

**17 SCOB [2023] AD 69****APPELLATE DIVISION****PRESENT:****Mr. Justice Hasan Foez Siddique****-Chief Justice****Mr. Justice Md. Nuruzzaman****Mr. Justice Obaidul Hassan****Mr. Justice Borhanuddin****Mr. Justice M. Enayetur Rahim****Mr. Justice Md. Ashfaqul Islam****Mr. Justice Md. Abu Zafor Siddique****Mr. Justice Jahangir Hossain****CRIMINAL REVIEW PETITION NO. 03 of 2020**

(From the judgment and order dated 15.03.2020 passed by this Division in Criminal Appeal No. 95 2014)

**Anowar Talukder****..... Petitioner****-Versus-****The State, represented by the Deputy  
Commissioner, Madaripur****..... Respondents**

For the Petitioner

Mr. Munsurul Hoque Chowdhury, Senior Advocate with Mr. Md. Helal Uddin Mollah, Advocate instructed by Mrs. Syeda Maimuna Begum, Advocate-on-Record.

For the Respondent

Mr. A.M. Aminuddin, Attorney General with Mr. Mohammad Saiful Alam, Assistant Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.

Date of Hearing

The 12<sup>th</sup> January, 2023

Date of Judgment

The 19<sup>th</sup> January, 2023**Editors' Note**

The petitioner of the case was sentenced to death for murdering his wife. The sentence was confirmed by the High Court Division and was upheld by the Appellate Division. Learned Counsel on behalf of the petitioner submitted during review hearing that death penalty was imposed upon the petitioner based on circumstantial evidence where there were several missing links. Further submission of the Counsel was that the petitioner is in condemned cell for more than 18 years. Therefore, considering his prolonged custody in the condemned cell he should be acquitted. The Appellate Division taking into consideration the prolonged custody in the condemned cell of the petitioner together with the fact that under the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 sentence of death was the only punishment for an offence committed by the petitioner but subsequently in the Nari-O-Shishu Nirjatan Daman Ain, 2000 imprisonment for life for the same offence was also included, commuted the sentence of the petitioner to

**imprisonment for life from death.****Key Words:**

Commutation of death sentence; prolonged custody in condemned cell; Nari-O-Shishu Nirjatan Daman Ain, 2000; sections 4 and 10 of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995

**The law is well settled that there must be some circumstances of a compelling nature together with prolonged custody which would merit consideration for commutation.**

**(Para 13)**

**The condemned prisoner has been languishing with the agony of death in the condemned cell for almost 18 years not due to any fault of his own. That being the situation, the fact of prolonged incarceration together with the discussion that we made above fortified with the recently passed decision of this Division can be considered as a mitigating circumstances and for that reason we are inclined to modify the order of sentence and commute the sentence of death to that of imprisonment for life.**

**(Para 18, 19)**

**JUDGMENT****Md. Ashfaquul Islam, J:**

1. This petition under Article 105 of the Constitution is for review of the judgment and order dated 15.03.2017 passed in Criminal Appeal No. 95 of 2014 arising out of judgment and order dated 07.11.2010 passed by the High Court Division in Death Reference No. 151 of 2005 along with Jail Appeal No. 1174 of 2005 confirming the judgment and order of conviction and sentence dated 02.10.2005 passed by the Nari-O-Shishu Nirjatan Daman Tribunal-2, Madaripur in Nari-O-Shishu Nirjatan Daman Case No. 49 of 1998 under sections 4 and 10 of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 (hereinafter referred to as Ain, 1995) and sentencing him to death and acquitting the other accused persons.

2. The relevant facts of the case are that on 02.04.1998, Abul Kahsem Kha, father of the victim, as informant, lodged the First Information Report (FIR) with the Rajoir Police Station, Madaripur, alleging that four years back the victim was married to Anwar Talukder, the condemned prisoner. At the time of marriage the condemned prisoner demanded tk. 75,000/- as dowry of which the informant was initially compelled to pay an amount of tk. 40,000/- thinking about his daughter's peaceful married life. Thereafter, the condemned prisoner started insisting the victim to bring the remaining amount of dowry money but on her failure she was subjected to torture off and on. On 16.03.1998 at about 11.00 am his brother-in-law, Emarot Bepari, came to the informant who resides in Dhaka and informed him that the condemned prisoner and the members of his family burnt his daughter, Ranu Begum to death for dowry. The informant along with his brother-in-law and others went to the place of occurrence where they did not find anybody in the house. On inquiry it was revealed from the condemned prisoner's neighbors that at around midnight of 13.03.1998 the condemned prisoner and his family members killed the victim by pouring kerosene and setting fire on her body.

3. After examination of investigation, police submitted charge sheet against the condemned prisoner and four other under sections 4, 10 and 14 of the Nari-O-Shishu Ain,

1995 and final report against the three other accused persons, who were also brought under the purview of the case on allowing the Naraji Petition filed by the informant.

4. The Tribunal framed charge against the convict-petitioner under sections 4 and 10 of the said Ain of 1995 and against the rest 7(seven) accused persons under sections 4/10/14 of the said Ain to which all the accused persons pleaded not guilty and prayed for trial. At the trial the prosecution examined as many as sixteen witnesses but the defence examined none.

5. After examination of the witnesses the convict petitioner and all the accused persons were examined under section 342 of the Code of Criminal Procedure whereupon all of them again pleaded not guilty and prayed for trial without adducing any witness. The trial court on consideration of the evidence on record found the condemned-petitioner guilty of the offence and convicted him under sections 4 and 10 of the Ain, 1995 and sentenced him to death by judgment and order of conviction and sentence dated 02.10.2005 and acquitted all other accused persons on the ground that the prosecution failed to prove the charge brought against them.

6. Pursuant to the aforesaid judgment and order of conviction a death reference was sent before the High Court Division under section 374 of the Code of Criminal Procedure for confirmation of the same which was registered as Death Reference No. 151 of 2005. Side by side the condemned prisoner also filed jail Appeal No. 1174 of 2005. The High Court Division heard the death reference along with the said jail appeal together and on consideration of the materials on record confirmed the death sentence and dismissed the jail appeal by judgment and order dated 07.11.2010.

7. Being aggrieved by and dissatisfied with the aforesaid judgment and order dated 07.11.2010, the condemned prisoner as appellant preferred Criminal petition for leave to appeal being No. 19 of 2011 and obtained leave giving rise to Criminal Appeal No. 03 of 2020 which upon hearing this Division dismissed the appeal holding that the conviction and sentence of death of the convict appellant was rightly affirmed by the High court Division against which the instant review petition has been filed by the condemned prisoner.

8. Mr. Munsurul Hoque Chowdhury, the learned Senior Advocate appearing with Mr. Md. Helal Uddin Molah, the learned Advocate for the petitioner made his submissions for reviewing the judgment of this Division mainly on the ground that the death penalty under section 4 and 10 of the Ain, 1995 have been inflicted totally depending on circumstantial evidence where there are several missing link. Therefore, in the absence of any eye witness or direct evidence as such, the convict petitioner should be acquitted.

9. He further submits that the petitioner voluntarily surrendered before the trial court on 13.10.2020 since then he has been languishing in jail. He has never been enlarged on bail by the trial court, High Court Division and this Division and he is in condemned cell from the

date of judgment passed by the Nari-O-Shishu Nirjatan Daman (Bishesh Bidahan) Adalat, Madaripur for more than 18 years. Therefore, he submits that considering his prolonged custody in the condemned cell for more than 18 years he should be acquitted.

10. Mr. A.M Aminuddin, the learned Attorney-General appearing for the State, submits that in view of the evidence and nature of offence committed by the petitioner, this Division rightly upheld the sentence of death of the petitioner and that there is no error of law apparent on the face of the record in the judgment of this Division.

11. Admittedly, the case is based on circumstantial evidence and there is no ocular witness/evidence or eye witness to the occurrence.

12. As regards of the conviction we are of the view that there is no scope to interfere with the same. Only thing that remains for consideration whether under the facts and circumstances of the case the sentence of death should be possible to commute.

13. The law is well settled that there must be some circumstances of a compelling nature together with prolonged custody which would merit consideration for commutation. From that point of view whether the inordinate incarceration of the condemned prisoner in the custody connected with the fact that the other co-accused of the instant case had been acquitted by the trial court may be considered as mitigating factor in this regard is one of the aspect to evaluate the issue.

14. In the case of Nazrul Islam vs. state 66 DLR AD 199 this Division unequivocally held where the period spend in the condemned cell is not due to any fault of the convict and where the period spend in the custody is inordinately long, it may be considered as a extenuating/compelling mitigating circumstances for commutation of sentence of death.

15. Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 has been subsequently repealed by the Nari-O-Shishu Nirjatan Doman Ain, 2000 (hereinafter referred to as Ain, 2000). In that repealed Ain section 34 provided for the trial of cases instituted or pending under the repealed Ain to be continued as if the Ain, 1995 has not been repealed. This section 34 of Ain, 2000 was declared ultra vires the Constitution in the decision of Bangladesh Legal Aid and Services Trust (BLAST) Vs. Bangladesh, represented by the Secretary, Ministry of Home Affairs, Dhaka and Ors. 67 DLR AD 185. This changed scenario of criminal jurisprudence certainly has an impact upon the instant case. The judicial pronouncements thus crystallized having a positive bearing in the instant case as well as in the administration of criminal justice.

16. Under the previous Ain, 1995 sentence of death is the only punishment for an offence under sections 4 and 10 of the Ain, but subsequently Ain, 2000 made provisions for imprisonment for life for the same offence. But the petitioner have been convicted and

sentenced to death. With the repeal of Ain of 1995, the sentences prescribed therein in respect of similar nature of offences are changed by the Ain of 2000, therefore, our judicial conscious pricks when we note that under the previous Ain, 1995, no option other than sentence of death was available to the court.

17. It is noted with care that in recently passed series of decisions such as Anowar Hossin vs. the State 74 DLR AD 55, Md. Humayun vs. the State 74 DLR AD 123, Samaul Haque Lalon vs. the State 74 DLR AD 151, Alaich Mahmud vs. the State 74 DLR AD 107, Noor Mohammad and Ors. vs. the State 74 DLR AD 170, Md. Mohasin Mollah vs. the State 74 DLR AD 212 and so on the principle as aforesaid for commutation of sentence of death to that of imprisonment for life have been considered.

18. The condemned prisoner has been languishing with the agony of death in the condemned cell for almost 18 years not due to any fault of his own.

19. That being the situation, the fact of prolonged incarceration together with the discussion that we made above fortified with the recently passed decision of this Division can be considered as a mitigating circumstances and for that reason we are inclined to modify the order of sentence and commute the sentence of death to that of imprisonment for life.

20. In the result, the Criminal Review Petition No. 03 of 2020 is dismissed. The sentence of death of the petitioner, Anowar Talukder is commuted to imprisonment for life and also to pay a fine of Taka 50,000/- (fifty thousand), in default, to suffer rigorous imprisonment for 5 (five) 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.

21. The concerned Jail Authority is directed to move the petitioner to the regular jail from condemned cell forthwith.