4 SCOB [2015] AD 20

Appellate Division

PRESENT
Madam Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Mohammad Anwarul Haque
Mr. Justice Hasan Foez Siddique

CRIMINAL APPEAL NO. 14 OF 2005
(From the judgement and order dated 16th May, 2004 passed by the High Court Division in Death Reference No.34 of 2001 with Jail Appeal No. 3201 of 2001)

Rokia Begum alias Rokeya Begum ... Appellant

=Versus=

The State ... Respondent

For the Appellant :Mr. Md. Nawab Ali
Advocate-on-Record

For Respondents :Mr. Shohrowardi,
Deputy Attorney General,
instructed by
Mr. Md. Zahirul Islam
Advocate-on-Record

Date of hearing : The 3rd of April, 2013

Meaning of life sentence:
The way it has been interpreted, the word "life" does not bear its normal linguistic meaning. In other words, a person sentenced to imprisonment for life does not necessarily spend his life in prison, although section 45 of the Penal Code defines "Life" as the life of a human being unless the contrary appears from the context. The given interpretation has been arrived at with the aid of section 57 of the Penal Code, which provides that in calculating fraction of terms of punishment, imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for 30 (thirty) years. This last mentioned section read with relevant provision of the Jail Code effectively means that a person sentenced to imprisonment for life will be released after spending a maximum of $22\frac{1}{2}$ years in prison. Under section 35A of the Code of Criminal Procedure the period of time spent by the accused in custody during pendency of the trial would be deducted from his total sentence. Thus we find that in many serious murder cases, where the trial lasts for many years, the accused who is found guilty and sentenced to imprisonment for life gets released after serving a total of 22½ years including the period spent in custody during trial. ...(Para 24)

JUDGEMENT

MUHAMMAD IMMAN ALI, J:-

1. This appeal, by leave, is directed against the judgement and order dated 16.05.2004 passed by the High Court Division in Death Reference No.34 of 2001 and the connected Jail Appeal No.3201 of 2001 accepting the reference and confirming the death sentence and dismissing the jail appeal thus maintaining the judgement and order of conviction and sentence dated 08.08.2001 passed by the Sessions Judge, Manikgonj in Sessions Case No.2 of 2001.

2. The prosecution case, in brief, was that the informant's mother-in-law, accused Rokeya Begum and her adopted son accused Farid alias Reza used to work at Nizam's Chinese Restaurant, Road No.126, House No.1/B, Gulshan. Approximately two months prior to filing of the case his mother-in-law took his sister-in-law Surja Begum (deceased victim) from his residence to her residence at Bangla Motor. On 16.06.2000 at about 10.30 p.m. his mother-in-law along with accused Farid came to the informant's house at Manikgonj and told him that Surja had gone out of the house at 11.00 a.m. with Tk.3,300/- and her whereabouts could not be traced. At that time both Rokeya Begum and accused Farid were found to be sweating. Rokeya Begum was found barefooted and on query by her daughter, i.e. the informant's wife, as to why she was not wearing her sandals, Rokeya Begum told her that at the time of boarding the bus one of the sandals fell and that is why the other one was thrown away. Rokeya Begum and Farid had their meal at the informant's house and they stayed there for the night and in the morning they left for Dhaka. At about 7.00 a.m. the informant came to know from a co-villager that a dead body was found in the sugarcane field of co-villager Jaber Mollah. Having heard this, the informant went there and identified the dead body as that of his sister-in-law Surja Begum. Her throat was found tied with a scarf and the eyes were found to be damaged. The informant found a pair of shoes and one piece of sandal by the side of the dead body and the said sandal was identified as that of Rokeya Begum. The informant came to Dhaka and at first he went to the Chinese Restaurant where his mother-in-law used to work. There he met one of his co-villagers namely Siraj and enquired about his mother-in-law, sister-in-law and accused Farid. Siraj told him that all three left for Surja Begum's maternal uncle's house at Adamji on the previous day, i.e. 15.06.2000 at 5.00 p.m. The informant got suspicious and went to the residence of his mother-in-law at Bangla Motor. The informant disclosed to his mother-in-law about the recovery of the dead body of Surja Begum and took his mother-in-law to his house at Manikgonj and there she confessed to have killed Surja Begum with the help of accused Farid alias Reza. It is alleged that the informant's mother-in-law had an illicit relationship with accused Farid and since Surja Begum disliked and protested it she was killed by strangulation. Hence, the informant lodged the First Information Report (F.I.R.) on 18.06.2000 before the Officer-in-Charge of Manikgonj Police Station, Manikgonj against the condemned prisoners under sections 302/34 of the Penal Code. Accordingly, Manikgonj P.S. Case No.13 dated 18.06.2000 corresponding to G.R. No.307/2000 was started.

3. The Investigating Officer visited the place of occurrence, prepared the sketch map with index, prepared inquest report, examined the witnesses and recorded their statements under section 161 of the Code of Criminal Procedure. After completion of investigation he submitted Charge-sheet No.113 dated 30.11.2000 under sections 302/34 of the Penal Code against the two accused persons.

4. The case was ultimately transferred to the Court of Sessions Judge, Manikgonj where it was numbered as Sessions Case No.02 of 2001. Charge was framed under sections 302/34 of the Penal Code against the accused persons and read over and explained to them, to which they pleaded not guilty and claimed to be tried. During trial the prosecution examined as many as 20 (twenty) P.Ws. who were cross-examined by the defence, but the defence did not examine any witness.

5. The defence case, as it transpires from the trend of cross-examination was that the accused persons were innocent and they had been falsely implicated in the case.

6. After close of recording of evidence, the accused persons were examined under section 342 of the Code of Criminal Procedure. They repeated their innocence.

7. The Sessions Judge, Manikgonj after hearing the parties and upon consideration of the evidence and materials on record convicted the accused persons under sections 302/34 of the Penal Code and sentenced them to death by his judgement and order dated 08.08.2001.

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, which was registered as Death Reference No.34 of 2001.

9. Before the High Court Division Jail Appeal No.3201 of 2001 was preferred by the condemned petitioner, which was heard along with the death reference. By the impugned judgement and order, the High Court Division accepted the reference and dismissed the jail appeal and confirmed the judgement and order of conviction and sentence passed by the Sessions Judge, Manikgonj.

10. The condemned prisoners filed Criminal Petition for Leave to Appeal No.311 of 2004 with Jail Petition No.3 of 2005.

11. Mr. Md. Nawab Ali, submitted that since it was a case of capital sentence the right of appeal is guaranteed under the Constitution. He further submitted that he would not argue on merit rather he would argue only on ground of sentence. After hearing, leave was granted only to consider the sentence of the condemned petitioner.

12. Mr Muhammad Nawab Ali, the learned Advocate-on-Record appearing on behalf of the appellant submitted that the case against the petitioner is one of murdering her own daughter. This, he submitted was unnatural to contemplate. He submitted that there is no ocular or direct evidence against the petitioner and she has been convicted on the basis of tenuous circumstantial evidence. He submitted that even if the petitioner had any part in the murder, which is highly unlikely, it was neither proper nor just to award the death sentence in the facts and circumstances of the case. He prayed that the sentence of death may be commuted, keeping in view that the petitioner is an old lady who has suffered through the loss of her own daughter.

13. Mr. Shohrowardi, the learned Deputy Attorney General, appearing on behalf of the State-respondent made submissions in support of the impugned judgement and order of the High Court Division. He submitted that when a mother plots and carries out the murder of her own child in order to cover up her illicit relationship, she does not deserve any sympathy. He submitted that the prosecution has been able to prove her involvement in the murder and

there is no scope to reduce the sentence in the facts and circumstances disclosed by the evidence on record.

14. We have considered the submissions of the learned Advocate-on-Record for the appellant and the learned Deputy Attorney General for the Respondent and perused the impugned judgement of the High Court Division and other connected papers on record.

15. The relevant law

The law relating to murder in Bangladesh is based upon sections 299 and 300 of the Penal Code which define culpable homicide and murder. Just by way of comparison, it is noted that the same law applies in neighbouring India. However, over the years the procedures followed and matters considered before passing sentence for murder under section 302 of the Penal Code has varied. In Bangladesh the sentence for murder is death, or imprisonment for life. Hence, it is the normal course upon finding the accused guilty of an offence under section 302 of the Penal Code to sentence him to death unless any extenuating circumstances lead the Court to award the lesser sentence of imprisonment for life, and for that he would have to give his reasons. So, effectively the burden lies on the accused to provide grounds for awarding the lesser sentence.

16. On the other hand, in India the sentence for murder under section 302 of the Penal Code is similarly either death or life imprisonment, but the difference is that life sentence is considered to be the norm and the sentence of death is to be awarded only in the rarest of rare cases.

17. At this juncture it may be noted that in Bangladesh there is no longer in existence any provision for a sentence hearing, which existed under sections 250K(2) and 265K(2) of the Code of Criminal Procedure which were introduced by the Law Reforms Ordinance, 1978 (Ordinance No. XLIX of 1978) which provided as follows:

> "250K(2):``Where, in any case under this Chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 349 or section 562, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law".
>
> 265K(2):``If the accused is convicted, the Court shall, unless it proceeds in accordance with the provisions of section 562, hear the accused on the question of sentence, and then pass sentence on him according to law".

18. These two provisions provided the opportunity to the accused to plead for a lesser sentence.

19. However, these two provisions were subsequently omitted by section 21 of Ordinance XXIV, 1982 and section 3 of Ordinance XXXVII, 1983 respectively. On the other hand, section 325(2) of the Indian Code of Criminal Procedure, 1973 provides for a hearing of the accused on question of sentence, which was held in the case of ***Santa Singh Vs. State of Punjab*** reported in ***AIR 1976 (SC) 2386*** to be a mandatory provision. In the said decision it was held as follows:

> "This Court has taken the view that under the provisions of the Code of Criminal Procedure, 1973, it is incumbent on the Sessions Judge delivering a judgement of conviction to stay his hands and hear the accused on the question of sentence and give him an opportunity to lead evidence which may also be allowed to be rebutted by the prosecution".

20. In the context of Bangladesh it is noted that in the prevailing adversarial system, there is very little scope for any accused persons to urge any plea in mitigation during the course of trial or at the time of examination under section 342 of the Code of Criminal Procedure. The accused practically stands by while his lawyer pleads for him. At the time of examination under section 342 of the Code of Criminal Procedure he is simply told what evidence has been placed against him and asked to comment on that evidence and he is asked whether he will produce any defence witness or say anything further. Having pleaded not guilty all through the trial, it is felt that any plea in mitigation at this stage would weaken the case of the accused. So, he says nothing more. In the absence of a sentence hearing there is no opportunity for the accused to bring to the notice of the Court any extenuating circumstances. The learned Judge conducting trial considers the points of view of the accused only so far as it is exposed during cross-examination of the prosecution witnesses and the statement of the accused given at the time of examination under section 342 of the Code of Criminal Procedure. It must be borne in mind that those aspects elicited by the defence counsel during cross-examination of prosecution witnesses are merely with the view to exonerate the accused from the charge levelled against him. The mitigating circumstances bearing around the accused, his family, social, economic and educational background etc. are seldom given any mention or importance. Thus there is little scope for the trial Judge to consider any mitigating or extenuating circumstances other than those directly apparent from the prosecution evidence as having existed at the time of commission of the offence. This in my opinion puts the accused at a serious disadvantage so far as sentencing is concerned. Moreover, there being no sentencing guidelines, the tendency is for trial Judges to award the highest possible sentence provided by the law.

21. Sentence of death or imprisonment for life:

As mentioned earlier, according to the prevailing decisions in Bangladesh, the sentence for murder under section 302 of the Penal Code is death or imprisonment for life and also fine. The dichotomy of awarding sentence of death or life imprisonment has been raging for decades across the globe. As of the present day 35 out of 50 States in the USA still retain the death penalty. The countries of the European Union as well as European countries outside the Union have abolished the death penalty. On the other hand, India, being the largest democracy of the world has retained the death penalty.

22. England abolished the death penalty:

The Royal Commission on Capital Punishment 1949-53 was set up to consider and report whether "capital punishment for murder should be limited or modified". The Commission recommended retention of capital punishment unless there was overwhelming public support for abolition, which there wasn't. Under the terms of the Murder (Abolition of Death Penalty) Act 1965 hanging was suspended for an experimental period of five years. On the 16th of December 1969, the House of Commons reaffirmed its decision that capital punishment for murder should be permanently abolished. However, the death penalty was retained for offences like treason and piracy with violence until 1998. In 1999 the home secretary signed the sixth protocol of the European Convention of Human Rights which formally abolished the death penalty in the UK and ensured it could not be brought back.

23. Upon scrutiny of the 35th Report of the Law Commission on Capital Punishment, 1967, India retained the death penalty. There was lengthy discussion on the issue by the Indian Supreme Court in the case of ***Bachan Singh Vs. the State of Punjab (1980)2 SCC 684*** (report published in 1967). Suffice it to say that India has found the sentence of death to

be lawful penalty to be awarded, whereas in England death penalty was not favoured as a proper or necessary punishment.

24. Meaning of life sentence:

It can be stated that sentence of "imprisonment for life" as used in Bangladesh is utterly a misnomer; indeed it appears to be an erroneous interpretation. The way it has been interpreted, the word "life" does not bear its normal linguistic meaning. In other words, a person sentenced to imprisonment for life does not necessarily spend his life in prison, although section 45 of the Penal Code defines "Life" as the life of a human being unless the contrary appears from the context. The given interpretation has been arrived at with the aid of section 57 of the Penal Code, which provides that in calculating fraction of terms of punishment, imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for 30(thirty) years. This last mentioned section read with relevant provision of the Jail Code effectively means that a person sentenced to imprisonment for life will be released after spending a maximum of $22\frac{1}{2}$ years in prison. Under section 35A of the Code of Criminal Procedure the period of time spent by the accused in custody during pendency of the trial would be deducted from his total sentence. Thus we find that in many serious murder cases, where the trial lasts for many years, the accused who is found guilty and sentenced to imprisonment for life gets released after serving a total of 22½ years including the period spent in custody during trial. Hence, the sentence of imprisonment for life imposed at the time of delivery of judgement appears to be a lenient sentence and may in the minds of some appear to be not a proper sentence, especially when some horrific facts are disclosed in evidence.

25. Criminal justice in Bangladesh is guided by the Penal Code, 1860, the Code of Criminal Procedure, 1898 and the Evidence Act, 1872, all vestiges of British rule, which ended 66 years ago. The law in England has over the years transformed and developed and looks nothing like the law which the British left behind for us. Just to give one example, which is relevant in the present context, life sentence in England can mean any period of sentence measured in years and months which the Court feels is an appropriate period in the facts and circumstances of the case and can extend to a sentence of imprisonment for life which would mean that the prisoner would not be allowed to leave the prison throughout his natural life. Such a punishment is arguably "a fate worse than death". Reference may be made to the famous case of the Moors murder where the accused Ian Brady and Myra Hindley were found guilty of murder of several children which took place between July 1963 and October 1965. Both the accused were sentenced to imprisonment for life and several appeals against their life sentence were made. But they were never released. Myra Hindley died in prison when she was aged 60; the other convict was declared insane and has been repeatedly asking to be allowed to die. This case clearly shows that for a criminal sentenced of imprisonment for life meaning the rest of his life, death would have been a softer option. Hindley who was sentenced to life in 1966 just after the death penalty was abolished wrote in a letter; "I knew I was a selfish coward but I could not bear the thought of being hanged. Although over the years I wish I had been" (as reported on BBC news dated 29.02.2000).

26. This day we find that in many countries, including England, after a sentence of life imprisonment is imposed the Judge may specifically order that the prisoner is not to be released before the expiry of a term of years which can be any number of years ranging from 10 to 60 years or even for the rest of his natural life, so long as the Judge follows the sentencing guideline issued by the appropriate authority. In the past the Lord Chief Justice

sitting in the Court of Appeal issued sentencing guidelines by way of judgements. The Sentencing Council for England and Wales was established in April 2010, replacing the Sentencing Guidelines Council and the Sentencing Advisory Panel, its predecessor bodies.

27. In Bangladesh there is no specific authority to issue any sentencing guideline and as a result Judges are guided only by the sentences provided in the Penal Code and other special laws, and life sentence, in some cases, turns out to be a relatively lenient sentence. It is in this backdrop that many Judges choose the sentence of death for crimes which they consider to be most heinous since that effectively is the harshest punishment. Had there been any provision in our law for gradation of the life sentence or for expressing the view that the convict shall not be released during his life time, or for a specified number of years, then perhaps the Judges would opt for the longer life imprisonment, which may be considered a more harsh punishment than death. Moreover, as we have explained above, the trial procedure does not allow for any effective plea in mitigation after the verdict is pronounced. As a result the sentencing in most cases is arbitrary and there is no scope for the accused to plead for a lesser sentence or for the trial judge to take into account any mitigating circumstances since there was no opportunity to place any before him.

28. In considering the sentence of the appellant before us, we may aptly refer to the decision in Nalu Vs. The State, 32 BLD (AD) 247 where this Division referred to the following mitigating circumstances which are also relevant in the facts of the instant case:

(1) The condemned prisoner has no history of prior criminal activity.
(2) The condemned prisoner is not likely to commit any further act of violence.
(3) She has been in the condemned cell since 8.8.2001, i.e. more than 11 years during which period the hangman's noose has been dangling in front of her eyes.

29. We may also refer to the case of Hazer Ali Mandal and others Vs. The State, 37 DLR (AD) 87. In that case the conviction and death sentence was based on circumstantial evidence. The High Court Division commuted the sentence of death to one of imprisonment for life. This Division upheld the decision of the High Court Division.

30. Returning to the facts of the instant case, it appears that there is no direct evidence against the appellant of having taken any part in the killing of the victim, her own daughter. The confessional statement of the co-accused is no evidence by itself when considering the complicity of another co-accused, and can only be used to lend support to other evidence. In her own confessional statement the appellant did not inculpate herself in the assault on the victim. However, her subsequent conduct in confessing before the witnesses points a finger towards her complicity, but not to the extent of it. In such circumstances, the conviction of the appellant under section 302/34 cannot be said to be without basis or illegal. But in the light of the evidence it would not be consonant to justice to impose capital punishment on the appellant.

31. 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 to 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. It is noted that the High Court Division in rejecting this plea in other cases referred to the case of Abed Ali Vs. the State, 10 BLD (AD) 89. In that case this Division noted the observation of the High Court Division in the case of Nowsher Ali and other Vs the State, 39 DLR 57, that delay in execution cannot by itself constitute a mitigating circumstance but a delay of six years may be considered for commutation of death sentence to life imprisonment (emphasis added). When the case of Nowsher Ali came before this Division, it was held that "In some cases inordinate delay in execution of death sentence may be considered a ground for commuting it to transportation for life but some delay such as in this case should not be considered to be a ground for commutation, particularly when the delay is not due to any laches of the prosecution. In that case the condemned prisoner had been in the condemned cell for about 4 years. However, their Lordships in fact commuted the death sentence on the ground of bitter matrimonial relationship which played a part. In the instant case, when the matter was heard by the High Court Division the convict had been in the condemned cell for less than three years, and hence the plea was not put forward. However, the convict has now been in the condemned cell for more than $11\frac{1}{2}$ years, which is beyond the threshold of six years mentioned by this Division in the Abed Ali case cited above. Thus the length of period by now can be taken as one of the reasons to commute the sentence of death to one of imprisonment for life.

32. In the light of the above discussion, we are of the view that the judgement of the High Court Division be upheld so far as it relates to conviction of the appellant under section 302/34 of the Penal Code. The Criminal Appeal is, therefore, dismissed. However, in the light of the discussion regarding sentence, we are of the view that in the facts and circumstances of the case justice will be sufficiently met if the sentence of death is commuted to one of imprisonment for life. Accordingly, the sentence of the convict Rokeya Begum alias Rokaya Begum is modified to imprisonment for life.

33. With regard to Criminal Petition for Leave to Appeal No.342 of 2007, filed by condemned prisoner Faridur Rahman @ Reza, Mr. Md. Nawab Ali made similar submissions with a view to commutation of the sentence of death to one of imprisonment for life. He submitted that the condemned prisoner is in the prime of his life and has suffered in the condemned cell for over 11 years. However, unlike the evidence against the appellant Rokeya, the inculpatory confession of accused Foridur Rahman alias Forid alias Raza establishes the case against him beyond any shadow of doubt. This considered alongside the other circumstantial evidence against him, we are not inclined to interfere with the judgement and order of the High Court Division passed against the petitioner Foridur Rahman alias Forid alias Raza. Hence the Criminal Petition for Leave to Appeal is dismissed along with Jail Petition No. 03 of 2005.