

16 SCOB [2022] AD 36**APPELLATE DIVISION****PRESENT:****Mr. Justice Muhammad Imman Ali****Mr. Justice Hasan Foez Siddique****Mr. Justice Md. Nuruzzaman****Mr. Justice Obaidul Hassan****CRIMINAL APPEAL NO.142 OF 2014 WITH JAIL PETITION NO.22 OF 2014**

(From the judgement and order dated the 2nd day of July, 2014 passed by the High Court Division in Death Reference No. 42 of 2009 with Jail Appeal No.430 of 2009).

Masum Billah alias Md. Masum Billah**Appellant/Petitioner****(In both the cases)****-Versus-****The State****. . . Respondent****(In both the cases)**

For the Appellant
(In CrI. A. No. 142 of 2014)

Mr. Mansurul Haque Chowdhury
Senior Advocate
Instructed by
Mr. Zainul Abedin
Advocate-on-Record

For the Petitioner
(In Jail P. No.22 of 2014)
For the Respondent
(In CrI. A. No. 142 of 2014)

Not represented

Mr. Biswajit Debnath,
Deputy Attorney General
Instructed by
Mr. Haridas Paul
Advocate-on-Record

For the Respondent
(In Jail P. No.22 of 2014)

Not represented

Date of hearing and judgement

The 7th day of December, 2021

Editors' Note

This case involves killing of a child and causing grievous injury on the head of the mother of the child while both the victims were sleeping in their bedroom. There was no eye witness in this case. After arrest the appellant gave a confessional statement. The Appellate Division found the confessional statement of the Appellant voluntary and true and also held that there was no sudden provocation to bring the offence within the category of culpable homicide not amounting to murder and therefore, confirmed the findings of the Courts below as to the conviction of the appellant. But considering, among others, the peculiar circumstances that the appellant out of grudge dealt stone blows aimed at the head of Khadiza Begum (PW2) but that accidentally struck the head of victim Farzana and as a result of that the minor child died instantly, commuted appellant's death penalty to imprisonment for life.

Key Words**Commutation of death penalty; Section 302 of Penal Code****Commutation of death Penalty:**

According to the confessional statement, the appellant out of grudge dealt the blows aimed at the head of Khadiza Begum (PW2) but that accidentally struck the head of victim Farzana and as a result of that the minor child died instantly. Taking that into consideration and all other aspects we are of the opinion to commute the sentence of death to imprisonment for life. ... (Para 17)

JUDGMENT**Muhammad Imman Ali, J:**

1. Delay of 140 days in filing Criminal Appeal No.142 of 2014 is hereby condoned.
2. This criminal appeal was preferred against the judgement and order dated 02.07.2014 passed by the High Court Division in Death Reference No.42 of 2009 heard along with Jail Appeal No.430 of 2009 accepting the reference and dismissing the jail appeal thereby maintaining the judgement and order of conviction and sentence passed by the Additional Metropolitan Sessions Judge, Court No.4, in Sessions Case No.205 of 2006 under section 302 of the Penal Code sentencing the appellant to death.
3. The prosecution case, in brief, is that the convict-appellant Md. Masum Billah being the nephew of informant Delowar Hossain used to stay in the rented house of the informant but he was ousted from the said rented house as his moral character deteriorated. Thereafter, the convict-appellant was trying to cause harm to the informant by using slang language and also uttered threat to teach good lesson. About 10 days before occurrence, the convict-appellant threatened the informant by unutterable slang language. On 10.09.2005 at about 6.45 A.M, the informant went to work leaving his wife and minor daughter in his rented house. On the same day at about 5.00 P.M. he was informed by Rehana Begum (PW5) another Sub-lessee of the house through mobile phone that the door of the western room was found shut from inside but the lock of the front door was found broken and the household articles of the rooms were found vandalised. At about 6.15 P.M. he along with other inmates broke open the lock, entered into the bedroom and found his wife and daughter lying injured on the bed, bleeding profusely. He took his wife and minor daughter to the hospital but the Doctor declared his daughter, Farzana dead and found his wife's condition to be serious. She was admitted to the hospital. The informant suspected the convict-appellant and lodged FIR. The wife of the informant, after being released from hospital disclosed the name of the convict-appellant as the assailant. The convict-appellant remained absconding till he was arrested by the Police, and after Police remand he made a confessional statement before the Magistrate.
4. The police investigated the case, visited the place of occurrence, prepared sketch map, seized *alamots* and prepared seizure list, recorded statements of the witnesses under section 161 of the Code of Criminal Procedure (the Code). The accused made a confessional statement which was recorded under section 164 of the Code of Criminal Procedure. After investigation, on 31.10.2005 police submitted charge sheet against the appellant under sections 302/307/325/380/411 of the Penal Code.

5. After submission of police report the case record was transmitted to the Court of learned Metropolitan Sessions Judge, Chattogram and it was registered as Sessions Case No.205 of 2006. Ultimately, the trial was held by the learned Additional Metropolitan Sessions Judge, Court No.4, who framed charge against the condemned prisoner under Sections 325, 302 and 380 of the Penal Code. The charges were read over to the sole accused to which he pleaded not guilty and claimed to be tried.

6. During trial the prosecution examined 17 witnesses and they were cross examined. After completion of the evidence the accused was examined under Section 342 of the Code of Criminal Procedure whereupon he again pleaded his innocence and produced three defence witnesses.

7. Upon hearing the parties and considering the evidence and materials on record the Additional Metropolitan Sessions Judge, 4th Court, Chattogram by the judgement and order dated 16.06.2009 convicted the accused Masum Billah under section 302 of the Penal Code for the murder of Farzana Akter Emu and sentenced him to death with fine of Tk.1,000/-.

8. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death of the convict-appellant, which was registered as Death Reference No.42 of 2009. Before the High Court Division, the convict-appellant Masum Billah preferred Jail Appeal No.430 of 2009, which was heard along with the death reference.

9. By the impugned judgement and order, the High Court Division accepted the reference and dismissed Jail Appeal No.430 of 2009 confirming the judgement and order of conviction and sentence passed by the trial Court.

10. Hence, the instant criminal appeal was filed before this Division.

11. Mr. Mansurul Haque Chowdhury, learned Senior Advocate appearing on behalf of the appellant submitted that the conviction and sentence is bad in law and facts and the prosecution did not prove the case beyond reasonable doubt but the Court awarded the sentence of death and as such the judgement of the High Court Division is liable to be set aside. He further submitted that the prosecution witnesses did not disclose the case properly as they all are not the eye witnesses of the fact but only on the basis of the circumstantial evidences the learned Judge awarded the capital punishment of death. He also submitted that the learned Judge did not consider the defence case and the witnesses at all and ignoring the witnesses awarded the capital punishment for death which is not sustainable in law. He further submitted that the confessional statement of the appellant, if believed, shows that he had no intention to deal any blow on the child victim and, therefore, he had no intention to cause her death. He lastly submitted that the appellant's sentence of death may be commuted to imprisonment for life.

12. Mr. Biswajit Debnath, learned Deputy Attorney General appearing on behalf of the respondent made submission in support of the impugned judgement and order of the High Court Division. He also submitted that this is a cold blooded killing of a child and also causing grievous injury on the head of the mother of victim Farzana while both the victims were sleeping in their bedroom. He further submitted that the appellant being outsider intentionally entered into the bedroom of the victims and caused stone (puta) blow on the head of victim Khadiza Begum (mother of the deceased child) first and thereafter, dealt a stone blow on the head of deceased victim Farzana Akter Emu, and receiving such blow the victim died instantaneously. He further submitted that there is no defence case by which the

act of the appellant can be considered within the exceptions as provided in Section 300 of the Penal Code. He submitted that the confessional statement made by the appellant if it is read together with the evidence of PW2, clearly and unambiguously proves beyond doubt that the appellant entered into the occurrence house with an intention to kill PW2 and inflicted the blow with a stone (puta) and thereafter caused blow on the head of the victim Farzana who died and thereafter the victim Khadiza Begum after taking treatment in the hospital for 18 (eighteen) days was released and as such the sentence as awarded against the appellant is liable to be sustained.

13. We have considered the submissions of the learned Advocate on behalf of the appellant and the learned Deputy Attorney General for the State, perused the impugned judgement and order of the High Court Division and other connected papers on record. It transpires that the convict-appellant had made a confessional statement regarding the facts of this case. The Magistrate who recorded the statement was examined in Court as PW3 who has recorded the said statement after complying with all the mandatory requirements of law as provided in sections 164 and 364 of the Criminal Procedure Code. During cross-examination there was nothing to suggest that the said statement was not voluntary and true. The defence witnesses DW1, DW2 and DW3 also deposed that the appellant had admitted to them the fact of causing blow on the head of victim Khadiza Begum with a stone (puta). It appears to us that the said statement made by the appellant is voluntary and true.

14. In the instant case the fact of sudden provocation and other considerations to bring an act of commission of offence within the category of culpable homicide not amounting to murder are absent. In the instant case it has been well proved by the evidence of PW2 as well as by the confessional statement of the appellant that the appellant with a view to strike blows on the head of the victim entered into the occurrence room and dealt blows without being provoked by the victims. Nothing is available on record to justify the act of the appellant.

15. Regarding the sentence imposed upon the convict-appellant, the learned Advocate prayed for commuting the sentence of death to one of imprisonment for life.

16. Mr. Mansurul Haque Chowdhury, pointed out that appellant has suffered in the condemned cell for about 12 years and has been suffering for a much longer period in custody, since he faced the trial. He has no previous conviction according to the charge sheet and does not pose any threat to society.

17. According to the confessional statement, the appellant out of grudge dealt the blows aimed at the head of Khadiza Begum (PW2) but that accidentally struck the head of victim Farzana and as a result of that the minor child died instantly. Taking that into consideration and all other aspects we are of the opinion to commute the sentence of death to imprisonment for life.

18. In the result the appeal is dismissed. The sentence of death of the appellant Masum Billah alias Md. Masum Billah, son of Abdus Salam Akond, of Village-West Baniakhali, Police Station-Sharankhola, District-Bagerhat is commuted to imprisonment for life and also to pay a fine of Tk.50,000/-(fifty thousand), in default, to suffer rigorous imprisonment for 2(two) years more. He will get the benefit of section 35A of the Code of Criminal Procedure in calculation of his sentence and other remission as admissible under the Jail Code.

19. Jail Petition No.22 of 2014 is disposed of in the light of the judgement passed in Criminal Appeal No.142 of 2014.