18 SCOB [2023] AD 45

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. 66 of 2022
with
CRIMINAL REVIEW PETITION NO. 67 of 2022
with
CRIMINAL REVIEW PETITION NO. 69 of 2022

(From the judgment and order dated 05.04.2022 passed by this Division in Criminal Appeal No. 90 of 2013 with Criminal Appeal No.108 of 2013 with Criminal Petition Nos. 257, 260 of 2022 and 322-323 of 2019 and Jail Petition Nos. 27-28 of 2014)

Md. Zahangir Alam **….. Petitioner (In Crl. R. P. No. 66 of 2022)**
Dr. Miah Md. Mohiuddin **….. Petitioner (In Crl. R. P. No. 67 of 2022)**
Md. Abdus Salam **….. Petitioner (In Crl. R. P. No. 69 of 2022)**

-Versus-

The State **….. Respondent (In all the petitions)**

For the Petitioner (In Crl. R. P. No. 66 and 69 of 2022)	:	Mr. S.N Goswami, Senior Advocate with Mr. N.K. Saha, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Petitioner (In Crl. R. P. No. 67 of 2022)	:	Mr. S.M. Shahjahan, Senior Advocate with Mr. Abdul Haque, Advocate instructed by Mrs. Shirin Afroz, Advocate-on-Record.
For the Respondent (In all the petitions)	:	Mr. A.M. Aminuddin, Attorney General with Mr. Sk. Md. Morshed, Addl AG, Mr. Mohammad Saiful Alam, AAG, Mr Sayem Mohammad Murad, AAG, Ms. Tamanna Ferdous, AAG and Ms. Abantee Nurul, AAG instructed by Ms. Sufia Khatun, Advocate-on-Record.
Date of Hearing	:	16th, 19th and 23rd February, 2023
Date of Judgment	:	2nd March, 2023

Editors' Note:

Dr. S. Taher Ahmed a Professor of the University of Rajshahi was brutally killed at his varsity residence. All the convict petitioners were found guilty and sentenced to death by the Tribunal. The High Court Division commuted the sentence of death to imprisonment for life awarded to convict Md. Abdus Salam and Md. Nazmul. It confirmed the sentence of death awarded to the appellant Dr. Miah Md. Mohiuddin and Md. Zahangir Alam. Against which, they preferred criminal appeals, criminal petitions and jail petitions and the state preferred criminal petitions. The Appellate Division dismissed all those cases and affirmed the judgment and order of the High Court Division. Against that judgment of the Appellate Division these review petitions were filed by the convicts. In the review petitions learned Counsel of the convicts made the same submission that they had made during appeal hearing without pointing to any error apparent on the face of the record that has been committed in the judgment passed by the Appellate Division. The Appellate Division finding no ground for reviewing its earlier decision dismissed all the review petitions observing that there is hardly any scope of rehearing of the matter afresh as a court of appeal in a review petition. It also observed that if the cases are reopened on flimsy grounds which have already been addressed by the courts then there will be no end to the litigation.

Key Words:

Article 105 of the Constitution; Rule 1 of Order XXVI of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988; error apparent on the face of the record; commutation of sentence

Article 105 of the Constitution and Rule 1 of Order XXVI of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988:

The core question for consideration is whether there is error apparent on the face of the record which calls for interference of the impugned judgment. It is an established jurisprudence that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only against patent error of law. Where without any elaborate argument one could point to the error and say that here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions to be entertained about it, a clear case of error apparent on the face of the record would be made out. It is only a clerical mistake or mistake apparent on the face of the record that can be corrected but does not include the correction of any erroneous view of law taken by the Court. (Para 23)

For entertaining a review an error has to be one which is so obvious that keeping it on the record will be legally wrong:

Further, it has now been settled that an error is necessary to be a ground for review but it must be one which is so obvious that keeping it on the record will be legally wrong. The moot point is, a party to a litigation is not entitled to seek a review of judgment merely for the purpose of rehearing or a fresh decision of the case. The power can be extended in a case where something obvious has been overlooked-some important aspects of the matter has not been considered, the court can reconsider the matter. There are exceptional cases where the court can remedy its judgment. In the alternative, it may be said that the error must also have a material real ground on the face of the case. (Para 24)

Delay in the disposal of this case cannot by itself be a ground for commuting the sentence of death:

From the nature of the offence it appears to us that the petitioner is in no way entitled to get any sympathy. We do not find any mitigating or extenuating circumstances on record for commutation of the sentence of death. Delay in the disposal of this case cannot by itself be a ground for commuting the sentence of death to one of imprisonment for life since the crime committed by the petitioner was premeditated senseless, dastardly and beyond all human reasonings. (Para 29)

There must be accountability for gruesome violations of our penal law:

We insist on accountability for gruesome violations of our penal law because that is how we defend the law and demonstrate our insistence on respect for the law going forward in a progressive legal system. If we fail to ensure accountability across the legal system by ending impunity, we risk undermining the very beneficial effects to which the nascent accountability drive that has built over the past decades. That is the final message we would wish to propel in adjudicating this significant criminal review.

(Para 34)

JUDGMENT

Md. Ashfaqul Islam, J:

1. All the review petitions are directed against a judgment of this court in its appellate forum maintaining the death sentence awarded to the petitioners Md. Zahangir Alam, Dr. Miah Mohammad Mohiuddin and commutation of sentence from death to imprisonment for life awarded to Md. Abdus Salam.

2. The prosecution case, in short, was that, Dr. S. Taher Ahmed was the senior most Professor of the Department of Geology and Mining, University of Rajshahi. He was a Member of both the Departmental Planning Committee and the Expert Committee of the University. Pursuant to the pre-concerted plan, Dr. Taher was brutally killed at his Quarters (Pa-23/B) by all the accused in furtherance of their common intention 01.02.2006 after 10.00 P.M. or thereabout on his arrival thereat from Dhaka. After the killing of Dr. Taher, his dead body was dumped into a manhole behind the place of occurrence house. In the morning of 03.02.2006, his dead body was recovered from the manhole. Thereafter, the son of the victim, namely, Mr. Sanjid Alvi Ahmed alias Himel (P.W.1), lodged an ejahar with Motihar Police Station, Rajshahi.

3. The Investigating Officers P.W.47 Md. Omar Faruk, P.W.48 Md. Golam Mahfiz and P.W.49 Achanul Kabir investigated the case. Accused Zahangir Alam, Abdus Salam and Nazmul made confessional statements before P.W.46 Magistrate Jobeda Khatun recorded under section 164 of the Code of Criminal Procedure. Finding prima facie case, the last Investigating Officer submitted a charge-sheet against all the accused including the acquitted accused Md. Azim Uddin Munshi and Md. Mahbub Alam @ Saleheen for committing offence punishable under section 302/201/34 of the Penal Code.

4. The Tribunal charged all the accused except Azim Uddin Munshi under section 302/34 of the Penal Code and the co-accused Azim Uddin Munshi was charged under section 201 of the Penal Code. They pleaded not guilty thereto and claimed to be tried.

5. The defence version of the case, as it appears from the trend of cross-examination of the prosecution witnesses, was that the accused are innocent and have been falsely implicated in the case and the alleged confessional statements of the accused Zahangir, Salam and Nazmul are the products of police torture, oppression and maltreatment and the P.W.25 Dr. Md. Sultan-Ul-Islam Tipu and P.W.29 Golam Sabbir Sattar Tapu are responsible for the death of Dr. Taher.

6. After hearing both the parties and upon perusing the materials on record and having regard to the attending facts and circumstances of the case, the Tribunal came to the conclusion that the prosecution brought the charge home against the appellants and petitioners, and accordingly, it convicted and sentenced them. The Tribunal also found the co-accused Saleheen and Azim Uddin Munshi not guilty and accordingly acquitted them.

7. Against the said judgment and order of the Tribunal, the convicts preferred criminal appeals and jail appeals. The Tribunal transmitted the record to the High Court Division for confirmation of the sentence of death which was registered as Death Reference No.57 of 2008. The High Court Division by the impugned judgment and order, dismissed the Criminal Appeal No.3455 and 4058 and Jail Appeal Nos.631-634 of 2008. However, the High Court Division commuted the sentence of death to imprisonment for life awarded to convict Md. Abdus Salam and Md. Nazmul. It confirmed the sentence of death awarded to the appellant Dr. Miah Md. Mohiuddin and Md. Zahangir Alam. Against which, they preferred criminal appeals, criminal petitions and jail petitions and the state preferred Criminal Petitions. By a judgment and order dated 05.04.2022 this Division dismissed all those cases and affirmed the death sentence awarded to the petitioners Md. Zahangir Alam, Dr. Miah Mohammad Mohiuddin and commutation of sentence from death to imprisonment for life awarded to Md. Abdus Salam. Against which the present review petitions have been filed by the convicts.

8. In the judgment the charges and evidence of the witnesses both oral and documentary have been meticulously considered and after evaluation of the same this court affirmed the sentence of death awarded to the two petitioners and commutation of sentence from death to imprisonment for life awarded to the another petitioner as mentioned above. In a review matter this court cannot re-assess the evidence afresh and re-hear the case. This court disposes of the points so far as it is relevant for the disposal of the matter. Learned Counsel argued on various points as if he were arguing an appeal and accordingly we refrained from discussing those points on reassessment of the evidence.

9. Mr. S.N Goswami, the learned Senior Advocate appearing for the petitioners in Review petition Nos. 66 and 69 of 2022 has submitted a written argument. His contention is that this court committed error of law in believing the confessional statements made by the accused petitioners without considering the following points:

1. Confessional statement of accused Jahangir was not voluntary in nature.
2. Confession recorded by Magistrate in violation of Section 164(3), Code of the Criminal Procedure cannot be used to convict the Appellant.
3. Confessional statement of accused Jahangir was not true.
4. Retracted confession should be corroborated in material particular by other evidence.

10. The points raised by the learned counsel as above have already been answered by this Division in the appeal. This court has thoroughly assessed the evidence of the witnesses both oral and documentary and on a careful evaluation of the confessional statements, found that

their statements are consistent with one another and corroborates the version given by each other and opined that confessing accused were speaking the truth. Therefore, those points are beyond the ambit of review and there is no scope for reconsideration of those facts.

11. The learned Senior Advocate further submits that the accused petitioner is in the condemn cell for more than $14^{1}/_{2}$ years suffering the pangs of death and it may be a good ground for commutation of sentence of death.

12. Mr. S.M. Shahjahan, the learned Senior Advocate appearing for the petitioner in Review petition No. 67 of 2022 has adopted the same argument advanced by the learned Senior Advocate Mr. S.N Goswami.

13. On the other hand Mr. A.M. Aminuddin, the learned Attorney General appearing for the State, submits that this Division elaborately discussed the evidence and answered those points raised by the learned Senior Counsel in the judgment sought to be reviewed. Since the points have already been considered by this Division in the judgment and the learned Counsel failed to show any error of law apparent on the face of the record in the conclusion arrived at by this Division, the points raised by the learned Counsel do not call for any interference.

14. Let us first discuss the relevant law, rules and decisions of the apex courts of home and abroad to maintain a petition for review in a criminal proceeding.

15. Provision of Article 105 of the Constitution empowers this Division to review its judgment pronounced or Order made "subject to the provisions of any Act of Parliament or of any Rules made by the division". This Division has made Rules for the review of criminal proceeding.

16. Rule 1 of Order XXVI in part IV of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988 provides:-

> "Subject to the law and the practice of the Court, the Court may, either of its own motion or on the application of a party to a proceeding, review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, rule 1 of the Code of Civil Procedure and in a Criminal Proceeding on the ground of an error apparent on the face of the record."

17. In the case of Zobaida Naher @ Jharna Vs. Khairunnessa being dead her heirs Md. Feroz Alam and others 3 BLC (AD) 170 it has been observed:

> "A review cannot be granted to urge fresh grounds when the judgment itself does not reveal an error apparent on the face of the record. To allow such a prayer for review is to allow re-hearing of the appeal on points not urged by a party".

18. For better understanding let us now discuss what is an error apparent on the face of the record. This has been explained in the case of AHM Mustain Billah vs Bangladesh 57 DLR (AD) 41. The concept of error apparent on the face of the record has been explained by his lordship Md. Fazlul Karim, J at paragraphs 27-28:

> "Mere error of fact or law is no error on the face of the record. It is such obvious error of law, which has either crept through Court's oversight or Counsel's mistake and failure to explain the legal position by the learned Counsel for the party. The error must be such which at a glance can be detected without advancing elaborate argument.

Though there is no hard and fast rule as to what is an error apparent on the face of the record but the same depends on the facts and circumstances of each case. But there could not be an error apparent on the face of the record merely because two possible views as to the interpretation or application of law vis-a-vis the particular facts of a case, one view accepted by the Court though may be erroneous but could not be the ground of review even if a decision or order is erroneous in law or on merits, the same shall not amount to an error apparent on the face of the record."

19. In the case of Zulfikar Ali Bhutto Vs. Suite reported in PLD 1979 SC 741 as to scope of review and what is error apparent it has been observed:

"In Order that an error may be a ground for review, it is necessary that it must be one which is apparent on the face of the record, that is, it must be so manifest, so clear that no Court could permit such an error to remain on the record. It may be an error of fact or of Law, but it must be an error which is self-evident and floating on the surface, and does not require any elaborate discussion or process of ratiocination. The contention that the exposition of the Law is incorrect or erroneous, or that the Court has gone wrong in the application of the Law to the facts of the particular case: or that erroneous inferences have been drawn as a result of appraisal or appreciation of evidence, does not constitute a valid ground for review. However, an Order based on an erroneous assumption of material fact, or without adverting to a provision of Law, or a departure from an undisputed construction of the Law and the Constitution may amount to an error apparent on the face of the record. At the same time if the judgment under review or a finding contained therein, although suffering from an erroneous assumption of facts, is sustainable on other grounds available on the record then although the error may be apparent on the face of the record, it would not justify a review of the judgment or the finding in question. In other words, the error must not only be apparent, but must also have a material bearing on the fate of the case. Errors of inconsequential import do not call for review."

20. In a good number of cases of this Division including the case of Mazdar Hossain Vs. Ministry of Finance 7 BLC (AD) 92 it has been held:

"A review is no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies where an error apparent on the face of the record exists. It is not a rehearing of the main appeal. Review is not intended to empower the Court to correct the mistaken view of law, if any, taken in the main judgment. It is only a clerical mistake or mistake apparent on the face of the record that can be corrected by leave but does not include the correction of any erroneous view of law taken by the Court."

21. In the case of Sow Chandra Kanta and another Vs. Sheik Habib reported in AIR 1975(SC) 1500 where Krishna Iyer, J. observed as follows:

"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition through different counsel of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step."

22. A review cannot be granted to urge fresh grounds when the judgment itself does not

reveal an error apparent on the face of the record. To allow such a prayer for review is to allow a re-hearing of the appeal on points not urged by a party. We find support for this view from the following observation of Hamoodur Rahman, CJ in Mohd Hussain vs. Ahmad Khan, 1971 SCMR 296 (297):

> "A review cannot be granted on the ground that the Counsel appearing at the original hearing did not argue or press a particular point which was available to him then and could have been found out with a little amount of diligence. This would really amount to granting a re-hearing of a matter merely to make good the failure on the part of Counsel to argue all the points that could have been argued. This cannot furnish an adequate ground for review."

23. The core question for consideration is whether there is error apparent on the face of the record which calls for interference of the impugned judgment. It is an established jurisprudence that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only against patent error of law. Where without any elaborate argument one could point to the error and say that here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions to be entertained about it, a clear case of error apparent on the face of the record would be made out. It is only a clerical mistake or mistake apparent on the face of the record that can be corrected but does not include the correction of any erroneous view of law taken by the Court.

24. Further, it has now been settled that an error is necessary to be a ground for review but it must be one which is so obvious that keeping it on the record will be legally wrong. The moot point is, a party to a litigation is not entitled to seek a review of judgment merely for the purpose of rehearing or a fresh decision of the case. The power can be extended in a case where something obvious has been overlooked-some important aspects of the matter has not been considered, the court can reconsider the matter. There are exceptional cases where the court can remedy its judgment. In the alternative, it may be said that the error must also have a material real ground on the face of the case.

25. This Division has repeatedly held that the court should not be oblivious of the theme that when the finality is attached to the judgment delivered by a court, particularly the judgments at the apex level of the judicial hierarchy, upon a full-fledged hearing of the parties, a review petition being neither in the nature of a rehearing of the whole case nor being an appeal against judgment, review is not permissible only to embark upon a reiteration of the same contention which were advanced at the time of hearing of the appeal, but were considered and repelled in the judgment under review. It was also expressed that while dispensing justice, it is the duty of the court to resolve the issue of law properly brought before it and once it is done, the finality is reached and then a review cannot be made on any grounds whatsoever. It is because of the fact that an opinion pronounced by this Division which stands at the apex of the judicial hierarchy should be given finality and any departure from that opinion will be justified only when circumstances of a substantial and compelling character make it necessary to do so.

26. Thus, the powers of review can be exercised sparingly within the limits of the statute. In the realm of law the courts and even the statues lean strongly in favour of finality of decisions legally and properly made. If the cases are reopened on flimsy grounds which have already been addressed by the courts then there will be no end to the litigation. That is why,

the power of review is restricted by given guidelines of the apex courts of the sub-continent.

27. Another vital aspect in respect of sentence of death for the offence of murder has been spelt out in the case of Rasedul Islam vs. State 68 DLR (AD) (2016) 114 which is as under:-

> "Predictably the exceptions to section 300 of the Penal Code have no application in this case and the accused persons have also not taken any plea in this regard. When such an act which is eminently dangerous and must in all probability cause death is committed with knowledge that death might be the probable result without any excuse,' the offence is murder. This clause applies only to a case of dangerous actions without intention to cause specific bodily injury to any person. The knowledge which accompanies the acts must be death. The act was so eminently dangerous that it must in all probability cause death. The sentence provided for the offence of murder is death and only in extraneous circumstances, life sentence may be awarded. On consideration of the brutality of the incident, the High Court Division has rightly confirmed the sentence of death to the petitioners. No special reason is required to be assigned in awarding the death sentence if the offence attracts section 302. Since the sentence of death is the legal sentence for murder particularly if the murder is perpetrated cold-bloodedly and in the absence of any extenuating circumstances to commute the sentence, this Division has committed 'no error of law in maintaining the petitioners' sentence. The accused petitioners were involved in heinous crime which was committed with inhuman brutality and the very nature of the incident called for no other than the extreme penalty provided in law. The enormity of the crimes and the gravity of the situation in which it was committed outweigh the consideration of other factors to consider the commutation of the sentence. As regards delay, it is now settled that mere delay is not a legal ground for commutation of the sentence."

28. But in the instant case, the learned Counsel for the petitioners argued the case, as if treating the case one as a regular appeal without attempting to make out a case one of error in the decision apparent on the face of the record or that the judgment is liable to be reviewed for any substantial reasons or any statutory provision was unnoticed in the impugned judgment.

29. From the nature of the offence it appears to us that the petitioner is in no way entitled to get any sympathy. We do not find any mitigating or extenuating circumstances on record for commutation of the sentence of death. Delay in the disposal of this case cannot by itself be a ground for commuting the sentence of death to one of imprisonment for life since the crime committed by the petitioner was premeditated senseless, dastardly and beyond all human reasonings.

30. On the question of confessional statements, this court has discussed the evidence thoroughly in support of the plea and disbelieved the defence plea. All points agitated by the learned counsels on behalf of the petitioners are not relevant for disposal of the review petition. The points raised by the learned counsels are reiteration of the points agitated at the time of hearing of the appeal.

31. In a recent decision of Md. Shukur Ali vs. the State 74 DLR AD 11 of this Division his lordship Mr. Obaidul Hassan, J observed:

> "We hold that confessional statement of a co-accused can be used against others non-confessing accused if there is corroboration of that statement by other direct or circumstantial evidence. In the instant case, the makers of the confessional statements vividly have stated the role played by other co-accused in the rape incident and murder of the deceased which is also supported/corroborated by the inquest report, postmortem report and by the depositions of the witnesses particularly the deposition of P.Ws. 1, 2, 3, 10, 11, 12, 14 and 18 regarding the marks of injury on the body of the deceased. Every case should be considered in the facts and circumstances of that particular case. In light of the facts and circumstances of the present case, we are of the view that the confessional statement of a co-accused can be used for the purpose of crime control against other accused persons even if there is a little bit of corroboration of that confessional statement by any sort of evidence either direct or circumstantial. (Emphasis added). Thus, the accused namely Shukur and Sentu are equally liable like Azanur and Mamun for murdering the deceased after committing rape."

32. Further in the instant case his Lordship Mr. Hasan Foez Siddique, CJ maintained:

> "There was no provocation and the manner in which the crime was committed was brutal. It is the legal obligation of the Court to award a punishment that is just and fair by administering justice tempered with such mercy not only as the criminal may justly deserve but also the right of the victim of the crime to have the assailant appropriately punished is protected. It also needs to meet the society's reasonable expectation from court for appropriate deterrent punishment conforming to the gravity of offence and consistent with the public abhorrence for the heinous offence committed by the convicts. It is unfortunate but a hard fact that appellants and petitioners have committed such a heinous and inhumane offence. The murder of a genius professor of the University has shocked the collective conscience of the Bangladeshi people. It has a magnitude of unprecedented enormity."

33. Culture of impunity and magnanimity in no way can over shadow the fathomless detestable offence that has been committed in this ill-fated ugly case. Mercy cannot be an option in such type of case.

34. We insist on accountability for gruesome violations of our penal law because that is how we defend the law and demonstrate our insistence on respect for the law going forward in a progressive legal system. If we fail to ensure accountability across the legal system by ending impunity, we risk undermining the very beneficial effects to which the nascent accountability drive that has built over the past decades. That is the final message we would wish to propel in adjudicating this significant criminal review espousing incidents that were horrendous and vile.

35. Fortified with the decisions and discussions as made above we are of the view that there is hardly any scope of rehearing of the matter afresh as a court of appeal in a review petition. Further in the instant petition the learned counsel fails to point out any error in the judgment apparent on the face of the record. Therefore, all the review petitions merit no consideration and accordingly those are dismissed.