IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Syed Mahmud Hossain, *Chief Justice*
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

JAIL APPEAL NO.9 OF 2014

(From the judgment and order dated 19.06.2011 passed by the High Court Division in Death Reference No.62 of 2007 with Criminal Appeal No.4016 of 2007 and, Jail Appeals No.851-54 of 2007)

Shahan Shah Sikder (Tito) and another : .....Appellants

-Versus-

The State : .....Respondent

For the appellants : Mr. A.B.M. Bayezid, Advocate.

For the respondent : Mr. Biswajit Debnath, Deputy Attorney General.

Date of hearing : The 23rd day of September, 2020.

Date of judgment : The 14th day of October, 2020.

JUDGMENT

Syed Mahmud Hossain, C.J. I have gone through the judgments proposed to be delivered by my brothers, Hasan Foez Siddique, J. and Obaidul Hassan, J. I agree with the reasoning, findings, and decisions given by Obaidul Hassan, J.

C.J.

Hasan Foez Siddique, J. This jail appeal is directed against the judgment and order dated 19.06.2011 passed by the High Court Division in Death Reference No.62 of 2007 heard analogously with Criminal Appeal No.4016 of 2017 and Jail Appeal Nos.851 of 2007, 852 of 2007, 853 of 2007 and 854 of 2007 accepting the Death

Reference in part and dismissing the Criminal Appeal No.4016 of 2017 and Jail Appeal preferred by the appellants.

On 18.07.2000, P.W.1 Syed Idris Ali filed a petition of Complaint (exhibit 1) being M.P. No.366 of 2000 in the Court of cognizance Magistrate, Narail Sader under section 302/34 of the Penal Code and 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain (the Ain) against accused 1. Shahan Shah Sikder; 2. Aleya Begum; 3. Tanjina Begum and 4. Ruma Khatun alleging, inter alia, that appellant Shahan Shah Sikder demanding dowry from his wife Muslima, daughter of P.W.1, treated her improperly. On 14.07.2000, accused Aleya Begum having caught hold the heirs of victim Muslima dragged her out from their dwelling hut. Appellant Shahan Shah Sikder assaulted on her forehead and accused Ruma assaulted on the left eye of the victim who fell down on the ground. Then accused Shahan Shah, throttling her neck, killed her. Thereafter, the accused persons killed victim Keya, 4 years old daughter of victim Muslima and accused Shahan Shah. Jiku Sikder, brother of accused Shahan Shah raised protest against such occurrence but he was beaten by the accused persons. Consequently, he committed suicide. Hence, the P.W.1 filed the instant petition of complaint.

Earlier U.D. Case No. being 71/2000 dated 14.07.2000 was filed by one Nasim Mahmud (Tutul) with the Narail Police Station on the same occurrence.

The cognizance Magistrate, Narail sent the said petition of complaint to the officer in-charge of Narail Police Station for holding investigation. The Case was investigated by S.I. Shafiqul Islam who, holding investigation, submitted final report on 28.04.2002 accepting the opinion of the Medical Board that victims Muslima and Keya died due to asphyxia resulting from drowning which was anti mortem and accidental. In the report, it was stated that the time of occurrence was raining cats and dogs and it was not established that the dead bodies of the victims were fastened by a gamchha at the time of recovery from the pond.

The complainant filed "naraji" petition. The Nari-O-Shishu Nirtatan Daman Tribunal, Narail took cognizance of the offence against all the accused persons under section 11(ka) of the Ain.

The Tribunal framed charge on 29.04.2004 against the 4 accused persons under Section 11(ka)/30 of the Ain, 2000. The accused persons pleaded not guilty and claimed to be tried. The prosecution examined as many as 9 P.Ws. whereas the defence examined 2 D.Ws. The defence case was that the victims Muslima and Keya died due to asphyxia resulting from drowning. They

were implicated in the case after thought and falsely. While cross-examining the P.Ws. the defence Advocate put a definite suggestion that the victims died due to drowning.

On 03.07.2007, that is, on the date fixed for hearing argument of the parties the Tribunal framed supplementary charge against the accused persons under sections 302/201 of Penal Code and, thereafter, again fixed for argument.

On 13.08.2007, the Tribunal convicted all the accused persons and sentenced Shahan Shah Sikder (Tito) under Section 11(ka) of the Ain read with Section 302/201 of the Penal Code; Aleya Begum under Section 11(ka)/30 of the Ain read with sections 302/201 of the Penal Code and Tanjina Begum and Ruma Khatun under Section 11(ka)/30 of the Ain, 2000 to death. They were also directed to pay fine of taka 20,000/- each.

The convicts preferred Jail Appeals No. 851 of 2007, 852 of 2007, 853 of 2007 and 854 of 2007. They also preferred Criminal Appeal being No.4016 of 2007 in the High Court Division. The Tribunal sent case record in the High Court Division for confirmation of sentence which was registered as Death Reference No.62 of 2007. All those matters were heard together by the High Court Division. The High Court Division confirmed the conviction and sentence of appellants Shahan Shah Sikder (Tito)

and Aleya Begum. However, it set aside the judgment and order of conviction of convicts Tanjina and Ruma on the charge of section 11(ka)/30 of the Nari-O-Shishu Nirjatan Daman Ain but it upheld their order of conviction under section 201 of the Penal Code. They were sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Tk.20,000/-, in default, to suffer rigorous imprisonment for 6 months more.

That against the said judgment and order of the High Court Division, the appellants have preferred this Jail appeal.

Mr. A.B.M. Bayezed, learned Advocate appearing for the appellants, submits that it has not been proved that the victims were killed rather from the post mortem report, it appears that they died due to asphyxia resulting from drowning which were ante-mortem and accidental in nature, the High Court Division erred in law in accepting the Death Reference and dismissing appeals of the appellants. He further submits that the police, holding investigation, submitted final report finding no prima-facie case against the appellants and that the prosecution failed to examine the cited witnesses of the petition of complaint and a new set of witnesses were examined who were interested witnesses, the High Court Division committed error of law in relying the testimonies of those witnesses, thereby, erroneously upheld the judgment and order of conviction. He submits that

charge framed against the appellants under sections 302/34/201 of the Penal Code and 11(ka)/34 of the Nari-O-Shishu Nirjatan-Daman-Ain was defective and on the basis of such charge awarding of conviction and sentence is liable to be set aside.

Mr. Biswajit Debnath, learned Deputy Attorney General appearing for the respondent, submits that the P.Ws. 2, 3, 4 and 5 were eye witnesses of the occurrence of killing the victims and act of throwing the dead bodies of the victims in the pond, the learned Courts below rightly believed the testimonies of those eye witnesses and other circumstantial evidence and convicted and sentenced the appellants. He submits that prosecution, upon proper appreciation of evidence on record, held that the charges against the appellants have been proved beyond all reasonable doubt and there was no error of law in the judgment and order of the Courts below.

It appears from the materials on record that on 14.07.2002, that is, on the date of occurrence one Md. Nasim Mahmud (Tutul) lodged U.D. case with Narial Police Station stating that at about 02:30 P.M. on 14.07.2000 victim Jhiku being dismayed committed suicide since his brother's wife Muslima Khatun and her daughter died due to asphyxia resulting from drowning in the pond situated near the house of the victims. Police, holding investigation, submitted report on 28.04.2002 holding that it had

not been proved that the victims Muslima and her daughter were killed rather they died due to asphyxia resulting from drowning. Meanwhile, on 18.07.2000, father of the victim Muslima, namely, Syed Idris Ali (P.W.1) filed a petition of complaint in the Court of cognizance Magistrate, Narial Sader against these two appellants, namely, Shahan Shah Sikder (Tito), Aleya Begum and two acquitted accuseds Tanjina Begum and Ruma Khatun under Section 302/34 of the Penal Code read with section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 citing Nos.1 Sarder Tohidur Rahman, 2. Hazzazur Rahman, 3. A. Rouf Sarder, 4. Belayet Ali and 5. Ahad Ali as witnesses.

P.W.1 in his testimony stated that on 14.07.2000 accused Aleya Begum having caught hold the heirs of victim Muslima dragged her out from their dwelling hut. Then accused Shahan Shah Sikder dealt bamboo stick blow on the right side of the forehead of victim Muslima. Accused Ruma dealt a bamboo stick blow on the left jaw of the victim Muslima. Acquitted accused Tanjina Begum dealt bamboo stick blow near the left eye of the victim Muslima who fell down on the ground. Then accused Shahan Shah Sikder, throttling Muslima, killed her. Victim Keya, aged about 4 years, started screaming. The accused persons then pressing her mouth fastened them with a gamchha and threw them in the pond. The complainant rushed to the place of

occurrence after receiving information that his daughter and grand daughter had died. P.W.1 complainant is not the eye witness of the occurrence.

In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of its intrinsic worth.

In this case, the prosecution withheld the material witnesses named in the petition of complaint, who are: 1. Hazzazur Rahman; 2. Abdur Rouf Sarder; 3. Belayet Ali and 4. Ahad Ali. Out of 5 cited witnesses in the petition of complaint, the prosecution examined only one witnesses who is P.W. 2. Towhidur Rahman. In the petition of complaint, the complainant stated, "সাক্ষীরা ঘটনা জ্ঞাত আছে।" That is, the witnesses, named in the petition of complaint, were conversant with the occurrence but they had been withheld by the prosecution. In his cross examination he said, "সাক্ষীরা আমার আত্মীয়". That is, withholding the witnesses named in the petition of complaint, the prosecution examined the witnesses who are the relatives of the complainant. If evidence would have been produced but has not been produced by a party, natural presumption is that the evidence, if produced, would have been unfavorable to the party withholding it. Adverse inference from non-production of evidence is one of the strongest presumptions known to law, and the law allows it

against the party who withholds the evidence by which the nature of his case would be manifested. Out of cited witnesses only P.W. 2 Towhidur Rahman was examined who in his cross-examination has said, 'বসত বাড়ীর জমি নিয়ে শাহানশার বাবার সাথে মামলা ছিল আমাদের। সে আমাদের বিরুদ্ধে চুরির মামলা করেছিল।' That is, he is inimical to the appellants. When the enmity is admitted the Court has to sift the evidence after a close scrutiny with anxious care and caution and to try to come to a conclusion as to the offence allegedly committed.

New sets of witnesses were P.W.3 Mahfuza Begum, wife of P.W.2 and daughter of P.W.1, P.W.4 Juleka Khatun, sister of P.W.1, and P.W.5 Forhad Hossian, brother of P.W.2, who in cross-examination stated that accused persons had filed a criminal case against them. All the alleged eye witnesses are closely related to the victims and the prosecution has chosen not to examine 4 cited witnesses and examined new sets of witnesses despite number of houses situate in the close vicinity of the place of occurrence which creates a dent in the version of the prosecution. Those 3 witnesses, claiming themselves to be the eye-witnesses of the occurrence, appeared in the court on 02.08.2004, for the first time, that is, after 4(four) years of the occurrence and claimed that they saw the occurrence. Since all those witnesses are closely related with the victims and had enmity with the accused, it was the duty

of the court to scrutinize their evidence more closely. P.W.1 in his petition of complaint stated that, "--------- বাদী সংবাদ পাইয়া আসামীদের বাড়ী আসিয়া সমুদয় ঘটনা শোনে এবং তার কন্যা মুসলিমার গায়ে মারপিটের চিহ্ন দেখে।" There is nothing in the petition of complaint about his source of knowledge or from whom he heard the facts of alleged killing. From careful reading of the petition of complaint it is apparent that complainant P.W.1 did not draft the petition of complaint. In his cross examination he said, "এম,পি, ৩৬৬/০০নং কেসে আরজিতে এসব কথা বলিনি যা আজ বললাম।" In his examination-in-chief, the P.W.1 also said, "আসামীরা আমাকে থানায় নিয়া আসে-সেখানে ইউ,ডি কেস হয়।" That is, the complainant was present at the time of filing U.D Case with the local police station. In cross-examination he further said, "সুরতহাল শেষে নড়াইল থানার দারোগা ও এ, এস,পি, সেখানে থাকার সময় আমি সেখানে যাই। আমি তাহাদের কাছে কোন এজাহার দেইনি।" P.W.2 in his cross examination said, "শ্বশুর রাতে আসামীদের বাড়ীতে ছিল।" That is, he did not disclose anything to the Police that the victims were killed though he got sufficient opportunity to narrate the occurrence to the police. In his cross-examination P.W.1 further said, "আমি নিজেই কেস করি। এরপর বড় মেয়ে (P.W.3) and জামাইয়ের (P.W.2) এর কাছে ঘটনা শুনি।" Then he said, "আমি নিজে কোন ঘটনা দেখিনি।" That is, before consultation with P.Ws.2 and 3 he filed petition of complaint. P.W.3, daughter of the P.W.1 and P.W.2, his son-in-law, in their evidence did not disclose anything about the occurrence to P.W.1. Though the P.Ws. 2, 3, 4

and 5 claimed to be present at the place of occurrence on the date of occurrence when many police personnel rushed to the place of occurrence and tried to unearth cause of death of the victims they did not disclose the alleged facts to the Police. Even P.W.1 participated in the Namaz-a-Janaza of the victims but neither P.W.1 nor other alleged eye witness did utter a single word to the police that, after killing the victims Muslima and Keya, their dead bodies were thrown in the pond by the accused persons. Such ommissions and non-discloser of material facts have created a serious doubt about the truthfulness or creditworthiness of witnesses which materially affected prosecution case. P.W.1 in his cross-examination further said, "ঘটনাস্হল বাড়ীর দক্ষিণ পাশে পুকুর আছে। ঘটনার সময় হয় বৃষ্টি হচ্ছিল।" P.W.2 Towhidur Rahman in his cross-examination said, "ঘটনাস্হল পুকুরে একটা পুরানো ঘাট ছিল। ভাংগা ছিল এ ঘাট। ঘাটে নামার সাথে লোহার শিক আলগা ছিল। ঘাটের সিড়ি উপরের দিকে ভাংগা।". P.W.3 in her testimony stated that Pinjira and Jhorna removed fastened gamchha from the persons of the victims but none of them had been examined to prove such story. P.W.3 stated that, after killing, the deadbodies of victims were thrown in the pond at 10 a.m. and those were recovered before Juma prayer. P.W.2 stated that deadbodies were recovered at 12.50 p.m. That is, according to them deadbodies were lying down in the pond for about $2\frac{1}{2}$ hours. But P.W.4 in his cross examination said, "অনুমান আধা ঘন্টা মত

মুসলিমা ও কেয়াকে পুকুরে ফেলে রেখেছিল।" P.W.5 claimed that he saw the occurrence of throwing the dead bodies but he did not take any step to recover the deadbodies then and there. P.W.6 was in Dhaka at the relevant time. P.W.7 S.I. Khan Abdul Jalil in his cross examination stated that in the U.D. case it was stated that Muslima and Keya had died due to drowning. P.Ws.8 and 9 are doctors who held autopsy of the deadbodies second time on 06.11.2000. D.W.1 in his testimony stated, "১২.১৫ টার দিকে নামাজ পড়তে আসার সময় মোসলেমা ও তার মেয়ে কেয়াকে পুকুর ঘাটে বসা দেখি। তারিখ ছিল ১৪/৭/২০০০ইং। আমরা মসজিদের মধ্যেই শুনতে পাই যে, মোসলেমা ও কেয়া পুকুরের পানিতে পড়ে মারা গেছে।"

The functions of the Court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the Court scans the materials on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to find the conviction of the accused. The testimonies of P.W. Nos. 2, 3, 4 and 5 lost its intrinsic reliability since they narrated said fact appearing before the court for the first time after 4(four) years of the occurrence though they got sufficient opportunity to disclose the material facts subsequent after the occurrence. P.W.2 in his cross-examination said, "মোসলেমা ও কেয়াকে যখন গামছা দিয়ে বাধে তখন চিৎকার করিনি। তাদেরকে পুকুরে ফেলে দেয়ার সময় স্থানীয় চেয়ারম্যান, মেম্বার বা থানায় যায়নি।

গন্যমান্য ব্যক্তিদের কাছেও যায়নি । আমার শুশুর বাড়ীতে খবর দেইনি ।" P.W.3 Mahfuza full sister of victim Muslima in her cross-examination has said, "অনুমান ১০.০০ দিকে পুকুরে লাশ ফেলা হয় । ঘটনার সময় চেচামেচি করি । আমি আমার জা, ভাসুর আমাদের বাড়ীর সীমানা হতে ঘটনা দেখি ।" Conduct of the P.Ws.2, 3, 4 and 5 were not consistent with natural human conduct. P.W.3 who is full sister of the victim Muslima claimed to have seen occurrence of killing her own sister and her daughter but she did not disclose the same to anyone including her father then and there. Sometimes, it is found that witnesses add embroidery to the prosecution case, for fear of being disbelieved and to punish the enemy. However, it is the duty of the Court to sift the evidence separate the chaff from the grain. In view of the facts and circumstances, it is difficult to rely upon the testimonies of P.Ws. 2, 3, 4 and 5.

In this case subsequent after recovery of the dead bodies, post mortem examination was held and the doctor held autopsy submitted report but the prosecution did not take any step to prove the contents of those reports. Doctor, who held the first autopsy, was not examined and those reports were not exhibited. However, the post mortem report is receivable in evidence without the doctor's evidence. I found those reports in the records. It appears from the first autopsy report of the victims that Muslima and Keya died due to asphyxia resulting from drowning

which were antemortem and accidental in nature. The relevant portion of the post mortem report of Muslima Khatun and Keya are reproduced herein below respectively for perusal.

-Muslima-

"Both lung realty distended, Blood stained frothy Fluid comes out from the cut margin of the lung. Clotted blood found under the scalp of the Rt. Forehead, which resist on washing". "In our opinion the Death was due to asphyxia resulting from drowning which was ante-mortem and accidental in nature".

-Keya-

"Both lung greatly distended. Blood stained frothy fluid comes out from the cut sarface lung on section, which resists on washing". "In our opinion the death was due to Asphyxa resulting from drowning which was ante-mortem and accidated".

One of the signs of drowning would be large amounts of froth present around nostrils and mouth in freshly drowned bodies. In autopsy reports of both the victims, doctor found frothy discharge from nose and mouth. After water inhalation, the lungs may be over inflated, filling the thoracic, cavity, generally water logged referred to as "*emphysema aquosum*". So the surfaces of lungs mare a marbled appearance with dark read areas linked with colluspsed alveoli, interspersed with more aerated tissues areas. In the reports the doctor found both lung greatly distained-

Blood stained frothy fluid from cut margin. Frothy fluid is to be expected when the body has been recovered. That is, autopsy reports were not consistent with prosecution case.

The prosecution withheld the doctors who held autopsy of the victims subsequent after their death. After about four months of the dead bodies of the victims were exhumpted and again autopsy was held. The doctors who held autopsy were examined as P.Ws. 7 and 8 who in their evidence stated that dead bodies were completely decomposed. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing out the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

Since, the postmortem report itself disclosed that the death was caused due to drowning which were ante-mortem and accidental in nature it is difficult to hold that the victim Muslima and Keya were killed. The testimonies of P.Ws.2, 3, 4 and 5 are not supported by medical evidence. In a murder case, the Court is charged with the supreme duty of making proper appreciation of evidence and of law before reaching the finding that the case proved is culpable homicide amounting to murder. The well settled principle is that if, after an examination of the whole

evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances, the accused is entitled to the benefit of doubt, not as a matter of grace, but, as of right, because the prosecution has not proved its case beyond reasonable doubt. The prosecution story must be true. Between "may be true" and "must be true" there is travel and the whole of this distance must be covered by legal, reliable and unpeachable evidence. Proof "beyond reasonable doubt" is a guide line and not a fetish.

Considering the aforesaid facts and circumstances, I am of the view that the learned Courts below committed error of law in not giving benefit of doubt to the appellants. Accordingly, I find substance in the appeal.

Thus, the jail appeal is allowed.

The judgment and order of conviction awarded by the learned Courts below are hereby set aside. The appellants Shahan Shah Sikder (Tito) and Aleya Begum are hereby acquitted of the charge.

J.

Md. Nuruzzaman, J. I have gone through the judgments proposed to be delivered by my brothers, Hasan Foez Siddique, J.

and Obaidul Hassan, J. I agree with the reasoning, findings, and decisions given by Obaidul Hassan, J.

J.

Obaidul Hassan, J. This Jail Appeal by the condemned prisoners is directed against the judgment and order dated 19.06.2011 passed by the High Court Division in Death Reference No.62 of 2007, heard along with Criminal Appeal No.4016 of 2007 also with Jail Appeal Nos.851 of 2007,852 of 2007, 853 of 2007 and 854 of 2007 and the High Court Division accepted the Reference in Part dismissing the Criminal Appeal No.4016 of 2007 and disposing of the Jail Appeals.

The High Court Division, by its judgment and order dated 19.06.2011, confirmed the judgment and order of conviction passed by the learned Judge (learned Sessions Judge) Nari O Shishu Nirjatan Daman Tribunal, Narail (hereinafter referred to as the Tribunal) convicting the appellant No.1, Shahan Shah Sikder Tito (hereinafter referred to as Tito/Shahan Shah) under section 11(ka) of the Nari O Shishu Nirjatan Daman Ain, 2000 (shortly, the Ain, 2000) read with Sections 302/201 of the Penal Code, 1860 (shortly, the Penal Code) and sentencing him to death under Sections 11(Ka)/302 and also to pay a fine of Tk.20,000.00 and convicting the appellant No.2, Aleya Begum (hereinafter referred to as Aleya) under Sections 11(Ka)/30 of the Ain, 2000

read with Sections 302/201 of the Penal Code and sentencing her to death under Sections 11(Ka)/30/302 and also to pay a fine of Tk.20,000.00.

Facts of the case, in short, are that one Syed Idris Ali, as complainant, filed a complaint petition on 18.07.2000 against the appellants before the cognizance Court of Magistrate, 1st Class, Narail for taking legal action under Sections 302/201 of the Penal Code, 1860 and 11(ka) of the Nari O Shishu Nirjatan Daman Ain, 2000 being numbered as M.P. 366 of 2000 and the magistrate forwarded the same to Narail Sadar Police Station to inquire and report. The victim Muslima was married to the appellant No.1 Shahan Shah Sikder Tito. To procure driving licence the appellant No.1 demanded dowry of taka thirty thousand and the complainant made payment of that amount of money to the appellant No.1. However, soon after the appellant No.1 again demanded an additional amount of taka ten thousand as dowry. The inability to meet such demand by the complainant resulted in his abusive behavior towards Muslima. He threatened to divorce her if the demanded amount is not paid up within 13.07.2000. There having been a delay to comply with the demand of dowry, on the fateful morning the appellant No.2 Aleya Begum having caught hold of Muslima by her hair, dragged her out of her room and Shahan Shah caused her to fall down by striking her on her

right forehead with a stick. The convict Ruma Khatun also struck a "*lathi*" blow on Muslima's left jaw and convict Tanjina Begum gave a further "*lathi*" blow on the left corner of Muslima's left eye resulting her to grievous hurt. Then the appellant No.1 descended on the body of his wife as she lay incapacitated on the floor and throttled her. Their infant daughter Keya having begun to wail upon witnessing the attack on her mother, both the appellants including the convict Ruma and Tanjina attempted to pacify her, but in vain. Realizing that the wailing daughter would be a liability to them and she would recount what she had just witnessed, the appellants with a view to prevent her from doing so, muffled her, tied her with a washcloth(গামছা) with her mother and pushed both of them into the pond. The complainant also came to know that Jiku, brother of the appellant No.1, having protested against their actions was beaten up by the appellant No.1. Thereafter, a distraught Jiku, overcome by grief, committed suicide by hanging. That the appellants to save them obtained post-mortem report in their favour, coercing the doctors employed for post-mortem examination which the complainant claimed to be false and prayed for re-examination after exhuming the dead body.

The police submitted a final report dated 28.04.2002 being signed by one S.I. Md. Shafiqul Islam wherein it has been stated

that a G.D Entry being numbered 71 of 2000 dated 14.07.2000 was registered with Narail Sadar Police Station and S.I. Khan Abdul Jalil took up the investigation, obtained postmortem report from Narail Sadar Hospital wherein it was opined that deceased Jiku Sikder committed suicide and deceased Muslima and Keya's death was accidental by drowning in the pond. Later on the basis of complaint dated 18.07.2000 dead body of deceased Muslima was exhumed in presence of the learned Magistrate and sent the same to Narail sadar Hospital for re-examination. The Medical Board sent the viscera for chemical examination and got report that there is no poison in the viscera of the dead body. Moreover, the doctor opined that it was not possible to pass opinion since the dead body is completely decomposed and accordingly police submitted final report considering the postmortem report. Against that report, the complainant filed '*Naraji*' petition on 27.08.2003 before the Nari-o-Shishu Nirjatan Daman Tribunal and prayed for the trial of the case. On hearing the '*Naraji*' petition the Tribunal took cognizance of this case on 15.11.2003 and framed charge on 29.04.2004 against the four accused persons under Sections 11(Ka)/30 of the Ain, 2000 and under Sections 302/201 of the Penal Code on 03.06.2007.

The prosecution examined as many as 09 witnesses in support of the prosecution case and they were cross-examined by

the defence and the defence examined 02 witnesses. Thereafter, the accused persons present were examined under Section 342 of the Code of Criminal Procedure, 1898 to which they claimed innocence.

The defence Case is that the appellants are fully innocent and the prosecution story is totally false and they have been falsely implicated by the influence of their local enemies and further it transpires from the trend of cross-examination of the PWs that appellant No.1 was not present at the place of occurrence at the time of occurrence took place and the alleged occurrence was accidental as the victim Muslima and Keya died by drowning when they went to the pond for taking bath.

The learned Judge, Nari O Shishu Nirjatan Daman Tribunal, Narail in consideration of the evidence on record, found the appellant No.1 Shahan Shah guilty of charge under section 11(ka) of the Nari O Shishu Nirjatan Daman Ain,2000 read with Sections 302/201 of the Penal code and sentenced him to death under Sections 11(Ka)/302 and also to pay a fine of Tk.20,000.00 and the Judge of the Nari O Shishu Nirjatan Daman Tribunal found the appellant No.2, Aleya Begum guilty of charge under Sections 11(Ka)/30 read with Sections 302/201 of the Penal Code and sentenced her to death with a fine of Tk.20,000.00 and also convict Ruma Khatun, Tanjina Begum were found guilty under sections

11(Ka)/30 of the Ain, 2000 and the Judge of the Tribunal sentenced them to death under sections 11(Ka) of the Ain, 2000 and also to pay a fine of Tk.20,000.00 each.

Being aggrieved by the judgment and order of the Tribunal, both the appellants and the convict Ruma Khatun and Tanjina Begum preferred Criminal Appeal No.4016 of 2007 before the High Court Division.

Upon hearing of the appeal, the High Court Division by its judgment and order dated 19.06.2011 reversed the sentences passed by the Tribunal of the condemned prisoners Ruma Khatun and Tanjina Begum from death to rigorous imprisonment for 7(seven) years accompanied by a fine of Tk.20,000.00 each in default to suffer rigorous imprisonment for a further period of 6(six) months and affirmed the order of conviction and sentence of the appellants No.1 and 2.

Being aggrieved by and dissatisfied with the judgment and order of affirmation of conviction and sentence of death, both the appellant No.1 and appellant No.2 filed Jail Appeal No. 09 of 2014 before this Division.

Mr. A.B.M. Bayezid, the learned Advocate for the appellants, has taken us through the complaint, testimonies of the witnesses, the judgment and order passed by the Tribunal and the

High Court Division, the postmortem report and connected materials on record and submitted that all the victims died due to asphyxia resulting from drowning in water which was ante-mortem and accidental in nature according to the medical report. As such, victims were not killed by torture or murder by any weapon or in any other way by the appellants. He also submits that the High Court Division without having sufficient evidence, upheld the judgment of the Tribunal and no specific point of offence has been made in the impugned judgment for which the impugned judgment is liable to be set aside for ends of justice. Mr. Bayezid further submits that there is no real eye witness in the case and the so-called eye witnesses are tutored witnesses and the prosecution failed to prove the case against the appellants beyond reasonable doubt. He next submits that the Tribunal did not take any further legal steps for further medical report and for further investigation by the police or other agency and the learned Tribunal did not take any action against the doctor or the police officer, who were blamed by the learned Tribunal in its judgment and which was reflected in the judgment of the High Court Division as well.

Mr. Bayezid next submits that the learned Tribunal did not insist or inspire the accused persons inviting their statement regarding the real facts of the case, in the case of a capital

punishment at the time of examining the accused persons under the provision of Section 342 of the Code of Criminal Procedure, 1898 (shortly, the Code) for which no accused person could understand to make the statement regarding the case, so that the real fact could not be found out through the statement of the accused persons at the time of examination under section 342 of the Code and the impugned judgment was passed with major doubt and the benefit of doubt, is to be given in favor of the appellants. It is also submitted by Mr. Bayezid that no neutral witness corroborated the alleged offence committed by the accused persons and the prosecution has totally failed to prove the case beyond reasonable doubt and, as such, the appeal should be allowed. Lastly, Mr. Bayezid submits that the Courts below misread and misconceived the facts and circumstances of the case as well as the aspect of law and, as such, the impugned judgment and order is liable to be set aside for the ends of justice.

In reply, Mr. Biswajit Debnath, the learned Deputy Attorney General appearing on behalf of the respondent, State, submits that it was the responsibility of the husband of the victim Muslima to describe how his wife was killed. In this case it appears that the principal accused fled away after the occurrence took place and he came back after 2 years 5 months which proves his guilty mind. The witnesses No.2-5 categorically stated to see the

occurrence of throwing the victim into the pond. Supporting the impugned judgment and order of conviction and sentence of the High Court Division Mr. Debnath submits that it is a well proven case and prayed for dismissal of the appeal.

We have examined the complaint, the testimonies of the witnesses, inquest report, postmortem report, judgment and order of conviction and sentence passed by the Tribunal, judgment and order of affirmation of conviction and sentence passed by the High Court Division in appeal and the connected materials on record.

In this case the appellant No.1 has been found guilty of the charges brought against him under Section 11(Ka) of the Nari O Shishu Nirjatan Daman Ain, 2000 read with Sections 302/201 of the Penal Code and he has been convicted and sentenced by the Tribunal under Section 11(Ka) of the Ain, 2000 read with section 302 of the Penal Code which was affirmed by the appellate Court.

Whereas the appellant No.2 has been found guilty of the charges brought against her under Sections 11(Ka)/30 of the Nari O Shishu Nirjatan Daman Ain, 2000 read with Sections 302/201 of the Penal Code and she has been convicted and sentenced by the Tribunal under Section 11(Ka) of the Ain, 2000 read with Section 302 of the Penal Code which was affirmed by the appellate Court.

Since the charge against the appellants (accused) has been brought by the prosecution under Sections 11(Ka)/30 of the Ain, 2000 and Sections 302/201 of the Penal Code, the prosecution has to prove firstly that the deceased victims Muslima and Keya were done to death and the cause of death was homicidal in nature. Therefore, we have to examine whether the prosecution has been able to prove, beyond any reasonable doubt, that the death of Muslima and Keya were homicidal in nature.

To ascertain the above question let us first examine the evidence on record about the cause of death.

In the complaint it has been mentioned by the complainant that "১৩/৭/২০০০ তারিখের মধ্যে যৌতুকের টাকা নিয়ে আসে নাই বলে আসামীরা বাদীর কন্যাকে নির্যাতন করিতে থাকে। ইং ১৪/৭/২০০০ তারিখে সকালে আসামীরা টাকা পায় নাই বলে ভিকটিম মুসলিমাকে ২নং আসামী আলেয়া বেগম চুল ধরে টেনে ঘর থেকে বের করে আনে। তখন ১নং আসামী সাহান শাহ শিকদার তার হাতে থাকা লাঠি দিয়া মুসলিমার ডান কপালে বাড়ী মেরে ফেলে দেয়। আসামী রুমা খাতুন তার হাতে থাকা লাঠি দিয়া মুসলিমার বাম চোয়ালে বাড়ী মারিয়া মারাত্নক জখম করে। আসামী তানজিয়ার হাতে থাকা লাঠি দিয়া মুসলিমার বাম চোখের কোনে বাড়ী মারিয়া মারাত্নক জখম করে। মুসলিমা মাটিতে পড়ে গেলে আসামী সাহান শাহ মুসলিমার গলা চেপে নিঃস্বাস রুদ্ধ করে ফেলে মুসলিমার ৪ বৎসরের কন্যা কেয়া কান্নাকাটি করতে থাকে এবং মৃত দেহ দক্ষিণ পার্শ্বের পুকুরে ফেলে দেয়।"

Thus, it appears from the complaint that there were injuries on the right forehead, left jaw and left corner of the eye of Muslima.

Complainant Syed Idris Ali as P.W.1 in his deposition stated that, "মেয়ের কান, নাক দিয়ে রক্ত নির্গত হচ্ছে, ডান কপালে, বাম চোয়ালে, চোখের কোনায় ক্ষত চিহ্ন ও গলা ফুলা দেখি। নাতনির পেটে সামান্য পানি ও গলায় কিছুটা ফুলা দেখি।"

From the inquest report of deceased Muslima it appears that the SI, who held inquest mentioned that, "মৃতাকে ইলিয়াছের (অপাঠ্য) ঘরের পার্শ্বে বারান্দায় লম্বা লম্বি ভাবে শোয়ানো পাইলাম। মৃতার শরীর একটা চেক চাদর দ্বারা ঢাকা পাইলাম এবং চাদর উঠাইয়া দেখা গেল মৃতার বয়স অনুমান ২০ বৎসর গায়ের রং ফর্সা মাথার চুল কাল লম্বা অনুমান ২০ ইঞ্চি, হাত দুইটি শরীরের সাথে লাগানো এবং চিৎ করিয়া শোয়া অবস্থায় ছিল। তাহার শরীর তাহার বোন মাহফুজা খাতুন, এবং চেয়ারম্যান আঃ রাজ্জাক ও সাক্ষীদের উপস্থিতিতে বাম চোখের কোনায় ক্ষত চিহ্ন এবং বাম চোয়ালে ফুলা চিহ্ন এবং ডান কপালের উপর ফুলা চিহ্ন দেখা যায় তাহার নাক দিয়া রক্ত নির্গত মৃতার গলায় ফুলা দেখা যায়।

তদন্ত

মৃত্যুর সঠিক কারন জানা যায় নাই।"

In the inquest report of the deceased Keya it has been mentioned that, "মৃতা তাহার মায়ের পাশ্বে শোয়ানো অবস্থায় পাইলাম তাহার বয়স অনুঃ ২ বৎসর হইবে শরীরের (অপাঠ্য) এবং মাথায় সামান্য চুল রহিয়াছে চক্ষু বন্ধ, মুখ বন্ধ । হাত দুইটি শরীরের সাথে মেশানো। শরীরের অন্য কোন (অপাঠ্য) দাগ পাওয়া যায় নাই। তাহার পরনে কোন বস্ত্র নাই। " (Underlined by us)

Thus, from the inquest report it appears that there were injuries on the right forehead, left jaw and left corner of the eye of Muslima. Blood was oozing from her nose and ear and there was wound on the neck of the deceased.

From the materials on record, it is found that two autopsy were conducted to find out the cause of death of the deceased. In the very first postmortem report dated 15.07.2000 the opinion regarding the cause of death was mentioned, "due to asphyxia resulting from drowning which was ante-mortem and accidental in nature."

In the second postmortem report dated 06.11.2000 the cause of death was not given until the chemical examination report is available and in the chemical examination report dated 14.06.2001 it was opined that due to complete decomposition of the body, it would not be possible to give any opinion regarding the cause of death.

It is evident that the complainant and the prosecution had to grapple with not only one but two doubtful and/or inconclusive autopsy reports. According to the submissions made by the learned advocate A.B.M. Bayezid on behalf of the appellants that the victims were not killed by torture or murder by any weapon or in any other way. They made this submission relying on the first medical report dated 15.07.2000. But the defence/the appellants could not make any credible or satisfactory case of accidental death by drowning. There were marks of wounds on the right forehead, left jaw and left corner of the eye of Muslima and also wounds and bruises were found on

the face and neck of the deceased, the defence failed to establish any discrepancy by cross-examining the PWs regarding the causes of those injuries on the body of deceased Muslima. Learned Deputy Attorney General Mr. Chakraborty made submissions before the High Court Division referring to "***Principles of Forensic Medicine Including Toxicology***" by Apurba Nandy (New Central Book Agency (P) Ltd.) and presented three scenarios of "wet drowning" being, accidental drowning as is contended to have occurred if one goes by the initial autopsy reports, homicidal drowning alleged by the prosecution and the suicidal drowning which is not contended by anybody in the present case. In this case homicidal drowning is the best answers following the facts and circumstances as well as the witnesses produced by the prosecution.

According to Nandy there are certain essential elements to cause homicidal drowning:

> "Homicidal drowning- Homicidal drowning deaths are not very common, but do occur. Different possible circumstances are-
>
> a) Forceful drowning of an adult swimmer is a difficult process but may be caused-
>
> i. When number of assailants are more than one.
>
> ii. When the victim has been made unconscious by injury or drug.

iii. When the hands and feet of the victim are tied before pushing him into the water."

It was argued by the prosecution in the High Court Division that the victim (Muslima) was reasonably likely to have been a good swimmer, considering that swimming as an activity is common in the villages of Bangladesh. With no rebuttal from the defence, the Court may infer the prosecution's claim to be true. Even if the weather had been wet/damp/moist and the victim(s) had been accidentally drowning, it would not have been impossible for her (Muslima) to rescue her daughter aged 4 (four) years instead of drowning along with her daughter. The complainant claimed that the victim with her daughter was tied up and pushed into the pond. So, it can be said that accidental drowning is not possible to a village girl who would be a good swimmer unless her feet and hands are tied up before drowning according to Apurba Nandy. In this case both the victims were tied up together before pushing into the pond according to the complaint as well as the depositions made by the witnesses.

For these reasons discussed above we are constrained not to rely on the said autopsy reports and lay emphasize rather on the eye witnesses and circumstantial evidences.

Now, let us turn our eyes to examine the circumstances relating to death.

According to the complaint petition, the deceased Muslima was beaten and tortured by her husband mother-in-law and sisters for dowry. At one point of time Shahan Shah descended on his wife as she lay incapacitated on the floor and throttled her. As the daughter of the victim Keya started screaming, the appellants muffled her and tied her with a washcloth (গামছা) with her mother and pushed both of them into the pond and caused their death.

PW.1, Syed Idris Ali, in his examination-in-chief stated that he heard the incident from his daughter PW3 and son-in-law PW2. He stated that his daughter Muslima was married to appellant No.1. In the middle of 2000. Tito (Shahan Shah) demanded dowry and tortured Muslima. Tito threatened to divorce Muslima if the dowry is not given. On 14.07.2000 there was a quarrel between Tito and Muslima at the room of Muslima. At one moment other accused persons entered into their room and Aleya caught hold of her hair, dragged her out of the room. Tito struck a lathi blow on the forehead of Muslima. Other accused persons beat up his daughter. When Keya, daughter of Muslima, started screaming, they throttled her and pushed her into the pond with her mother. Then they died. After going to the house of the appellants, he found the dead bodies of Muslima and Keya lying. Blood was oozing from the nose and ear of Muslima and there were also wounds on her forehead and neck.

PW.2, Md. Touhidur Rahman in his deposition stated that, the deceased Muslima was married to Shahan Shah in 1995. Shahan Shah demanded dowry of 10,000/- from Muslima in the middle of 2000. Tito threatened to divorce Muslima if the dowry is not given. There was a quarrel between Tito and Muslima regarding dowry. On hearing their crosstalk he along with his wife Mahfuja and sister-in-law Julekha went there. They saw that Aleya dragged Muslima out of her room by catching hold of her hair and Tito struck her with a lathi blow, hence Muslima fell down on the floor. Ruma and Tanjina also struck her with lathi blow. When keya was crying, Aleya throttled her. When they went to protect Muslima and Keya, the appellants scolded and threatened them. Then they went back to their houses. They also saw that Shahan Shah tied up Muslima and Keya with a washcloth (গামছা) and pushed them into the pond.

PW.3 Mahfuja Begum, sister of Muslima in her deposition stated that Tito demanded dowry from Muslima. On the date of occurrence, there was a crosstalk between Tito and Muslima because of non-payment of dowry. After hearing their screaming they went to the house of the appellants. They saw that Aleya dragged Muslima out of her room by catching hold of her hair and Tito struck her with a lathi blow, hence Muslima fell down on the floor. Ruma and Tanjina also struck her with lathi blow. When

Keya was crying, Aleya throttled her. When they went to protect Muslima and Keya, the appellants scolded and threatened them. Then they went to their houses. They also saw that Shahan Shah tied up Muslima and Keya with a washcloth(গামছা) and pushed them into the pond. When she went to resist them, Aleya pushed her and she fell down and became senseless.

PW.4, Julekha khatun stated that the appellants are her neighbors. On the day of incident hearing their screaming she went to their house and saw that Aleya caught hold of the hair of Muslima and dragged her out of her room. She also saw Shahan Shah struck a lathi blow on the right forehead of the deceased. Ruma and Tanjina also gave lathi blow on left jaw and left corner of eye of Muslima. When Muslima shouted, Shahan Shah throttled her. After watching this, Keya started shouting, then Aleya throttled Keya. They went to resist them, but the appellants scolded them and they went to their houses. From an open place she saw that Muslima and Keya were tied up with a washcloth and pushed into the pond by the appellants.

PW.5 Forhad Hossen stated that the appellants are his neighbors. On the date of occurrence after hearing their screaming he went to the place of occurrence and saw that Aleya dragged Muslima out of her room by catching of her hair and Shahan Shah Pushed her by holding neck and he throttled

Muslima. When Keya started shouting, Aleya and Tito throttled her. Then they tied Keya with washcloth with her mother and pushed them into the pond.

PW.6 Kamrujjaman Mithu is the brother of Muslima and he deposed that he heard the incident from his parents and brother-in-law. In his cross-examination he stated that Tito demanded dowry from Muslima after their marriage.

PW.7 Khan abdul Jalil is the investigating officer of this case. He made the inquest report of deceased Muslima and Keya. He said that he found injuries on right forehead, left jaw and left corner of eye of Muslima. He also found wound on her neck and blood was oozing from her nose and ear.

PW.8 and PW.9 are the medical persons and formal witnesses. In their depositions they stated that they were not able to give opinion regarding the cause of death due to the dead bodies of the victims were completely decomposed.

In this case, two postmortem reports were obtained where both the reports are inconclusive. In the first postmortem report the cause of death has been shown as accidental drowning but the eye witnesses and circumstantial evidence show that the drowning was homicidal in nature. When there any conflict arises between medical report and circumstantial evidence as well as oral evidence, then circumstantial evidence will prevail if the

circumstantial evidence as well as oral evidence can create confidence. It was held in the case of ***Thakur and others V. State*** **reported in AIR (1955) (Allahabad) 189, "Where there is a conflict between the medical evidence and the oral testimony of witnesses, the evidence can be assessed only in two ways. A Court can either believe the prosecution witnesses unreservedly and explain away the conflict by holding that the witnesses have merely exaggerated the incident or rely upon the medical evidence and approach the oral testimony with caution testing it in the light of the medical evidence. The first method can be applied only in those cases where the oral evidence is above reproach and creates confidence and there is no appreciable reason for the false implication of any accused. Where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion, the only safe and judicial method of assessing evidence is the second method.**

In the second postmortem report of the present case the cause of death was not given due to complete decomposition of the dead body. In this circumstances, we are of the view that when in the postmortem report the cause of death is uncertain or no opinion was given regarding cause of death, the court has to consider the circumstantial evidence as well as the eye witnesses.

From the depositions of PWs, it is evident that the appellants demanded dowry from Muslima which remained unchallenged by the defence. All the PWs in a voice supported the torture inflicted by the appellants on Muslima. All of them categorically said that the appellants pushed Muslima along with her daughter into the pond having tied up with washcloth. In this case, PW.2, PW.3, PW.4 and PW.5 all are eye witnesses, where PW.5 is a neutral witness. The defence could not establish any inconsistencies or discrepancies by cross-examining them.

The defence made submissions that there are no real eye witnesses to this case. But from the depositions of PW.2, PW.3, PW.4 and PW.5, it appears that they have witnessed the incident and they were present at the time of occurrence. Even though PW.2, PW.3 and PW.5 are relatives of victims, it does not make their statements shaky and unbelievable. It was held in the case of ***Yogeshwar Gope vs. State*** **[58 DLR (AD) 73]** that, "**Only because of relationship witnesses evidence cannot be thrown away unless the evidence is found to be untrue or tainted with motive."**

Since the incident took place at the house of the appellant and the PWs 2-5 are the neighbours of the appellant, they were the most natural witnesses. So it cannot be said that only because the PW.2, PW.3 and PW.4 are relatives of the deceased, they have

given false evidence inflicting the appellants. Those PWs had witnessed the incident and stated before the court only what they had seen.

The defence in their cross-examination also tried to establish that the some of the PWs are the interested witnesses because the appellants filed criminal case against them. So the witnesses tried to prove the appellants guilty. The evidence of the witnesses cannot be disbelieved only because they are interested witnesses if the evidence given is considered by the court to be true. In the case of ***State vs. Ful Mia*** **[5 BLC (AD) 41]** it has been held that "**The evidence of eye witnesses cannot be discarded on the ground that they are interested witnesses and such evidence is admissible in evidence if they are found to be truthful witnesses and telling the truth."**

The learned advocate appearing for the appellants also submitted that there is no neutral witness in this case. All the PWs are the relatives of the deceased. But from the deposition of PW.5 it is found that he is a neighbor of the appellants and he is not a close relative of the deceased. So he is the sole independent or neutral witness to this case who in his deposition supported the statements made by other witnesses except the fact of active participation of Aleya in the alleged killing.

On the other hand, the defence adduced two witnesses to provide an *alibi* only for the appellant No.1 not for others. Both the DW.1 Shikder Rezaul Islam contended that the appellant No.1 is a bus driver and on 14.07.2000 he was in Jessore. DW 2 Rezaul Hossain Khan said that the appellant No.1 was not at home at the date of occurrence. Neither DW 1 nor DW 2 was with the appellant No.1 in Jessore on the date of occurrence. Thus the *alibi* provided by the appellant No.1 effectively remained unsubstantiated.

In consideration of the evidence discussed above, we are of the view that the prosecution has been able to prove each ingredient of the offences with which the appellant No.1 was charged i.e. under Section 11(Ka) of the Nari O Shishu Nirjatan Daman Ain, 2000 and Sections 302/201 of the Penal Code, 1860 beyond reasonable doubt.

The case against the appellant No.2 Aleya Begum so far as she has been charged with under Sections 11(Ka)/30 of the Ain, 2000 and Sections 302/201 of the Penal Code appear, however, not to have been proved beyond reasonable doubt. PW.5 is the sole independent/neutral witness to this case. In his deposition he said nothing regarding Aleya's participation in pushing Muslima and Keya into the pond. So the statements of other PWs regarding the involvement of Aleya in killing Muslima and Keya

are not reliable and worthy of credence. So, the appellant No.2 Aleya Begum be acquitted from the charge levied against her.

In view of the facts and evidence discussed above, our considered opinion is that the prosecution has been able to prove beyond reasonable doubt that the appellant No.1 demanded dowry and having not gotten said dowry, he murdered the victim. Therefore, the conviction and sentence in respect of Appellant No.1 Shahansha Sikder (Tito) cannot be said to be illegal.

It is important to assess whether the sentence imposed upon the Appellants by the tribunal and the High Court Division was proper. Per section 11(Ka) of the 'Ain' 2000, the only available sentence is death penalty, where the wife has been murdered. It is understandable then, that the courts below imposed such a penalty in accordance with the provision of the existing law. It is, therefore, imperative for this division to consider whether the law itself upholds the tenants of justice and our constitution.

This Division in the case of Bangladesh Legal Aid and Services Trust (BLAST) and others –Vs- Bangladesh (67 DLR (AD) 185) has observed that "The Court always keeps in mind while construing a statute to prevent no clause, sentence or word be declared superfluous, void or insignificant. It is also the duty of the Court to do full justice to each and every word appearing in a

statutory enactment. However, the Court should not shut its eyes to the facts that the draftmen are sometimes careless and slovenly, and that their draftmanship result in an enactment which is unintelligible, is absurd."

"True, the concept of due process is not available in our Constitution but if we closely look at Articles 27, 31 and 32 it will not be an exaggeration to come to the conclusion that the expressions "be treated in accordance with law" and 'No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment' used in Article 35(5) are cognate nature. In Article 31 it is also stated that no action detrimental to the life, liberty, body of any person shall be taken except in accordance with law. It is not the same that a person's life has been taken away by a provision of legislation without conclusively determining as to his guilt in the commission of the crime. Again in Article 32 it provides that no person shall be deprived of his life save in accordance with law. These concepts are more or less akin to the concept of the due process law. The provisions of sub-sections (2) and (4) of section 6 deprive a tribunal from discharging it's constitutional duties of judicial review whereby a it has the power of using discretion in the matter of awarding sentence in the facts and circumstances of a case and thus, there is no gainsaying that Sub-sections (2) and (4) of section 6 of the Ain

of 1995 as well as section 303 of the Penal Code run contrary to those statutory safe guards which give a tribunal the discretion in the matter of imposing sentence. Similarly, section 10(1) of the said Ain stands on the same footing."

"No law which provides for it without involvement of the judicial mind can be said to be constitutional, reasonable, fair and just. Such law must be stigmatized as arbitrary because these provisions deprive the tribunals of the administration of justice independently without interference by the legislature."

In the said case it has also been observed that "While legislating the Ain of 2000 similar provisions have been provided in sub-sections (2) and (3) of section 9 providing alternative sentence. This shift in the attitude of the legislature, on the question of sentence within a space of five years justifies the unreasonableness in the repealed law. However, in section 11(Ka) of the Ain of 2000, it is provided that if death is caused by husband or husband's, parents, guardians, relations or other persons to a woman for dowry, only one sentence of death has been provided leaving no discretionary power for the tribunal to award a lesser sentence on extraneous consideration. This provision is to the same extent *ultra vires* the Constitution".

Appellate Division of the Supreme Court of Bangladesh is uniquely provided the authority under Article 104 of the

Constitution to consider all reasons in order to ensure complete justice. The preamble of the Constitution and part III promises to uphold and enumerates fundamental rights, including that of the right to life. It is of utmost importance that the Apex Court is allowed the opportunity to award punishment as seen fit for the purposes of administering complete justice. If the law, is contrary to the notion of justice, it is important that the intent of the law be taken into account. Principles of Criminal Justice focus on all aspects of punishment, restitution, retribution, rehabilitation, deterrence and incapacitation. The penalty of death eliminates possibility all of such beyond retribution. Hence, it must be allowed for the Appellate Division of Supreme Court to consider and award punishment that posit all possible outcomes of any punishment rendered. An Act/Or Any Law that confines such notions of justice to only seeking retribution, is u*ltra vires* to the Constitution.

In view of the above discussion and the decisions, we are of the view that this Division has discretion to award any sentence either Imprisonment for life or Death Penalty upon the accused who committed offence under Section 11(Ka) of the Nari–O-Shishu Nirjatan Daman Ain, 2000, (Ain 2000).

In this case the appellant has been convicted under section 11(Ka) of the Ain, 2000 read with Section 302 of the Penal Code by

the High Court Division. From the materials on record, it is found that the appellant No.1 Shahan Shah Sikder (Tito) has been in condemned cell for more than 13 (thirteen) years suffering the pangs of death.

It was held in ***Nazrul Islam (Md) vs State*** **reported in 66 DLR (AD) 199** that,**" Lastly with regard to the period of time spent by the accused in the condemned cell, there are numerous decisions of this Division which shed light on this aspect. In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death."** In view of the decision cited above, we are inclined to commute the sentence of death to one of imprisonment for life.

The appeal is allowed in part with modifications of sentence.

Accordingly, the conviction of the appellant No.1 Shahan Shah Sikder (Tito), son of late Elias Sikder, Village-Tularampur, Police Station & District-Narail is maintained. However his sentence is reduced to imprisonment for life along with a fine of Tk.20,000.00. The jail authority of Jessore jail is directed to shift

the convict-appellant No.1, Shahan Shah Sikder (Tito), son of Elias Sikder from condemned cell to regular prison forthwith.

The appellant No.2, Aleya Begum, wife of Elias Sikder, Village-Tularampur, Police Station & District-Narail be acquitted of the charge leveled against her. Let her be set at liberty forthwith if not wanted in connection with any other case.

J.

Courts order

The appeal is allowed in part by majority decision with modifications of sentence.

C. J.

J.

J.

J.

The 14th day of October, 2020
Total words 9992