

at 11:30 am which was registered as Chokoria P.S. Case No.17/167 wherein the informant being father of deceased Hasina Begum (14) alleged that 6 years ago condemned prisoner Anowar Hossain (hereinafter referred to as the appellant/the convict-appellant/ the condemned prisoner) had married his eldest daughter Farida Begum, who had two children. About 2/3 months ago, the condemned prisoner wanted to take away his daughter Hasina to his (appellant) house for pleasure trip but his (informant) wife refused it. The informant also alleged that 14/15 days prior to the occurrence, the appellant came to his house and took along the deceased with him to his house for pleasure trip. He then alleged that on 20.08.1995 at 10:00 am he came to know from local people that the dead body of the deceased was found at paddy field at Gaitarchar and accordingly, he went there and saw the same and then came to the police station. He further alleged that on coming to the police station, he found the appellant, who on asking disclosed that on 19.08.1995 at 10:00 am while he went out of the house for driving rickshaw, he met accused Matiur Rahman and Jane Alam on his way and they inquired about the departure of the deceased while he told them that he would take deceased with him at 7/7:30 p.m. Accordingly, the appellant with the deceased started their journey towards his in-law's house and when they reached at Gaitarchar at about 8:00 p.m., they saw Matiur and Jane Alam were

there. The appellant, Matiur Rahman and Jane Alam raped the deceased one after another. When the deceased told that she would narrate the incident to people, they caused her to death by strangulation. The informant lodged the FIR with the local police station.

The police after receipt of the postmortem report and after finding *prima facie* case submitted charge sheet against the condemned prisoner and two other accused persons under section 6(4) of the Nari O Shishu Nirjatan Daman (Bishes Bidhan) Ain, 1995 (shortly, the Ain).

The condemned prisoner and accused Matiur Rahman were ultimately placed on trial and charged under section 6(4) of the Ain was framed against them. The charge so framed was read over and explained to them who pleaded not guilty and claimed to be tried. The accused Jane Alam was absconding since the occurrence and he had been tried in absentia.

During trial, the prosecution examined as many as 12 witnesses and all of them were cross-examined by the defence. The defence examined none. After closure of the prosecution witnesses, the condemned prisoner and Matiur were examined under section 342 of the Code of Criminal Procedure, 1898 to which they repeated their innocence.

The defence case as it transpires from the trend of cross-examination is total denial and their case, inter alia, is that the occurrence as alleged by the prosecution is false and that they have been falsely implicated in this case out of enmity and grudge.

The learned Additional Sessions Judge, as Judge of Nari O Shishu Adalat (hereinafter referred to as the trial court) after considering the evidence, confessional statement of the condemned prisoner and the facts and circumstances of the case found the condemned prisoner guilty of the charge under section 6(4) of the Ain and convicted him thereunder and sentenced him to death. The trial Court found accused Matiur Rahman and Jane Alam not guilty of the charge leveled against them and acquitted them accordingly.

The condemned prisoner along with accused Matiur Rahman were defended by both state defence lawyer and private lawyer in the trial court. The condemned prisoner Anowar preferred Jail Appeal No.1984 of 1999 and the matter of death penalty has been referred before the High Court Division by the learned Judge, Nari O Shishu Adalat under section 374 of the Code of Criminal Procedure, 1898 for confirmation.

The High Court Division on 26.10.2002 and 27.10.2002 heard the Jail Appeal No.1984 of 1999 along with the Death Reference No.22 of 1999 and after hearing, the High Court Division by its

judgment and order dated 02.11.2002 accepted the Death Reference and dismissed the Jail Appeal.

Being aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the appellant has preferred this Criminal Appeal.

Mr. Md. Iqbal Kabir, the learned advocate, appearing for the appellant, has taken us through the FIR, the inquest report, the postmortem report, the charge sheet, the testimonies of the witnesses, the judgment and order passed by the trial court and the High Court Division, the connected materials on record and submits that there was only circumstantial evidence, but no eye witness of the occurrence was found to examine and most of the P.Ws. are the close relatives of the appellant and due to serious conspiracy and enmity they involved the appellant in this case, thus the impugned judgment and order passed by the High Court Division is liable to be interfered. He also submits that the High Court Division was absolutely wrong in passing the impugned judgment and order on the evidence of close relatives of the deceased, who are also the close relatives of the convict-appellant and on extraneous consideration, the same has occasioned failure of justice in this case, since each circumstances relied upon by the prosecution must be established by cogent, succinct and reliable evidence and the proved circumstances must be unequivocal point to the guilt of the accused.

Mr. A. M. Amin Uddin, the learned Attorney General for Bangladesh, appearing on behalf of the respondent, supported the judgment and order passed by the High Court Division and prays for the dismissal of the appeal.

We have heard the learned advocates appearing on behalf of both the parties and examined the FIR, the testimonies of the witnesses, inquest report, postmortem examination report, charge sheet, the judgment and order of conviction and sentence passed by the trial court, judgment and order of affirmation of conviction and sentence passed by the High Court Division in Death Reference and the connected materials on record.

Now, to ascertain whether the prosecution has been able to prove the charge against the appellant Anowar Hossain, let us examine and analyse the depositions of the witnesses produced by the prosecution.

P.W.1, Aneatul Karim Chowdhury, ex-chairman of Purbo Baro Vawla Union claimed that on 19.08.1995 at 10:00 p.m. accused Anowar Hossain's elder brother Noor Hossain along with 2/3 persons came to him and informed that while Anowar Hossain was taking his sister-in-law Hasina Begum to his father-in-law's house (Hasina's father's house), some people abducted his sister-in-law. He also claimed that at that time U.P. member Belal Uddin was present there and accordingly, he told him to search but after searching

P.W.2, Belal Uddin came and told that the deceased could not be traced. He then claimed that on 20.08.1995 at 5/5:30 a.m. accused Anowar Hossain came and informed him that the dead body of deceased was found at the paddy field at Gaitarchar. However, he directed accused to file case but at that time accused was found pale and his behavior and conduct was, somewhat, suspicious. He further stated he, thereafter, went to the police station and found accused Anowar Hossain there. Meanwhile, the informant came to the police station. Further he claimed that subsequently he came to know that accused Anowar Hossain, Matiur Rahman and Jane Alam after committing rape killed the deceased.

During cross-examination he declined the suggestion that as he told that he did not know anything about the occurrence, the daroga did not record his statement. He also declined the suggestion that he did not know anything about the occurrence and that he deposed falsely.

P.W.2, Belal Uddin, U.P. member claimed that Noor Hossain, brother of accused Anowar Hossain while narrated the occurrence on coming to the house of Chairman, he was then present there and as per direction of P.W.1 he searched for the deceased at night, but could not trace her. He also claimed that in the following morning at 5:00 a.m. (on 20.08.1995) the accused Anowar Hossain and Noor Hossain on coming to his house disclosed that the dead body of

deceased was found at paddy field at Gaitarchar. He further claimed that then he along with Noor Hossain and Anowar Hossain went to the house of Chairman (P.W.1) and informed him of the same. Thereafter, they went to the police station while informant on coming to police station lodged the FIR. He further claimed that, later on, they came to know that accused Matiur Rahman, Anowar Hossain and Jane Alam killed the deceased by strangulation after committing rape.

During cross-examination he stated that he did not see how Hasina had been killed. He stated that there was injury on the throat of the deceased. He denied the suggestion that he deposed falsely.

P.W.3, Dr. Md. Mafizul Alam, claimed that on 21.08.1995 he held postmortem examination on the dead body of deceased and found injuries on the dead body. In his opinion, the cause of death was due to asphyxia resulting from strangulation, which was ante-mortem and homicidal in nature. He also claimed that during postmortem examination, it was found that the deceased was raped before murder. Deceased's Hymen was ruptured and that marks of violence generally remain absent while there is no capacity for obstruction.

During cross-examination, he stated that if a girl does not resist during rape, there remains no sign of injury. He denied the

suggestion that during postmortem examination there was no alamot of rape before killing of the deceased.

P.W.4, Isahak Miah, the informant and father of the deceased Hasina Begum, claimed that the condemned prisoner Anowar Hossain husband of his eldest daughter Farida Begum was taking the deceased to his house 14/15 days before the occurrence for pleasure trip. On 19.08.1995, at 7/7:30 p.m. accused Anowar Hossain while taking his daughter towards his house, on the way at Gaitarchar accused Anowar Hossain along with Matiur Rahman and Jane Alam raped her daughter forcibly and killed her by strangulation and kept the dead body at the paddy field. He also said that on 20.08.1995 at 9:00 a.m. he came to know that the dead body of deceased was found at paddy field at Gaitarchar. He, thereafter, went to police station and found Chairman, Member, accused Anowar Hossain, dafadar and others there and in their presence accused Anowar Hossain on asking by Officer-in-Charge of the police station disclosed that he along with Matiur Rahman and Jane Alam raped the deceased and the moment she told them that she would disclose the same, they killed her by strangulation and kept the dead body at the paddy field. He further stated that he lodged the FIR at the police station.

During cross-examination, he stated that the daroga has not seized anything from the place of occurrence. He denied the

suggestion that he found any injury on the body of Anowar Hossain. He also denied the suggestion that he did not find any injury on the body of his daughter.

P.W.5, Farida Begum, full sister of the deceased claimed that 10/12 days prior to the occurrence, her husband Anowar Hossain carried the deceased to her house from her father's house for pleasure trip. She stated that on the alleged date accused Anowar Hossain came at home after Magrib prayer and then started for her father's house along with her sister Hasina but after one and half hour accused Anowar Hossain returned home alone. At that time there was mud on the cloth of accused Anowar Hossain and after coming home he became senseless. She also claimed that Anowar Hossain's elder brother Noor Hossain then came and they all poured water on the head of the accused Anowar Hossain. After gaining sense accused Anowar Hossain on asking about Hasina disclosed that accused Matiur Rahman and Jane Alam after beating him snatched away Hasina and then raped her. She then claimed that while the deceased Hasina told them that she would disclose the same, they killed her by strangulation. She stated that her brother-in-law Noor Hossain then narrated the occurrence to the Chairman, Member and on the following morning the dead body of the deceased was found at paddy field at Gaitarchar.

During cross-examination she stated that the dead body of her sister was found on the following morning. She denied the suggestions that to protect her husband she deposed falsely.

P.W.6, Noor Ayesha and P.W.10, Dr. Pauchonu were tendered by the prosecution and defence declined to cross-examine them.

P.W.7, Noor Hossain, elder brother of the condemned prisoner, claimed that on the alleged date after Magrib prayer he came to the old house and found that accused Anowar Hossain had just come home after driving rickshaw and thereafter he started for his father-in-law's house along with Hasina but after half an hour he came back and became senseless. At that time there was mud on his cloth and then water was poured on his head. After gaining sense, on asking about Hasina he disclosed that on way to Gaitarchar accused Matiur Rahman and Jane Alam snatched away Hasina and then raped her. He also disclosed that while Hasina told that she would disclose the same, they killed her by strangulation. He narrated the occurrence to Chairman, Member and others, but on the following morning the dead body of deceased was found at the paddy field.

During cross-examination he denied the suggestion that he did not know anything about the occurrence.

P.W.8, Md. Mizanur Rahman, Magistrate 1st class, stated that he recorded the confessional statement of the condemned prisoner

Anowar Hossain after observing all the legal formalities. The confessional statement is true and was made voluntarily.

During cross-examination he denied the suggestion that the accused was compelled to make confessional statement out of police torture.

P.W.9, Abdur Rashid, Constable No.226, stated that he carried the dead body of deceased Hasina to the morgue along with constable Shajahan and then duly identified the dead body to the doctor.

Defence declined to cross-examine him.

P.W.11, Md. Shajahan, Constable No.229, stated that he carried the dead body to the morgue along with P.W.9.

During cross-examination he stated that he got the dead body on 20.08.1995 and on the same day he brought the same to the Cox's Bazar hospital.

P.W.12, Bashir Ahmed, the Investigating Officer, stated that he conducted the investigation, visited the place of occurrence, prepared sketch map and index of the place of occurrence, sent the dead body to the morgue for postmortem examination by a constable, seized alamot by preparing a seizure list, examined witnesses under section 161 of the Code of Criminal Procedure, 1898 and then submitted the charge sheet against the condemned prisoner and two other accused persons.

During cross-examination he stated that in the inquest report it was stated that there was no injury on the chest or back of the dead body. He denied the suggestion that he submitted false charge sheet.

These are the witnesses produced by the prosecution. Among the witnesses P.W.1 is the chairman and P.W.2 is the member of the Purbo Baro Vawla Union Parishad, P.W.4 is the father of the deceased, P.W.5 is the full sister of the deceased, P.W.7 is the elder brother of the appellant, P.Ws.3,8,9,11-12 are the official witnesses and P.Ws.6 and 10 were tendered by the prosecution.

From the materials on record, it is clear that there is no eye witness to the occurrence. Both the trial court and the High Court Division convicted the appellant based on circumstantial evidence and confessional statement as made by the appellant Anowar Hossain.

It is admitted that the deceased Hasina Begum is the sister-in-law of the condemned prisoner Anowar Hossain and about 14/15 days prior to the occurrence the deceased was taken to the house of Anowar Hossain. It is also admitted that on the date of occurrence, the deceased was taken back to Anowar Hossain's father-in-law's house and there is no denial of killing of the deceased at Gaitarchar in custody and presence of Anowar Hossain. Also from the deposition of P.W.5 and P.W.7, it is clear that the occurrence took

place at Gaitarchar while Anowar was taking back the deceased to her father's house and there was mud on the cloth of the appellant.

P.Ws.1 and 2 claimed that they had heard the occurrence from P.W.7. P.W.7 stated that accused Matiur Rahman and Jane Alam abducted the deceased from Anowar Hossain, but he did not mention the name of Matiur Rahman and Jane Alam to P.Ws.1 and 2. The P.W.5 and P.W.7 in a voice claimed that accused Matiur Rahman and Jane Alam abducted the deceased from Anowar Hossain and they killed the deceased after committing rape.

P.W.5 is the daughter of P.W.4 and P.W.7 is the close relative of P.W.4. Though they are close relatives of P.W.4, the father of the deceased, they did not inform the matter of abduction of the deceased at the very fateful night to the informant and the police station. P.Ws.5 and 7 stated that the appellant after coming back home with mud on his cloth narrated the abduction of the deceased, but the appellant did not inform the matter to the informant and the police station which gives scope of thinking regarding the involvement of the appellant with the occurrence. It is crystal clear that in the custody of the appellant the alleged occurrence took place and on the following morning the dead body was discovered.

P.Ws.1 and 2 in their depositions stated that the appellant was found pale and his conduct and manner was suspicious. P.W.1 stated that he directed P.W.2 to keep an eye on the condemned

prisoner. They claimed that thereafter they came to know that the appellant killed the deceased after committing rape in connivance with accused Matiur Rahman and Jane Alam. P.W.4 the informant as well as the father of the deceased claimed that on going to the police station, he found P.Ws.1,2, dafadar, Anowar Hossain and others while Anowar Hossain confessed his guilt before people.

On the alleged date, taking the deceased by the appellant and also remaining present at the place of occurrence till killing the deceased is admitted and on the following morning the dead body was recovered. It is crystal clear that from the beginning to the end condemned prisoner suppressed the real fact and he gave false information to both P.Ws.5 and 7 to confuse them.

The appellant made confessional statement under section 164 of the Code of Criminal Procedure, 1898 before the Magistrate of 1st Class, P.W.8 which reads as follows:

“আমার শালী হাছিলা আমার বাড়িতে বেড়াইতে এসেছিল। ১৯-৮-৯৫ ইং ১৯.৩০ ঘটিকায় আমার শালীকে তাহার বাড়িতে নিয়ে রওয়ানা দেই। ঘাটে পৌঁছার আগে ভাঙ্গা রাস্তায় জানে আলম পিং করিম উল্লাহ ও মতিয়র রহমান পিং অজ্ঞাত সাং পূর্ব বড় ভেঙলা আমার শালীর সাথে খারাপ কাজ করিবে বলিয়া আমাকে প্রস্তাব দেয়। আমি মানা করিলে তাহারা খারাপ কাজ করিয়া শালীকে আগাইয়া দিবে বলিয়া জানায়। আমি রাজি না হইলে তাহারা আমাকে ২০০ টাকা দিতে চায়। আমি রাজি না হইলে মতিয়র রহমান আমার শালীকে চিপে ধরে শোয়ায় এবং মুখ চিপে ধরে আর জানে আলম ধর্ষণ করে। এরপর আমাকে ধর্ষণ করতে বলে। তখন আমি ধর্ষণ করি। এরপর মতিয়র রহমান করে। মতিয়র রহমান উঠে এলে আমার শালী তার বাপকে বলে দিবে বলে জানায়। তখন জানে আলম ও মতিয়র রহমান তাকে চিপে ধরে।

মতিয়র রহমান গলা চিপে তাকে মেরে ফেলে । আমি বাঁধা দিলে তাহারা বাঁধা মানে নাই ।
মতিয়র রহমান আমাকেও আঘাত করেছে ।“

On perusal of the confessional statement it is found that the appellant raped the deceased but denied the killing. It is admitted that at the time of occurrence the appellant did not raise any alarm and did not inform the informant of the incident. It is also admitted that the appellant was taking the deceased to the house of informant and the deceased was in custody of the appellant.

From the materials on record, it appears that P.W.8, Md. Mizanur Rahman, Magistrate 1st Class, recorded the confessional statement following all the procedures required to be followed by law and we find the confessional statement of the appellant was made voluntarily and it is true and it was rightly found to be so by both the trial court and the High Court Division.

From the deposition of P.W.3, Dr. Md. Mafizul Alam, and postmortem report, it is clear that there were injuries on the person of the deceased and the cause of death of the deceased was opined due to asphyxia resulting from strangulation which was ante-mortem and homicidal in nature. P.W.3 also stated in the postmortem report that he found the deceased was raped before she was killed. He also stated that hymen was ruptured and that the marks of violence generally remain absent while victim got no capacity for obstruction. All the P.Ws. categorically stated that

accused Matiur Rahman and Jane Alam after abducting the deceased from the custody of the appellant killed her by strangulation after committing rape by one after another, the appellant also took part in committing rape the deceased.

Charge against the accused Matiur Rahman and Jane Alam was not proved, therefore, they were acquitted from the charge leveled against them. The appellant was convicted and sentenced to death based on confessional statement and circumstantial evidence. The confessional statement of the accused was made voluntarily and it is true. The confessional statement made by the appellant is inculpatory in nature. It is well settled that an accused can be convicted on the sole basis of the confessional statement recorded under section 164 of the Code of Criminal Procedure, 1898 if the confessional is made voluntarily and it is found to be true.

As there is no eye witness in the instant case, we are inclined to examine the circumstantial evidence. The principle of circumstantial evidence to prove the guilt of an accused is that the prosecution has to prove the circumstantial evidence beyond reasonable doubt and the chain of circumstances should be cogent and consistent showing that the accused is compatible with the circumstances. If the evidence is analyzed, we can find the chain of circumstances linking on fact with the other about the complicity of the convict-appellant. The first chain was to take the deceased by the

appellant towards the house of the informant, the father of the deceased. The second chain was the so called abduction of the deceased in the custody of the appellant but he did not raise any alarm after the abduction. The third chain was not to inform the informant and the police station regarding the abduction, rape and killing of the deceased in front of the appellant. Fourth chain was that the appellant was looking pale and suspicious after the occurrence as narrated by P.Ws.1 and 2. We find the consistency regarding the involvement of the convict-appellant Anowar Hossain so far as regards the chain of circumstances disclosed in the instant case. It was held in *the State vs. Arman Ali and others* [42 DLR(AD) (1990) 50] that, **“In a case based on circumstantial evidence, before any hypothesis of guilt can be drawn on the basis of circumstances, the legal requirement is that the circumstances themselves have to be proved like any other fact beyond reasonable doubt.”** In this case, the prosecution has been able to prove the circumstantial evidence involving the complicity of the convict-appellant Anowar Hossain with the alleged death after committing rape upon the deceased beyond reasonable doubt.

The punishment for murder after committing gang rape has been specified in section 6(4) of the Nari O Shishu Nirjatan Daman (Bishesh Ain), 1995. Section 6(4) of the Ain reads as follows:

“৬। ধর্ষণের শাস্তি ঃ(১).....

(২).....

(৩).....

(৪) যদি একাধিক ব্যক্তি দলবদ্ধভাবে ধর্ষণ করিয়া কোন শিশু অথবা নারীর মৃত্যু ঘটান বা ধর্ষণ করার পর কোন শিশু বা নারীর মৃত্যু ঘটান তাহা হইলে ঐ সকল ব্যক্তি মৃত্যুদণ্ডে দণ্ডনীয় হইবেন।”

In the Ain the only punishment provided for murder after committing rape was death sentence. In the case of *Bangladesh Legal Aid and Services Trust (BLAST) and others vs. Bangladesh, represented by the Secretary, Ministry of Home Affairs, Dhaka and others* [67 DLR (AD) 185 the Appellate Division of our Supreme Court has declared sub-section (2) and (4) of section 6 of the Nari O Shishu Nirjatan Daman (Bishesh Ain), 1995 *ultra vires* the constitution. In pursuance of the judgment and order passed by the Appellate Division, Nari O Shishu Nirjatan Daman (Bishesh Ain), 1995 was amended by Nari O Shishu Nirjatan Daman Ain, 2000 and section 6 of the Ain was repealed. In section 9 of Nari O Shishu Nirjatan Daman Ain, 2000 the punishment for murder after committing rape was passed death sentence or imprisonment for life and a fine of Taka not exceeding 1(one) lac.

In the above mentioned case (reported in 67 DLR(AD) 185) the Appellate Division declared sub-section (2) and (4) of section 6 *ultra vires* holding that, "A provision of law which deprives the court to use of its beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was

committed and, therefore without regard to the gravity of the offence cannot but be regarded as harsh, unfair and oppressive. The legislature cannot make relevant circumstances irrelevant, deprive the court of its legitimate jurisdiction to exercise its discretion not to impose death sentence in appropriate cases. Determination of appropriate measures of punishment is judicial and not executive functions. The court will enunciate the relevant facts to be considered and weight to be given to them having regard to the situation of the case. Therefore we have no hesitation in holding the view that these provisions are against the fundamental tenets of our Constitution, and therefore, *ultra vires* the Constitution and accordingly they are declared void."

From the materials on record, it is found that the appellant Anowar Hossain has been in the condemned cell for more than 22 (twenty two) 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 and the decision of *Bangladesh Legal Aid and Services Trust (BLAST) and others vs. Bangladesh, represented by the Secretary, Ministry of Home Affairs, Dhaka and others* [67 DLR (AD) 185] as well as the circumstances of this case, we are of the view that justice would be sufficiently met if the sentence of death of the appellant Anowar Hossain be commuted to one of imprisonment for life.

Accordingly, the appeal is **dismissed** and the sentence of the appellant is commuted to imprisonment for life and to pay a fine of Tk.5,000.00, in default, to suffer imprisonment for 15(fifteen) days more. The appellant shall get the benefit of section 35A of the Code of Criminal Procedure, 1898 and remission as per law.

C. J.

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