

5 SCOB [2015] HCD 49**High Court Division**

Death Reference No.06 of 2006.
with
Criminal Appeal No.208 of 2006.
with
Criminal Appeal No.231 of 2006.
with
Criminal Appeal No.447 of 2006.
with
Criminal Appeal No.1157 of 2006.
with
Jail Appeal No.87 of 2006.
with
Jail Appeal No.88 of 2006.
with
Jail Appeal No.89 of 2006.

The State

... Petitioner

Versus

Syed A. Salam & others

... Condemned Prisoner

Jahangir @ Kala jahangir

... Appellant

(In CrI. A.No.208 of 2006)

Syed Abdus Salam @ Md. Salam

... Appellant

(In CrI. A. No.231 of 2006)

Al-Amin

... Appellant

(In CrI. A. No.447 of 2006)

Sumon

... Appellant

(In CrI. A. No.1157 of 2006)

Syed A. Salam

... Appellant

(In jail A. No.87 of 2006)

Al-Amin

... Appellant

(In Jail A. No.88 of 2006)

Md. Jahangir

... Appellant

(In Jail A. NO.89 of 2006)

Versus

The State

...Respondent

Mr. Alal Uddin, Advocate with
Mr. Jalal Uddin Ahmed with
Ms. Suraya Begum, Advocates
...For the condemned Prisoner No.1
and appellant in Criminal Appeal No.231
of 2006.

Mr. Mantu Chandra Ghosh, Adv.
...For the condemned Prisoner No.2
and appellant in Criminal Appeal No.208
of 2006.

Mr. Sattoyendro Chandra Bhakto

... For the appellant

(In CrI. A. No.447 of 2006)

Mr. Md. Sharafatullah, Adv.

... For the appellant

(In CrI. A. No.1157 of 2006)

Mr. Aminur Rashid(Raju), Adv.

... For the appellant

(In Jail A. No.87 of 2006)

Ms. Nahid Hossain (Liza), Adv

... For the appellant

(In Jail A. No.88 of 2006)

Ms. Zinnat Akhter Nazley Begum

... For the appellant

(In Jail A. No.89 of 2006)

Ms. Hasna Begum, State Defence Adv.

... For the absconding condemned
accused Shah Kamal Rony and Sabuj @
Hanif.

Mr. Bhishmadev Chakraborty, D.A.G with

Mr. Md. Atiqul Haque, A.A.G

... For the State.

Heard on:08.05.11, 09.05.11, 10.05.11,
11.05.11 and 12.05.2011.

Judgment on:15.05.2011.

Present:

Mr.Justice Syed Refaat Ahmed

And

Mr.Justice Bhabani Prasad Singha

Legal Remembrancer's Manual, 1960

Chapter XII

Paragraph no.6:

An Advocate to defend an undefended accused charged with capital punishment should be appointed well in time of the commencement of trial of the case to enable him to study the case and the lawyer should be of sufficient standing and able to render assistance. The lawyer should be provided with the papers similar to that of the Public prosecutor. ... (Para 20)

Section 340 of CrPC

And

Legal Remembrancer's Manual, 1960

Chapter XII

Paragraph no.6:

The convict-accused-persons have been denied the right of an accused punishable with capital punishment as per the provision of section 340 of the Code of Criminal Procedure and the same also resulted in the breach of the provisions of Chapter XII of the Legal Remembrancer's Manual, 1960 (Specially the provision of Paragraph no.6 of the Legal Remembrancer's manual, 1960) which have rendered the trial as one not according to law requiring fresh trial. ... (Para 26)

Judgment

Bhabani Prasad Singha,J:

1. The Criminal Appeal No.208 of 2006 and Jail Appeal No.89 of 2006 at the instance of the convict-accused Jahangir @ Kala jahangir, the Criminal Appeal No.231 of 2006 and Jail Appeal No.87 of 2007 at the instance of the convict-accused Syed Abdus Salam @ Md. Salam, the Criminal Appeal No.447 of 2006 and Jail Appeal No.88 of 2006 at the instance of the convict-accused Al-Amin and the Criminal Appeal No.1157 of 2006 at the instance of the convict-accused Sumon are directed against the judgment and order of conviction dated 30.01.2006 passed in Sessions Case No.672 of 2005 corresponding to G.R. Case No.1011 and Narayanganj P.S. Case No.14(9)2004 passed by the Sessions Judge, Narayanganj. By the said judgment and order of conviction the leaned trial court convicted the accused persons Syed A. Salam, Jahangir @ kala jahangir, Al-Amin, Shah Kamal Rony(Absconding) and Sabuj @ Hanif under sections 302/34 of the Penal Code awarding them death sentence and to pay a fine of Tk.50,000/- each. By the selfsame judgment the learned trial court convicted the accused-persons Syed A. Salam, Jahangir @ Kala Jahangir, Al-Amin, Shah Kamal Rony (Absconding) and Sabuj @ Hanif under section 201 of the Penal Code sentencing them to suffer rigorous imprisonment for 10(ten) years and to pay a fine of Tk.2,000/- each, in default, to suffer imprisonment for another 1(one) year and convicted the accused Sumon under sections 302/34 of the Penal Code sentencing him to suffer imprisonment for life and to pay a fine of Tk.50,000/-, in default, to suffer rigorous imprisonment for another 1(one) year.

2. The learned trial Judge also made a Death Reference (Death Reference No.06 of 2006) for confirmation of the death sentences imposed upon the condemned accused-persons Syed A. Salam, Jahangir @ Kala Jahangir, Al-Amin, Shah Kamal Rony (Absconding) and Sabuj @ Hanif.

3. The Death Reference and the aforesaid Criminal Appeals being cropped up from the self-same judgment and common question of law and facts being involved in the Death Reference and the Criminal and Jail Appeals, said cases have been heard analogously and are being disposed of by this single judgment.

4. The prosecution case, to narrate in brief, is that on 12.09.2004 at about 8.30 p.m. at night the accused A. Salam went to the house of the informant and on the pretext of having some talks he along with 3/4 unknown youths called away Jewel, the younger brother of the informant towards Bowbazar. The brother of the informant did not return home after he was called away by the accused-persons. Mentionably, in the 2nd floor of the house no.145/2, Mobarak Shah Road situated beside the house of the informant, a new tenant came where two young girls, namely, Shila and Suma used to reside. In that residence the accused Salam often used to come. The accused Salam had love affair with said Shila. Said two girls used to banter with Jewel. As a sequel to the said matter, in furtherance of their common intention in a pre-planned way the accused-persons Salam, Shah Kamal Rony, Jahangir @ Kala jahangir, Sumon and Al-Amin called away the brother of the informant i.e. the deceased, took him to the rented residence of the accused Salam, killed him by strangulation with a "gamchha" (towel), cut his throat totally, amputated his left hand from the shoulder, poured the cut pieces of the body of the deceased in to a bag and dropped into the "Ambagan Canal"

5. On receipt of the First Information Report(hereinafter referred to as the FIR) of the case, police took up investigation of the case and after investigation prima facie case having been made out against the accused persons submitted charge sheet No.15 dated 25.01.2005 of Narayanganj Police Station, under sections 364/302/201/34 of the Penal Code against them.

6. At the commencement of trial of the case charge under Sections 302/201/34 of the Penal Code was framed against the accused-persons. The charge was read over and explained to the accused-persons Syed A. Salam, Jahangir @ Kala Jahangir, Al-Amin, Shah Kamal Rony and Sabuj @ Hanif to which they pleaded not guilty and claimed to be tried. The accused Sumon being absconding the charge could not be read over and explained to him

7. To substantiate it's case the prosecution in all examined as many as 18(eighteen) witnesses. On the other hand, none was examined on behalf of the defence.

8. On the closure, of the evidence of the prosecution the accused-persons Sumon, Al-Amin, Jahangir @ Kala Jahangir and Syed A. Salam were examined under Section 342 of the Code of Criminal Procedure whereupon they once again pleaded their innocence informing the Trial Court that they would not adduce any evidence on their behalf. The other accused-persons being absconding, they could not be examined under section 342 of the Code of Criminal Procedure.

9. The defence case, as it transpires from the trend of cross-examination of the prosecution witnesses is the denial and the plea of innocence in the alleged occurrence.

10. After trial, on hearing the learned Advocates for both the sides and so also on perusal and on analysis of the evidences and materials on record, the learned trial Judge came to the finding that the prosecution succeeded in bringing home the charge as brought against the accused-persons and accordingly, he convicted and sentenced them by the impugned judgment and order as aforesaid.

11. Md. Alal Uddin, the learned Advocate for the condemned-accused-appellant A. Salam submits that the State defence lawyer for the accused A. Salam was not appointed at proper time; that the defence lawyer for the accused A. Salam was appointed at the last moment at the time of cross-examination of the P.W.3; that the case of the said accused was not conducted properly and as such, the instant case is a fit case to be sent back on remand for re-trial. In support of his submission the learned Advocate has referred the case of *The State Vs. Purna Chandra Mondol* reported in 22 DLR at page 289, the case of *State Vs. Altaf* reported in 32 DLR at page 254 and the case of *Abdul Gani Vs. The State* reported in 16 DLR at page 388.

12. Mrs. Hasna Begum, the learned Advocate representing the absconding convict-appellants Kamal Rony and Sabuj @ Hanif made her submission in the line of the learned Advocate for the accused A. Salam.

13. Mr. Montu Chandra Ghosh, the learned Advocate representing the accused jahangir @ Kala jahangir submits that the confessional statement of the accused Al-Amin has been used against this accused without having any corroboration by any independent witness and weighing the same on legal basis and as such, the impugned judgment so far as it relates to the accused Jahangir @ Kala Jahangir is liable to be set aside.

14. No one appears on behalf of the convict-accused Al-Amin.

15. On the other hand, Mr. Bhishmadev Chakraborty, the learned Deputy Attorney General representing the State submits that in a case of capital punishment the appointment of a State Defence Lawyer is the mandatory provision of law; that after examination of the P.W.1 and the P.W.2, the State Defence Lawyer was appointed for the accused A. Salam; that after the said State defence Lawyer relieved himself from the charge of defending the accused A. Salam, said accused himself cross examined the remaining prosecution witnesses; that although the overwhelming evidence on record points to the guilt of the convict-appellants and there are sufficient material on record to base conviction against them, due to procedural defects the conviction against the convict-appellants cannot be upheld and that on setting aside the entire judgment the case should be sent back on remand for retrial to pass a judgment after removing all the procedural defects giving chance to the Advocates or the state defence lawyers to be appointed on behalf of the accused A. Salam and the absconding convict-accused-persons to cross-examine the prosecution witnesses. The learned Deputy Attorney General also referred the case of *Abdur Rashid Vs. The State* reported in 27 DLR(AD) at page 1 and the case of *The State Vs. Hanif Gani* reported in 45 DLR at page 400.

16. In view of the submissions and the counter submissions of the learned Advocates for the parties, let us review the relevant materials on record and scan the attending circumstances of the case to arrive at a proper and correct decision.

17. On perusal of the lower court's record, it transpires that on receipt of the record of Sessions Case No.672 of 2005 from the court of Magistrate, 1st Class(South) by the Sessions Judge, Narayanganj on 04.10.2005 cognizance was taken on that date fixing 9.10.2005 for framing charge. On 9.10.2005 charge under sections 364/302/201/34 of the Penal Code was framed against the accused-persons fixing 16.10.2005 for trial of the case. On 16.10.2005 i.e. on the very first date of trial of the case Advocate Md. Kamruzzaman was appointed the State Defence Lawyer for the absconding accused persons and Advocate Md. Zakaria Habib was appointed the State Defence Lawyer for the accused A. Salam and that on that date 6 prosecutions witnesses, namely, Ripon, Dr. Shahjahan Mia, Shahidul Alam, Mafia Begum, Shafi Uddin Swapan and Nasir Uddin were examined. Although from the order dated 16.10.2005, it appears that the State Defence Lawyer on behalf of the accused A. Salam was appointed before start of recording evidence of the said witnesses but from the observation of the learned trial court to the effect that the accused A. Salam himself was cross examining the P.W.3, it appears that after examination of the P.W.1 and the P.W.2 Advocate Mr. Zakaria Habib was appointed State Defence Lawyer on behalf of the said accused at the time of cross examining the P.W.3. Said State Defence lawyer conducted the case on behalf of the accused A. Salam up to the examination of the prosecution witness No.9. Record further shows that on 18.10.2005 after examination-in-chief of the P.W.10 accused A. Salam orally informed the court that he himself would cross-examine the witness. In the said circumstances, the learned State Defence Lawyer filed an application for dropping him as the State Defence Lawyer for the accused A. Salam stating that said accused had no confidence in him. The learned trial court allowed the petition and thereafter, the accused A. Salam cross examined the remaining prosecution witnesses. In the said state of affairs it was a duty cast upon the learned trial court to appoint a fresh State Defence Lawyer for the accused A. Salam at that point of time which he did not do. Now, with regard to the State Defence Lawyer Advocate Kamruzzaman on behalf of the absconding accused-persons. As stated earlier on the very date of start of trial of the case Advocate Kamruzzaman was also appointed State Defence Lawyer for the absconding accused-persons. Said State Defence Lawyer conducted the case on behalf of the absconding accused-persons till 24.10.2005. His appointment as a State Defence Lawyer for the absconding accused-persons was cancelled on that date and a new State Defence Lawyer namely Selina Yesmin was appointed State Defence Lawyer on behalf of the absconding accused-persons who only adopted the cross examination of the remaining prosecution witnesses i.e. the P.W.11, to the P.W.18 of the other lawyers and declined to cross examine them which is apparent on the face of the record.

18. Section 340(1) of the Code of Criminal procedure guaranteed the right to an accused to be defended by an Advocate which runs as follows:

“Section 340(1) of the Code of Criminal Procedure. Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader”.

19. In the light of provision of section 340 of the Code of Criminal Procedure, provisions have been made in Chapter XII of the Legal Remembrancer's Manual, 1960 to provide defence to an undefended accused charged with the offence punishable with death. The provisions of paragraphs 1-7 of Chapter XII of the Legal Remembrancer's Manual, 1960 relating to undefended accused are as follows:

“1. Pauper accused punishable with capital sentence to be given legal assistance. Every persons charged with committing an

offence punishable with death shall have legal assistance at his trial and the Court should provide advocate or pleader for the defence unless they certify that the accused can afford to do so.

2. Committing Magistrate to report to the District magistrate. In committing murder cases to the Sessions Court, the Magistrate will report to the District Magistrate whether the accused was represented in the proceedings before him, and if not, whether he can afford to engage an advocate or pleader for his trial in the Sessions Court. If the Magistrate reports that the accused has not sufficient means, it will be incumbent on the District Magistrate to engage an Advocate or pleader at Government expense.

3. Judge to take action when accused goes unrepresented. In any case, if the accused is unrepresented in the Sessions Court and the Judge considers that he has insufficient means to obtain legal assistance, in spite of the committing Magistrate's report to the contrary, the Judge shall immediately inform the District Magistrate, who must make the necessary arrangement for the defence of the accused.

4. No discretion of the Court allowed. It is no longer left to the discretion of the courts to decide whether the nature of the case makes legal assistance essential. The sole criterion is whether the accused has sufficient means or not and the courts are bound to satisfy themselves on this point.

5. In each district the Magistrate may, after consulting the District Judge, form a panel of pleaders for the defence of pauper accused in murder cases subject to the approval of the Legal Remembrancer and the panel should consist of pleaders of sufficient standing and ability and should not be unreasonably large. The number of pleaders who will constitute the panel shall be fixed after approval by the Legal Remembrancer and shall not be altered without his approval. The District Magistrate may, however, appoint or remove any pleader after consulting the District Judge within the number approved by the Legal Remembrancer and after obtaining the Legal Remembrancer's previous sanction.

6. Engagement of pleaders to be made in time. In all cases, the advocate or pleader should be appointed in time to be able to study the case, and the person selected should be of sufficient standing and ability to render substantial assistance. He should be given a brief similar to that prepared for Public Prosecutor and it would be convenient if the two briefs were prepared together. He should be supplied free of cost with copies of all papers of which an accused person is ordinarily allowed copies.

7. Employment of pleaders in mutually antagonistic defence- When two or more paupers accused of murder in the same trial put forward mutually antagonistic defence, arrangement should be made for separate representation of the accused by different pleaders or advocates at the expense of Government".

20. Paragraph 6 of the Legal Remembrancer's Manual regarding an undefended accused clearly shows that an Advocate to defend an undefended accused charged with capital punishment should be appointed well in time of the commencement of trial of the case to enable him to study the case and the lawyer should be of sufficient standing and able to render assistance. The lawyer should be provided with the papers similar to that of the Public prosecutor.

21. From the facts as stated above, it is found that two types of lapses which are erroneous on the face of the record took place in disposal of the Sessions Case No.672 of 2005.

22. Firstly, the lapse of the learned trial court in not appointing the State Defence Lawyer for the accused A. Salam and the other condemned-accused-persons as per the provisions of the Legal Remembrancer's Manual, 1960(specially the provision of paragraph No.6) and not appointing a fresh lawyer when the learned State Defence Lawyer for the accused A. Salam surrendered power on behalf of the said accused in the face of non confidence of the accused A. Salam to him. The aforesaid facts and circumstances show that the learned trial court did not comply with the provision of section 340 of the Code of Criminal Procedure and so also the rules of the Legal Remembrancer's Manual, 1960(Specially the provision of paragraph no.6) for an accused punishable with punishable with capital punishment.

23. Secondly, the laches on the part of the State Defence Lawyers for the accused A. Salam and the absconding accused-persons. After they were appointed to be State Defence Lawyers they should have taken proper preparations to conduct the case on behalf of the said accused persons on taking relevant papers from the court. But instead of doing that, in cases of most of the prosecution witnesses they either adopted the cross examination of the lawyer of other accused-persons or declined to cross examine the prosecution witnesses.

24. As stated earlier, the learned Advocate for the condemned-accused A. Salam referred the cases of *The State Vs. Purna Chandra Mondol* reported in 22 DLR at page 289, the case of *State Vs. Altaf* reported in 32 DLR 254 and the case of *Abdul Gani and another Vs. State* reported in 16 DLR at page 388 and that the learned Deputy Attorney General referred the case of *Abdur Rashid Vs. The State* reported in 27 DLR(AD) at page 1 and the case of the *State Vs. Hanif Gani* reported in 45 DLR at page 400.

25. In the case of *The State Vs. Purna Chandra Mondol* reported in 22 DLR at page 289 it is held that "Last moment appointment of a defence lawyer for an undefended accused virtually negatives the right of the accused to be properly defended in the case". In the case of *the State Vs. Altaf* reported in 32 DLR at page 254 it is held that "Last minute engagement with hardly any time to prepare for defence in consultation with the convict-accused amounts to denial of justice to the accused". In the case of *Abdul Gani and another Vs. State* reported in 16 DLR at page 388 it is held that "in a case of an undefended accused to be defended at the State's cost the brief must be supplied and proper opportunity be given to the lawyer to make himself ready". In the case of *Abdur Rashid Vs. The State* reported in 27 DLR(AD) at page 1 our apex court deprecated the last moment appointment of a defence-lawyer to defend an accused on a murder charge. The apex court also held that elaborate provisions made in the first paragraphs of Chapter XII of the Legal Remembrancer's Manual, 1960 must be kept in view when a defence lawyer to represent an undefended accused is appointed. In the case

of the State Vs. Hanif Gani reported in 45 DLR at page 400 it is held that "An Advocate to defend an undefended accused charged with capital offence should be appointed well in time to enable him to study the case and the lawyer should be of sufficient standing and able to render assistance. He should be provided with papers which are ordinarily allowed to the accused".

26. In the light of discussion made here above, and so also on consideration of the facts and circumstances of the case we are of the view that the convict-accused-persons have been denied the right of an accused punishable with capital punishment as per the provision of section 340 of the Code of Criminal Procedure and the same also resulted in the breach of the provisions of Chapter XII of the Legal Remembrancer's Manual, 1960 (Specially the provision of Paragraph no.6 of the Legal Remembrancer's manual, 1960) which have rendered the trial as one not according to law requiring fresh trial. The accused A. Salam should be offered the choice of choosing a lawyer to defend himself within a reasonable time. If he does not do so then he as well as the absconding accused-persons be provided with the defence at State expense allowing them reasonable time to prepare the case providing all relevant papers to enable them to cross examine the prosecution witnesses.

27. In view of the discussion made here above, we are not inclined to discuss the evidences and merit of the prosecution case as well as the other submission made by the learned Advocates.

28. In the result, the death reference is rejected and the Criminal Appeal No.208 of 2006, Jail Appeal NO.89 of 2006, Criminal Appeal No.231 of 2006, Jail Appeal No.87 of 2006, Criminal Appeal No.447 of 2006, Jail Appeal No.88 of 2006, Criminal Appeal No.1157 of 2006, Jail Appeal No.89 of 2006 are allowed. The impugned judgment and order dated 30.01.2006 passed in Sessions Case No.672 of 2005 convicting and sentencing the accused-persons under sections 302/201/34 of the Penal Code is hereby set aside and the said case is to be retried on the charge already framed. Let the case be sent back on remand to the court of learned Sessions Judge, Narayanganj for fresh trial. The learned trial court shall dispose of the case within 4(four) months from the date of receipt of the judgment in the light of discussion made here above (specially keeping in view the provisions of the paragraph no.6 of the Legal Remembrancer's Manual, 1960) giving the State Defence lawyers or the learned lawyers for the accused-persons adequate time and opportunity to prepare for and to cross-examine the prosecution witnesses.

29. Let the condemned-prisoners be shifted from the condemned cells to the cells meant for under trial prisoners in jail.

30. The accused Sumon is directed to surrender before the court of the learned Sessions Judge, Narayanganj within 15 days from the date of receipt of the judgment. He will remain on bail as granted by this court as before till disposal of the case.

31. Let a copy of this judgment along with the lower court records be sent down expeditiously.