IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Present:
Mr. Justice Jahangir Hossain
And
Mr. Justice Md. Jahangir Hossain

Death Reference No. 31 of 2010
The State
-Versus-
Md. Abul Kashem Kha
……...Condemned Prisoner
With
Criminal Appeal No. 3404 of 2010
Md. Abul Kashem Kha
-Versus-
The State
And
Jail Appeal No. 158 of 2010
Md. Abul Kashem Kha
-Versus-
The state
Mr. Zahirul Haque Zahir, D.A.G with
Mr. Abdur Rokib [Montu] with
Mr. Md. Atiqul Haque [Selim], A.A.Gs
…...for the State
Mr. Md. Bodizzaman Tafader with
Mr. Das Tapan Kumar, Advocates
……..for the Condemned Prisoner

Heard on- 12.01.2016, 13.01.2016, 17.01.2016, and 18.01.2016
Judgment on- 19.01.2016 and 20.01.2016

Jahangir Hossain, J

Learned Judge of the Nari-O-Shishu Nirjaton Daman Tribunal, Satkhira has referred this matter to the

High Court Division for confirmation under section 374 of the Code of Criminal Procedure [hereinafter referred to as Cr.P.C] and subsequently it has been numbered as Death Reference No. 31 of 2010. After conclusion of trial the learned judge found accused Md. Abul Kashem Kha guilty of the charge leveled under section 11(ka) of the Nari-O-Shishu Nirjaton Daman Ain, 2000 as amended in 2003 and sentenced him to death with a fine of Tk-5000/-.

Condemned prisoner Md. Abul Kashem Kha thereafter preferred Criminal Appeal No. 3404 of 2010 before this court and also filed Jail Appeal being No. 158 of 2010. As the matter has been arisen out of the judgment and order passed by the learned Judge of the Nari-O-Shishu Nirjaton Daman Tribunal, Shatkira in Nari-O-Shishu case No. 16 of 2005 arising out of G.R case No. 324 of 2004 [Tala] corresponding to Tala Police Station case No. 14 dated 27.09.2004, the Death Reference No. 31 of 2010 along with Criminal Appeal No. 3404 of 2010 and

Jail Appeal No. 158 of 2010 have been heard together and are also being disposed of by this single judgment.

The prosecution case as narrated in the FIR, in brief, is that [one] Md. Shahidul Islam, brother of the victim, being informant lodged an FIR on 27.09.2004 with Tala Police Station against 07 [seven] persons including the condemned prisoner alleging, inter-alia, that his sister Ms. Shahanara Khatun got married to Md. Abul Kashem Kha on 09.09.1991 with an amount of Tk-20,000/-as dowry. During their conjugal life she gave birth to a son named Masum Billah now aged about 10 [ten] years. After wards, her husband gave pressure on her to meet him with Tk-20,000/-more as dowry and forced her to leave his house after beating her up.

Subsequently, his sister brought an allegation before the Nari-O-Shishu Nirjaton Daman Tribunal, Satkhira on 16.09.2003 by filing an application numbered as Nari-O-Shishu case No. 41 of 2004. During pending of the said case her husband took her back to his house upon an

amicable settlement but he started threatening her continuously as to why she lodged a case against him. On 26.09.2004 around 11:00 am having reached the house of the accused persons the informant saw them running away from the house and he also found his sister lying at the courtyard in a critical condition with severe bleeding injury on her head. On query, he came to know that the accused persons including her husband dealt blows with sharp weapons [dao] on the body of the victim, in particular on forehead for refusal to pay dowry money amounting to Tk-20,000/-. He then with the help of locals took her sister to Satkhira Sadar Hospital for treatment and thereafter she was referred to Khulna Medical College Hospital as her condition was seen so severe and critical. She was in an unconscious condition and could die at any time.

Upon receiving the ejaher police registered Tala Police Station case No. 14 dated 27.09.2004 under sections 11(ka)(kha)/30 of the Nari-O-Shishu Nirjaton Daman Ain, 2000 [as amended in 2003]. Thereafter, police launched

investigating the alleged crime. During investigation of the case, the victim was shifted to Dhaka Medical College Hospital after six days' treatment in Khulna Medical College Hospital, as her condition was deteriorated. She had undergone treatment in Dhaka Medical College Hospital for about two months and 04/05 days.

The investigating officer visited the place of occurrence, prepared sketch map with index and recorded statements of witnesses after examining them under section 161 of the Cr. P.C. He had discussion with doctors of Khulna Medical College Hospital and collected medical certificates but failed to record the statement of the victim and discuss with her as she became unable to have sense of conversation. He had found injuries on the body of the victim at different limbs and her scalp of the head was operated by doctor. After conclusion of investigation he submitted charge sheet being No. 207 dated 22.12.2004 against the accused persons including the condemned

prisoner under sections 11(ka)(kha)/30 of the Nari-O-Shishu Nirjaton Daman Ain, 2000.

Having no hope of recovery she was taken to the house of the informant where she succumbed to her injuries on 03.02.2005 while undergoing treatment. The informant again lodged a complaint with the same police station stating the reasons of his sister's death. On which a UD case No. 04 of 2005 dated 04.02.2005 was registered. Previous investigating officer took over the charge of the said UD case to investigate the reason of her subsequent death.

Thereafter, he visited the house of the informant, prepared inquest report of the deceased, seized the alamat including medical documents and the pictures of the injured victim and sent the dead body to the Sadar Hospital for an autopsy and subsequently he collected the same and again examined the witnesses including some new others. After conclusion of investigation, he submitted supplementary charge sheet being No. 207 [ka] dated

03.04.2005 against all the accused persons under sections 11(ka)/30 of the Nari-O-Shishu Nirjaton Daman Ain, 2000 while he submitted final report in the UD case No. 04 dated 04.02.2005.

On 29.05.2005 the learned Judge of the Nari-O-Shishu Nirjaton Daman Tribunal took cognizance against them under sections 11(ka)(kha)/30 of the Ain and on 28.03.2007 they were indicted by the same Tribunal under sections 11(ka)/30 of the Ain which was read over and explained to the accused persons present to which they pleaded not guilty and claimed to be innocent in the trial and demanded to get justice.

In the event of proving the charge leveled against the accused persons, the prosecution examined as many as 08 [eight] live witnesses in the case while defence examined none. The defence case as it transpires from the trend of cross-examination of the prosecution witnesses that the accused persons are quite innocent and they did not hit the victim. Accused Abul Kashem Kha did not give blow on

the head of the victim. No occurrence took place in the house of accused Abul Kashem and they were not present at the time of occurrence. They further claimed that the victim died having received injuries inflicted by unknown persons and the informant falsely implicated the accused persons in the case.

Upon closure of the evidence of the prosecution witnesses, the accused on dock were examined under section 342 of the Cr.P.C. This time they also reiterated about their innocence. Having considered the facts and circumstances and the evidence on record the learned Judge of the Nari-O-Shishu Nirjaton Daman Tribunal, Satkhira found accused Md. Abul Kashem Kha guilty of the charge and sentenced him to death while acquitted six others.

Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence dated 20.05.2010 passed by the learned Judge of Nari-O-Shishu Nirjaton Daman Tribunal, Satkhira, condemned

prisoner Md. Abul Kashem being appellant presented Criminal Appeal No. 3404 of 2010 and also filed Jail Appeal No.158 of 2010.

Mr. Md. Zahirul Haque Zahir, learned Deputy Attorney General along with Mr. Abdur Rokib [Montu] and Mr. Md. Atiqul Haque [Selim], Assistant Attorney Generals appeared on behalf of the respondent [State] supporting the Death Reference and opposing the Criminal Appeal as well as Jail Appeal. They have first placed before us the FIR, charge sheets, testimony of the witnesses, medical documents including post mortem report, inquest report, impugned judgment and other connected papers available in the paper book, then Mr. Zahir contends that;

[a] The prosecution could establish its case against the condemned prisoner beyond all reasonable doubt and as such there is nothing to show by the defence to interfere by this Court with the impugned judgment and order of conviction and sentence dated 20.05.2010 passed by the learned Judge of Nari-O-Shishu Nirjaton Daman Tribunal.

[b] There is sufficient evidence against the condemned prisoner to show that he was a real perpetrator in the subsequent death of the victim.

[c] Time, place and manner of the occurrence have been proven by the prosecution evidence beyond reasonable doubt and there is no single discrepancy or contradiction in the evidence of the prosecution witnesses as to time, place and manner of the occurrence.

Mr. Zahir further contends that the act and conduct of the condemned prisoner in the commission of offence are so heinous and cruel that does not deserve any kind of sympathy from the court upon him. In support of his contentions he has cited some decisions namely 43 DLR (AD) 92 [in respect of wife killing], 6 BLC (AD) 53 and 9 BLC (AD) 229 [in respect of sections 8 and 106 of evidence Act], 28 DLR (AD) 35 [regarding section 342 of the Cr. P.C], and 63 DLR (AD) 106 [about section 114 (G) of the evidence Act].

On the contrary, Mr. Md. Badiuzzaman Tafader along with Mr. Das Tapan Kumar, learned Advocates submits

that the prosecution utterly failed to prove the case against the condemned prisoner beyond reasonable doubt and the demand of dowry as alleged by the prosecution has not been proven by evidence as to when and where the condemned prisoner demanded money as dowry. More so, for alleged demand of dowry the victim lodged a case earlier against him in which the condemned prisoner was found guilty and sentenced him to suffer three years rigorous imprisonment with a fine of Tk-5,000/-.

Mr. Zaman argues that informant has no scope to come back from the FIR story. If the informant narrates anything more beyond his FIR story, the same happens to be treated as an embellishment and afterthought. In the FIR it is stated that he did not see the condemned prisoner inflicting on the person of the victim but in his deposition he has disclosed that he saw the occurrence on his own eyes.

He further submits that as per evidence adduced by the prosecution witnesses there was no pre-plan or

premeditation and no heavy weapon or article used in the alleged attack on the victim. So it is not a case of pre-planned murder. Moreover, the victim died more than four months after the occurrence. In support of his contentions, he has referred to some decisions namely 18 BLC (HCD) 718, 18 BLD (HCD) 492, 43 DLR (AD) 223, 41 DLR (AD) 01, 1985 BLD (AD) 176, and 7 BLC (HCD) 54.

He contends that as per section 106 of the evidence Act if the defence fails to prove its case, the onus of proof by the prosecution does not go away. Though the duty of the husband is to show or explain how his wife sustained injuries in his vicinity but at the same time prosecution must prove that the husband was present at the relevant time and within his custody the wife was killed or attacked [State -Vs- Sadqul Islam 63 DLR (AD) 134 and Sabur Alam –Vs- State, 51 DLR (1999) 16].

In the present case although the condemned prisoner did not give any evidence in support of his defence but it

cannot be said that for his non-explanation conviction can be based on him. In the absence of any proof beyond reasonable doubt by the evidence of prosecution witnesses, the burden of proof should not be shifted to the condemned prisoner [21 BLT (AD) 16]. He finally prays for rejection of the Death Reference and allowing the Criminal Appeal as well as Jail Appeal after setting aside the impugned judgment and order of conviction and sentence dated 20.05.2010.

Upon scrutiny of the evidence adduced by the prosecution witnesses along with exhibits as well as material exhibits it has emerged that the learned defence lawyer has cross-examined the witnesses thoroughly to ascertain their veracity and credibility. Now the question is before us whether the prosecution has been able to prove the instant charge leveled against the condemned prisoner beyond all reasonable doubt. Let us carefully examine and analyze the evidence adduced by the prosecution witnesses

to come to a conclusion in the proper adjudication of justice.

In proving the case in hand there are 08 live witnesses examined by the prosecution. As informant of the case pw-01 has described that his sister Shahanara Khatun got married to condemned prisoner in the year 1991 and in their conjugal life they have a 13 year old son named Masum Billah. Condemned prisoner demanded Tk-20,000/-as dowry to his sister who failed to meet the claim as demanded by him.

Subsequently, his sister left her husband's house and lodged a case being Nari-O-Shishu case No. 41 of 2004 against her husband, condemned prisoner while staying in his [informant] house. But the condemned prisoner took his sister back to his house upon a compromise. On 26.09.2004 at 11:00 am he went to his brother-in-law's [condemned prisoner] house in order to meet his sister where he could see that all accused persons severely beat his sister, particularly accused Kashem struck a bamboo

stick blow on the head of his sister and he raised alarm to save his sister who also started shouting. Surrounding neighbors rushed to the spot of the crime soon after the incident. With the help of others he took his sister to Satkhira Sadar Hospital in a microbus. Thereafter, she was shifted to Khulna Medical College Hospital as her condition deteriorated and she took treatment therein for six days. She was again referred to Dhaka Medical College Hospital wherein she was given treatment for around two months and 04/05 days. Having no hope of recovery she was taken to the house of the informant in consultation with the doctors concerned. Around two months later, she succumbed to her injuries in the house of the informant. He has further stated that his sister's scalp split with the brain coming out on being inflicted by accused Abul Kashem and the victim died due to sustaining injuries inflicted by accused Abul Kashem.

Having inflicted they killed his sister for demand of dowry. He has identified the accused on dock and the FIR,

marked as exhibit-01, his signature as exhibit-01/01. He has also recognized his signature put on the seizure list of blood stained sharee and blouse of his sister seized by police which is marked as exhibit-02 and his signature as exhibit-02/01. He took colored pictures of the injured place and health condition of the victim. Bone of scalp is seized and the medical documents were also submitted.

Pw-02 Abul Hossain, has testified that the occurrence took place on 26.09.2010 at 11:00 am. Local men telling each other that accused Kashem killed his wife for demanding Tk- 20,000/- as dowry. Upon hearing such fact he rushed to the house of Abul Kashem where he saw victim lying at the courtyard with blood injury, her brain with the head got out having split inflicting on her head by bamboo stick. He saw the victim once. He, with the help of others, sent the victim to Satkhira Hospital at first in a vehicle. Subsequently, she was shifted to Khulna Hospital, then Dhaka and the doctors of Dhaka Medical College Hospital sent back the victim to the house of the

informant around two months later. She succumbed to her injuries around 04 months after the incident in the house of the informant. Though the victim could not speak but she was given proper treatment while she was staying in the house of the informant. Informant took her photographs when she was undergone treatment. He is a seizure list witness of the blood stained apparels of the victim seized by police. Seizure list is marked as exhibit-04 and his signature as exhibit-04/01. Police had also seized bone of split scalp and medical documents of the victim.

Pw-03 Miajan Morol has testified that sister of the informant got married to condemned prisoner who struck on the head of the victim for demanding dowry. The occurrence took place on 26.09.2004 at about 11½ am. He saw the informant and the victim in a microbus while he was going to Modanpur village home. He could see the victim in an injured condition. Informant narrated to him that his brother-in-law Abul Kashem inflicted on the head of his sister for dowry. He went to the hospital with them.

Doctors sent the victim from Dhaka Medical College Hospital to the house after giving two months' treatment. While she was undergone treatment she died in the house of the informant about two months' later.

Pw-04 Akram Ali has stated in his deposition that the occurrence took place on 26.09.2004 at about 11:00 am in the house of the accused. He rushed to the spot on hearing hue and cry while he was going to purchase cattle. Informant Shidul had gone there before he reached. He could see victim Shahanara lying in the courtyard with head injury. He heard that victim received injuries inflicted by accused for dowry. They did not see the accused in the house as they left before their coming.

Pw-05 Mokshed has testified that the occurrence took place on 26.09.2010 at 11:00 am in the house of the accused. They went to the spot on hearing hue and cry while he along with his brother Akram was going beside the house of the accused to purchase cattle. He saw the victim Shahanara lying in an injured condition. Informant

told him that victim sustained injuries inflicted by the accused due to demanding dowry. They took the victim to Satkhira, then Khulna for treatment. They did not see the accused in the house when they came to the place of occurrence.

Pw-06 Kismot Ali has been tendered by the prosecution and defence has declined to cross-examine him.

Pw-07 SI Shafiqur Rahman testifies that after having being endorsed he investigated the case. He has recognized FIR and the signature of the recording officer, marked as exhibit-5 and his signature as exhibit-05/01. He visited the place of occurrence and held sketch map with index, marked as exhibit-06 and his signature as exhibit-06/01 and recorded statements of witnesses after examining them. He has recognized blood stained Sharee as material exhibit-I, blouse as material exhibit-II, colured photos as material exhibit-III, bone of the victim as material exhibit-IV, medical documents of the victims containing 16 pages as material exhibit-V series as submitted by the informant

on 08.012.2012 to him. He prepared seizure list, marked as exhibit-04 and his signature as exhibit-04/02.

He states further that the victim lost her memory and even then, she could not speak till her eyes are being closed forever. For that reason he failed to record her statement regarding the incident. Inquest report was held by him on 04.02.2005 at the residence of the informant, marked as exhibit-08 and his signature as exhibit-08/01. He finally submitted investigation report against the condemned prisoner and 06 others under sections 11(ka)(kha)/30 of the Nari-O-Shishu Nirjatan Daman Ain, 2000.

Pw-08 Dr. Abul Hossain, deposes that on 05.02.2005 at 02:00 pm he examined the dead body of the victim identified by one constable Md. Afaz Uddin. He found the following injuries on the body of the victim,

> ***"[1] One old incised wound size about 3"X 2" X½" depth cutting of skin, pericranium bone was right side of partial region of head.***

[II] One old incised wound 1 ½"X ½" X ¼" depth over right parietal region of head below the injury no.1.

On dissection: Congestion of soft tissue found corresponding to injuries mentioned above. Brain matter liquefied blackish colour. Congested tissues resisted on washing with water.

Opinion: Death was due to cardio respiratory failure as a result of shock and hemorrhage due to consequence injuries described which was ante-mortem and homicidal in nature."

This post mortem examination report is marked as exhibit-07 and his signature as exhibit-07/01. In cross-examination he has replied that the age of injuries has not been mentioned in the post mortem examination report and both the injuries are to be infected.

It reveals from the cross-examination of the witnesses that the defence has failed to discredit the evidence of witnesses and also failed to make contradictions among its evidence. Rather most of the events have been made confronted by putting questions to them. Some of the questions put to them [witnesses] as if

they are invited to confirm the prosecution case. Except some denials or suggestions like falsely implication in the case or innocence of the occurrence of the condemned prisoner, defence has not been able to show any of its case. However, weakness of the defence should not be taken into consideration for inference in the fair administration of justice. It would be fair and just if justice is done on the basis of proper evaluation of evidence adduced by the prosecution witnesses and material particulars.

Having gone through the evidence of the prosecution witnesses it appears that pw-01 is the full brother of the victim, who went to the house of condemned prisoner to meet his sister [victim] on the day of occurrence at 11:00 am. It finds further from FIR, marked as exhibit-01 that having reached the house of the condemned prisoner he saw the accused persons including condemned prisoner running away and found his sister lying at the courtyard with severe blood injury on 26.09.2004 around 11:00 am. On hearing hue and cry

neighbors came to the spot and he took his sister to the hospital with the help of them. Subsequently victim succumbed to her injuries in his residence around 04 [four] months after the incident. Although this witness does not state in the FIR that he saw the condemned prisoner inflicting on the person of the victim on his own eyes but his deposition claims that he saw directly the conduct of the condemned prisoner in the beating of the victim. Except this version of evidence other evidence corroborates the FIR story. About seeing the condemned prisoner at the relevant time may be an excessive measure taken by this witness, the informant of the case, but that does not hamper the prosecution case in any way. It has been corroborated by both his deposition and FIR story that when this witness reached the house of the occurrence, he could see the accused persons along with condemned prisoner leaving the house in a shameful manner.

Pw-02 is a local man who has no relation with the victim or the informant in any way. His evidence on record reveals that the time, place and manner of the occurrence are exactly similar to the version of pw-01. Immediately after the occurrence he rushed to the scene, the house of the condemned prisoner, where he saw the victim lying at the courtyard in a critical condition with grievous head injury. He heard from pw-01 about the cause of injuries inflicted by condemned prisoner for demanding dowry. The evidence of pw-03 shows that the occurrence took place at about 11:00 am on 26.09.2004 in the house of the condemned prisoner. He saw the victim in a critical condition in a microbus by which he also went to the hospital. This evidence finds support from the evidence of pws-01 and 02 as to the injury on the person of the victim inflicted by the condemned prisoner. There is definite indication of injuries on the victim which this witness saw on his own eyes immediately after the occurrence and he went to the hospital with them to help as her condition

was so worsen and critical. He also heard from pw-01 the cause of attack on the victim was for dowry.

Pws-04 and 05, both are full brothers, rushed to the scene immediately after the incident. They also saw the victim lying at the courtyard of condemned prisoner with a severe head injury. This portion of evidence corroborates the evidence of pw-02 who is an independent witness in the instant case. Even then, a piece of evidence is not found inconsistent in their entire evidence. Both the pws further disclosed that they heard from pw-01 the cause of injury was for dowry. Although pws-04 and 05 are the relatives of pw-01 but their evidence show that they are credible witnesses in this case. Because their credibility as witnesses are not turned down in any way by the defense during cross-examination. They have narrated exact scenario as to the crime corroborating the evidence of pws-01, 02 and 03. The evidence of aforesaid 05 live witnesses regarding injuries of the victim also supported by the evidence of pw-08, the doctor of the post mortem

examination report who narrated the cause of death of the victim in the following manner,

> ***"One old incised wound size about 3" X 2" X ½" depth cutting of skin, pericranium bone of right side of parietal region of head and one old incised wound 1 ½" X ½" X ¼" depth over right partial region of head below the injury no.1."***

And the Doctor opined that death was due to cardio respiratory failure as a result of shock and hemorrhage due to consequence injuries described which was ante mortem and homicidal in nature.

The injuries of the victim as stated by pws-01 to 05 have been supported by the post mortem examination report in which two injuries are mentioned on the head of the victim and below the injury No. 01. So, there is no doubt about the injuries inflicted on the victim in the house of the condemned prisoner at the relevant time. It has also been supported by material exhibits- I to V namely blood stained Sharee and blouse, colored photos, bone of head and medical documents of the victim.

In respect of these material exhibits no suggestion has been given by the defence that these materials are not belonged to the victim of the case and subsequent death of the victim was not occurred due to the above two injuries inflicted by the condemned prisoner as deposed by the prosecution witnesses. It is not found in evidence that the defence put any suggestion to the witnesses that the victim died due to other reasons or negligence of doctors.

It appears from the impugned judgment of the trial court that the victim earlier filed a case against the condemned prisoner on an allegation that he assaulted her for demand of dowry at Tk-20,000/- and sent her to her father's house for meeting his demand. Subsequently the victim was taken back to the house of the condemned prisoner following an amicable settlement. But he made remarks thereafter saying that he would show the music for lodging the case against him so that such initiative does not arise further in future. It has been narrated in the ejaher, exhibit-01 that,

"#mB ‡_#K wewfbœmg q Zvnvi vAvg vi ‡e vb#K
ûgvK vwqv e‡j #h, #Zv#K #Km K i vi gRv‡`Lv e|
Avi #hb #Km K i‡Z bvc wvim #mBiKg e¨vw¯'vK i‡e v
e vi !!!!!!!!!!"

Having considered the facts of the earlier case and subsequent threat it has meant that the condemned prisoner had gathered some grievances in his mind to take action against his wife as to why she made allegation against him by filing a criminal case. So, from this version of evidence it is clearly found probe that the condemned prisoner made himself prepared from before to take revenge on the person of the victim and subsequently he did it on the day of occurrence within his custody. Moreover, the injury inflicted on the head of the victim is so severe that became enough to cause the death. So, the intention of killing is clearly found present in the act and conduct of the condemned prisoner. Therefore, we do not find any cogent ground on this point to consider in the argument of the learned Advocate for the defence.

Having considered the above ground and attending circumstances of the case, it appears that the condemned prisoner made attack intentionally on the person of the victim to take his revenge liquidating her forever.

Now we are to see whether the marital relationship was subsisting between the victim and the condemned prisoner at the relevant time. It appears from evidence on record that admittedly the victim of the case came under attack at the courtyard of the condemned prisoner and no one denied during cross-examination of the witnesses that both of them had no marital relationship as husband and wife at the relevant time rather it has come into evidence that they have a 13 year old son named Masum Billah. Even there is no denial given by the defence that the victim did not receive the injuries within the periphery of condemned prisoner and the defence does not feel to take a plea of alibi that he was not present in his house at the time of commission of crime. And as such, responsibility goes to the condemned prisoner to explain how his wife

sustained severe injuries at the courtyard of his house. There is no explanation as to the cause of injuries on the person of the victim shown by the condemned prisoner neither in course of cross-examination of the prosecution witnesses nor at the time of examination under section 342 of the Cr.P.C. So he cannot escape his sacred responsibility as per section 106 of the Evidence Act. Defence simply said in its suggestion that victim was attacked by unknown person but why, it was not suggested by defence. The reason must be there to be explained by the condemned prisoner as husband. The attack as allegedly made by unknown persons in the house of the condemned prisoner is seemed to be a vague term used by the defence in the given suggestion. It does not carry any legal value to consider in favour of the defence.

In the absence of any other proof as to the injuries of the wife by her husband i.e. if the husband failed to explain the cause of injuries inflicted on the person of the victim in his periphery, which proves that it was none but the

husband to be liable. It finds support from the case of Golam Murtuza –Vs- State, reported in 9 BLC [AD] 2004, 229 where their Lordships opined that,

> ***"In the absence of any other proof of commission of murder of the wife in other way and in the absence of explanation coming from the side of the husband of the wife for the murder of his wife in his custody and it being proved by evidence that the condemned prisoner demanded dowry some days before murder of his wife and the report of post- mortem containing several injuries on the person of Bilkis Banu proving her death and fact of abscondence from the house on the day of occurrence of murder and the petitioner murdered his wife for dowry as has been rightly found by the high court division."***

To make the husband liable the minimum fact that must be fetched on record either by direct or circumstantial evidence that the husband was in the house at the relevant time and the victim was within his custody. In the present case in hand we find evidence given by the

prosecution witnesses particularly pws-01 and 03-05 who found the victim lying at the courtyard of condemned prisoner with a severe head injuries that cannot be brushed aside in any way. Even pw-01 narrates that he saw the accused persons including the condemned prisoner fleeing away in a shameful manner when he rushed to the crime site. It is also pertinent to mention here that in respect of wife killing case, it is very rear to get the eye witness proving the incident as the wife lives within the custody of the husband. None of the inmates of the house comes forward to provide evidence against his relative like the husband of the wife. In such a situation, the prosecution has to rely on circumstantial evidence. In the instant case, we find some of the evidence as to the injuries of the victim inflicted within the vicinity of the condemned prisoner. In finds support from the case of the State –Vs- Md. Shafiqul Islam, reported in 43 DLR [AD] 92, it was held by our Apex Court that,

> ***"In such a case, there could be no eye-witness of the occurrence, apart from inmates of the house who may refuse to tell the truth. The neighbours may not also come forward to depose. The prosecution is, therefore, necessarily to rely on circumstantial evidence".***

The learned defence lawyer contends by referring to a decision of AIR 1953 [SC] 76 that the examination of accused under section 342 of the Cr.P.C was not done properly by the learned Trial Judge. Having gone through the examination of the accused under section 342 of the Cr.P.C, we find that the learned Trial Judge at the time of examination of the accused brought the incriminating pieces of evidence to the notice of the accused. It also appears from evidence of the prosecution witnesses that the defence has elaborately cross-examined the witnesses. Both the accused and his engaged lawyer followed the proceeding of the case all the time in the trial court and the accused was asked if he had anything to say. He replied simply in the negative that he was innocent. We do not find any grave error or complaint in the examination under

section 342 of the Cr. P.C so that the condemned prisoner could be prejudiced. Having minor error or irregularity in the conduct of examination under section 342 of the Cr.P.C, the trial will not be vitiated as it is always curable.

It also finds support from the case of Abdur Razzak and another-Vs-State, reported in 28 DLR [AD] 35, learned judges of the Apex Court opined that,

> ***"It is to be remembered that consensus of judicial opinion is that trial will not be vitiated if there is no question of prejudice due to any flaw in the examination of the accused under section 342.***
>
> ***The defence challenged the prosecution case in respect of the alleged statement of appellant Abdur Razzaque to pw-1 Humayan Kabir, Officer-in-charge and the recovery of the rifle and the magazine containing 7 live cartridges in pursuance of his alleged statement. It also appears that all the prosecution witnesses were cross-examined at length on behalf of the appellants and thorough cross-examination the whole case of the defence was put before the Court and to the witnesses. The appellants were fully***

aware of the prosecution case and heard the evidence from start to finish. They had therefore no difficulty to follow the trial proceeding. After close of the prosecution case they were examined under section 342. It was put to them that they had heard the evidence in details against them and they were asked if they had anything to say. Their reply was simply that they were innocent.

In these circumstances it cannot be said that because of the general question put to the appellants while examined under section 342 any miscarriage or failure of justice has been caused and as such there arises no question of prejudice of the appellants in the trial held against them. It will be expedient to mention here that similar view was taken by the Federal Court as regards the examination of the accused similar manner in the case of Abdul Wahad –Vs- the Crown reported in 7 DLR (FC) 87. "

In the instant case, it appears from the evidence on record that the condemned prisoner all along was present in the court and he heard the evidence adduced by the prosecution witnesses from start to finish. Placing the all

evidence to the notice of the accused, learned judge asked him if he had anything to say. His reply was simply that he was innocent.

Further contention of the learned Advocate is that the son of the victim as well as condemned prisoner named Masum Billah did not come forward to give evidence in proving the allegation of this case, although his name has been cited as witness in the charge sheet and the prosecution with ill-motive restrained to produce him before the trial court so that real fact of the incident could not be leaked out. Replying to this event it can be said that there is no hard and fast rule that the prosecution has to examine all the witnesses proposed in the charge sheet. If the allegation is proved by other witnesses, no need to produce more witnesses to prolong the trial process in a wife killing case. However, it is very difficult task on the part of a son during tender age to take side either of the parties and that might have happened in his life to be silent.

In this case there are two incidents to be proved by the prosecution under section 11 (ka) of the Nari-0-Shishu Nirjaton Damna Ain, 2000. First incident is demand of dowry and second incident is killing of the victim for not meeting dowry money. Now the question is before us whether the prosecution has been able to prove the allegation of demand of dowry against the condemned prisoner. On perusal of the evidence of all prosecution witnesses it appears that the victim was sent to her father's house to meet the demand of dowry of the condemned prisoner after beating her up. During her stay in her father house, she filed a case vide No. 41 of 2004 with Nari-O-Shishu Nirjatan Daman Tribunal on the allegation of demand of dowry against the condemned prisoner under section 11 (ga) of the Nari-O-Shishu Nirjatan Daman Ain, 2000. Following an amicable settlement she was taken back to the vicinity of the condemned prisoner before later incident took place.

Had the victim met the informant or her relatives to say that the condemned prisoner further demanded money as dowry from her, is totally absent in the evidence of the prosecution witnesses. Although the pw-1 has claimed that his sister was inflicted by the condemned prisoner for dowry but as to when and where he was told by his sister victim regarding further demand of dowry is not present in the evidence. Since, the source of information as to the demand of dowry is absent and subsequent hearsay evidence given by other pws are not admissible in law. With the said evaluation it can be firmly envisaged that the prosecution has not been able to prove the allegation of demand of dowry beyond reasonable doubt.

More so, it has emerged from the evidence on record and the impugned judgment that in the earlier case the Tribunal by its judgment dated 26.01.2010 found the condemned prisoner guilty under section 11(ga) of the said Ain and sentenced him to suffer rigorous imprisonment for a period of 3[three] years with a fine of Tk-5,000/-

before the impugned judgment was delivered. Question may arise at this stage whether the demand of dowry can be created more than once. Answer is obviously positive. But in this case we find that victim brought an allegation earlier against the condemned prisoner for his illegal demand of dowry under torture and humiliation. Such allegation brought by the victim made the condemned prisoner ferocious and infuriated. Ultimately it turned into an attack on the victim by the condemned prisoner after being enraged. So the second incident took place not for dowry. If it is considered at this moment that the victim subsequently died after being tortured by the condemned prisoner for not meeting the dowry then it would be double standard practice in the criminal dispensation of justice because for demanding dowry, the condemned prisoner has already been punished on trial by this time. Under article 35(2) of the Supreme Law of the Land clearly prohibits that no person shall be prosecuted and punished for the same offence more than once and according to

section 403 of the Cr.P.C it would also be a principle of double jeopardy if a person is convicted or acquitted for the same offence more than once.

It appears from record that the condemned prisoner was apprehended on 28.09.2004 in connection with the instant case. From that day till delivery of the impugned judgment he was remained in normal cell of the jail. Thereafter, he was shifted to condemned cell since 20.05.2010 as of today. And the victim of the case died around 04[four] months after the incident. In that view of the facts as stated above and considering the entire evidence and circumstances of the case we are constrained to hold that justice will be met if the condemned prisoner is sentenced to imprisonment for life instead of awarding him to sentence to death.

Since the cause of death for dowry against the condemned prisoner has not been proved under section 11(ka) of the Nari-O-Shishu Nirjaton Damon Ain, 2000 the conviction from the offence of section 11(ka) of the

Nari-O-Shishu Nirjatan Daman Ain, 2000 passed by the learned Judge of the Nari-O-Shishu Nirjaton Daman Tribunal, Satkhira is altered to one of section 302 of the Penal Code and he is sentenced to imprisonment for life with a fine of Tk-5000/-[five thousand], in default, to suffer rigorous imprisonment for three months more.

In the result, the Death Reference is hereby rejected. The Criminal Appeal No. 3404 of 2010 along with Jail Appeal 158 of 2010 is also dismissed with the aforesaid modification in the sentence.

The condemned prisoner be shifted from the condemned cell to normal cell meant for similar convicts at once.

Send down the lower courts record along with a copy of this judgment expeditiously.

Md. Jahangir Hossain, J

I agree

Rashida/B.O