

6 SCOB [2016] AD 70**APPELLATE DIVISION****PRESENT:**

Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Muhammad Imman Ali
Mr. Justice A. H. M. Shamsuddin Choudhury

JAIL APPEAL NOS. 2-3 OF 2012

(From the judgment and order dated 17th of May, 2006 passed by the High Court Division in Death Reference No. 41 of 2003 with Criminal Appeal Nos. 1181 and 1245 of 2003 and Jail Appeal No.295 of 2003.)

Sohel Dewan @ Mehedi Hasan @	...Appellant
Chanchal	(in Jail Appeal No. 2 of 2012)
Billal Hossain and another	...Appellants
	(in Jail Appeal No. 3 of 2012)

Versus

The State	... Respondent
------------------	----------------

For the Appellants (in both cases)	:Mr. Md. Helal Uddin Mollah, Advocate
For the Respondent (in both cases)	:Mr. Biswajit Deb Nath, Deputy Attorney General
Date of hearing & judgement	:The 1 st of April, 2015

Penal Code, 1860**Section 302/34:**

In the facts of the case before us, where there is some inkling of a doubt as to which of the shots from the firearms of the accused caused the death, or conversely which one of the three accused who fired the shots missed his target, the application of sections 302/34 of the Penal Code was correct, but the question remains as to whether the death sentence would be appropriate. We are inclined towards the view that where the conviction is not under section 302 of the Penal Code simpliciter, and where the complicity of the accused is proved by the aid of section 34 of the Penal Code, then the sentence of death would not be appropriate. ... (Para 16)

J U D G M E N T**MUHAMMAD IMMAN ALI, J:-**

1. These two Jail Appeals, by leave, are directed against the judgment and order dated 17.05.2006 passed by the High Court Division in Death Reference No. 41 of 2003 heard along with Criminal Appeal Nos. 1181 and 1245 of 2003 and Jail Appeal No.295 of 2003, accepting the death reference and dismissing Criminal Appeal No. 1181 of 2003 and Jail Appeal No. 295 thereby maintaining the conviction of those appellants under sections 302/34 of the Penal Code. Criminal Appeal No. 1245 of 2003 was allowed acquitting appellant

Emran Hossain alias Rana of the charge levelled against him under sections 302/109 of the Penal Code.

2. Since the both the appeals arise out of the same judgment of the High Court Division, these were heard together and they are dealt with by this single judgment.

3. The relevant facts are as follows:

On 08.08.2002 at about 5:30 p.m. victim Badsha Miah, elder son of the informant Nurjahan Begum, was sitting in front of his place of business, namely Badsha Community Center. At that time the informant along with her grandson P.W. 2 Rafiqul Islam @ Suman, was going to her daughter Jahanara's house and on her way she talked with her son Badsha Miah. When the informant proceeded a little further, she saw Sohel, Billal, Manik and some other persons loitering on the right hand side in front of the market. As she proceeded further, she heard the sound of firing and looked back and saw accused Billal, Sohel and Manik shooting at her son Badsha Miah with the firearms in their hands. Then she cried out for help to save her son. Appellants Billal, Sohel and Manik along with others left the place of occurrence towards the South firing blank shots from their firearms. The informant and Sumon went to Badsha Miah and saw blood oozing from his nose, mouth, neck, belly and his entire body was soaked with blood. Badsha Miah fell on the ground from the chair. Yasin (P.W.3), Sumon(P.W.2) and Dukhu (P.W.4) took Badsha Miah to hospital in a baby-taxi. As the informant was crying, she was taken to her house. After a while she received information from the hospital that Badsha Miah succumbed to his injuries. When the other relatives came to the house of the informant, she along with her 'putra' (brother of daughter-in-law) Rezaul Karim (P.W.8), Sumon and Dukhu went to Kafrul Police Station to lodge the First Information Report (F.I.R.). Accordingly, Kafrul P.S. Case No.11 dated 08.08.2002 was started.

4. After completion of the investigation police submitted charge-sheet No. 4 dated 17.01.2003 against the appellants and two others under sections 302/34 of the Penal Code.

5. After submission of charge sheet the case record was transferred to the Druto Bichar Tribunal No. 4, Dhaka for trial and the case was re-numbered as Druto Bichar Tribunal Case No. 1 of 2003. Charge was framed under sections 302/34 of the Penal Code against the appellants and under sections 302/109 of the Penal Code against the other two accused, which was read over to them, to which they pleaded not guilty and claimed to be tried.

6. During trial the prosecution examined as many as sixteen witnesses who were cross-examined by the defence, but the defence examined none. The defence case of the appellants, as it appears from the trend of cross-examination, was that they did not commit the offence as alleged by the prosecution and that they had been falsely implicated in the case. The appellants were examined under section 342 of the Code of Criminal Procedure when again they pleaded their innocence.

7. After hearing the parties and upon consideration of the evidence and materials on record, the Druto Bichar Tribunal, by the judgment and order dated 17.05.2006, convicted the appellants Shoel Dewan, Billal Hossain and Manik @ Omar Faruque under sections 302/34 of the Penal Code and sentenced them to death. The Tribunal also found the other two co-accused guilty under sections 302/109 of the Penal Code and sentenced each of them to suffer imprisonment for life and to pay a fine of Tk. 5,000/-each, in default to suffer rigorous imprisonment for one year more.

8. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death, which was numbered as Death Reference No.41 of 2003. The appellants also filed Criminal Appeal No. 1181 of 2003 and Jail Appeal No. 295 of 2003 before the High Court Division. The co-convict Emran Hossain @ Rana filed Criminal Appeal No. 1245 of 2003.

9. A Division Bench of the High Court Division after hearing the death reference along with the criminal appeals and jail appeal accepted the reference and dismissed the appeals filed by the appellants. However, the High Court Division allowed Criminal Appeal No. 1245 of 2003 and acquitted the co-convict Emran Hossain @ Rana. Hence, the appellants filed Jail Petition No.11-12 of 2012 before this Division.

10. Leave was granted to consider the following:

“I. whether the High Court Division failed to consider the vital aspect of the case in confirming the sentence of death awarded by the Tribunal to the petitioners that although P.Ws. 1, 2, 3 and 10 posing themselves to be the eye witnesses stated in their deposition that all the three condemned prisoners fired shots at the deceased from the firearms in their hands, the inquest report and the post mortem report show that the victim received two injuries only and thus, these lead to a controversy as to out of the three appellants whose shot struck the body of the victim; and

II. Whether the above anomaly between the medical evidence and the testimony of the witnesses also creates doubt about the prosecution case and in the circumstances whether their sentence of death may be commuted to imprisonment for life.”

11. Mr. Md. Helal Uddin Mollah, the learned Advocate appearing on behalf of the appellants submitted that the alleged eye witnesses, namely P.Ws. 1, 2, 3 and 10 all deposed to the effect that the three accused appellants shot the victim with their firearms as a result of which the victim died. But only two bullets were recovered which belies the prosecution story that the three convict appellants shot and killed the victim. He further submitted that since the evidence of the eye witnesses is not fully consistent with the post mortem examination report and the evidence of the Doctor P.W. 14, doubt is created which is sufficient to commute the sentence of death to one of imprisonment for life and the High Court Division erred in law in not considering this aspect.

12. The State respondent did not file any concise statement. Mr. Biswajit Deb Nath, learned Deputy Attorney General appearing for the State with leave made submissions in support of the impugned judgement and order of the High Court Division.

13. We have considered the submissions of the learned Advocate for the appellants and the learned D.A.G. for the respondent and perused the impugned judgment and order of the High Court Division and other connected papers on record.

14. It appears that only two injuries having been found on the dead body of the victim, there is some doubt created inasmuch as one of the convict appellants did not shoot the victim with any firearm, or his shot, if fired at all, did not hit the victim. There is no doubt from the evidence and materials on record that the presence of the convict appellants at the place of occurrence was established. There is no way of assessment as to which one of the three

convict appellants did not use his firearm against the victim. Hence, there is no illegality in the findings of the trial Court which has been upheld by the High Court Division, that the convict appellants are guilty on an offence under sections 302/34 of the Penal Code. However, the question of sentence based on the given facts and circumstances, has to be looked at carefully.

15. In this regard we may profitably refer to the decision in the case of *Hari Har Singh and others v the State of UP, 1975 4 SCC 148*. In that case two of the accused had shot the victim and three others had struck with lathis. The medical evidence indicated that the victim died of the cumulative effect of the injuries. Out of four shots fired by the accused only two hit the victim. It was held that where the accused had not been convicted under section 302 simpliciter the death penalty ought not to have been imposed. On the medical evidence it could not be proved which of the two gunshot injuries was sufficient in the ordinary course of nature to cause the death of the victim.

16. In the facts of the case before us, where there is some inkling of a doubt as to which of the shots from the firearms of the accused caused the death, or conversely which one of the three accused who fired the shots missed his target, the application of sections 302/34 of the Penal Code was correct, but the question remains as to whether the death sentence would be appropriate. We are inclined towards the view that where the conviction is not under section 302 of the Penal Code simpliciter, and where the complicity of the accused is proved by the aid of section 34 of the Penal Code, then the sentence of death would not be appropriate.

17. Moreover, the accused appellants were convicted and sentenced to death by an order of the trial Court dated 21.4.2003. The convict appellants have, therefore, suffered in the condemned cell for almost twelve years. In this connection we may refer to our earlier decision in the case of *Manik versus The State* judgment delivered on 19th January, 2015 (unreported) where the sentence of death was commuted to imprisonment for life considering, *inter alia*, the long period spent in the condemned cell.

18. In view of the discussion above, we are of the opinion that ends of justice will be sufficiently met if the sentence of death is commuted to imprisonment for life.

19. Accordingly, the jail appeals, which challenged only the sentence of the convict appellants, are allowed and the sentence of death imposed upon the convict appellants Sohail Dewan @ Mehedi Hasan @ Chanchal, Billal Hossain and Md. Omar Faruq, is commuted to one of imprisonment for life.