. With the above alteration and modification, this criminal appeal is dismissed. The appellant will be released from jail after serving out the sentence of ten years rigorous imprisonment, if he is not wanted in connection with any other criminal case.

Send down the lower Courtôs record.

Mohammad Marzi-ul-Huq, J:

I agree.