

7 SCOB [2016] AD 42**APPELLATE DIVISION****PRESENT:**

Mr. Justice Surendra Kumar Sinha
Chief Justice
Ms. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CIVIL REVIEW PETITION NO.76 OF 2015

(From the order dated 5th May, 2015 passed by the Appellate Division in Civil Appeal No.116 of 2010)

Bangladesh Legal Aid and Services Trust (BLAST) and another. :Petitioners.

=Versus=

Government of Bangladesh, represented by the Secretary, Ministry of Home Affairs and others. :Respondents.

For the Petitioners. : Mr. M. K. Rahman, Senior Advocate (Mrs. Sara Hossain, Advocate and Mr. A. B.M. Bayezid, Advocate with him) instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.

Respondents. : Not presented.

Date of hearing. : The 3rd August, 2015.

Commutation of death sentence:

The petitioner has no significant history of prior criminal activity and that he was aged 14 years at the time of commission of the offence and 16 years at the time of framing of charge. The petitioner has been in the condemned cell since 12.07.2001, that is, more than 14 years. Considering all aspects of the case, we are of the view that the death sentence of the petitioner be commuted to imprisonment for life. ... (Para 17)

JUDGMENT**SYED MAHMUD HOSSAIN, J:**

1. This petition for review arises out of the judgment and order dated 05.05.2015 passed by this Division in Civil Appeal No.116 of 2010 allowing the appeal in part and maintaining the death sentence against convict-appellant Shukur Ali.

2. The facts, leading to the filing of this petition for review, in brief, are:

The prosecution case is that on 11.06.1999 Sumi Akter aged about 7 years, daughter of Md. Harun driver, was playing with one Sajib, P.W.10 on the varandah of their house while her mother Rahima Begum was sleeping in the house. At about 2.30 p.m. she woke up but failed to trace out the whereabouts of her daughter Sumi Akter. She along with P.W.6, Abdur Rouf, searched Sumi Akter from door to door and the house of the condemned prisoner Shukur Ali (hereinafer referred to as the petitioner) was found under lock and key. On search, the body of Sumi Akter was found inside the house, which was taken out of the house and the gold and silver ornaments which she was wearing were found missing. There were marks of injuries on her leg and also reddish liquid was found by the side of her genital organ. The petitioner was caught by the people from Tepra and was brought there who admitted in presence of witnesses to have raped and killed Sumi. On the basis of a First Information Report to that effect a case was started in Sibalaya Police Station.

3. The petitioner was convicted by Nari-O-Shishu Nirjatan Daman Bishesh Adalat for sexually assaulting to death of Sumi Akter, a minor girl aged about 7 years. The Bishesh Adalat sentenced him to death. The High Court Division confirmed the death sentence and this Division also affirmed the death sentence. A review petition filed before this Division was also dismissed. After that, the petitioner along with another moved the High Court Division challenging the mandatory death penalty provided in section 6(2) of the Ain as *ultra vires* the Constitution.

4. Upon hearing the parties, the High Court Division declared section 6(2) of the Ain, 1995 *ultra vires* the Constitution but refrained from declaring section 34 of the Ain,2000 unconstitutional and also did not declare the sentence of the petitioner to be unlawful. The High Court Division granted a certificate under section 103(2)(a) of the Constitution and as a result of which, Civil Appeal No.116 of 2010 has been initiated.

5. By the judgment dated 05.05.2015, this Division declared sub-sections 2 and 4 of section 6 Nari-O-Shishu Nirjatan Daman Bishesh Bidhan Ain,1995, sub-sections (2) and (3) of section 34 of the Nari-O-Shishu Nirjatan Daman Ain,2000 and section 303 of the Penal Code *ultra vires* the Constitution. This Division further has held that despite repeal of Ain of 1995, the pending cases and pending appeals in respect of those offences shall be tried and heard in accordance with the provision of the Ain,1995, but the sentences prescribed in respect of similar nature of offences of the Ain,2000 shall be applicable. This Division has further held that there shall be no mandatory sentence of death in respect of offence of murder committed by an offender who is under sentence of life imprisonment.

6. Admittedly, the petitioner was caught red-handed by the people of Tepra and was brought to the place of occurrence and before the witnesses. He admitted the incident of killing the victim. The victim Sumi Akter was only 7 years old. This Division found that the

killing was brutal and diabolical and that there was no extenuating ground for commuting the sentence and accordingly his sentence was confirmed.

7. Feeling aggrieved by the impugned judgment dated 05.05.2015, the petitioner filed this review petition before this Division.

8. Mr. M. K. Rahman, learned Senior Advocate (Ms. Sara Hossain, Advocate with him), appearing on behalf of the petitioner, submits that the petitioner was merely a boy of 14 years old at the time of occurrence and 16 years at time of trial and therefore, he was a minor and sub-sections (2) and (4) of section 6 of Ain,1995 and sub-sections (2 and (3) of 34 of Ain,2000 having been declared ultra vires the Constitution, the question of imposing death sentences prescribed in respect of those offences in the Ain,2000 does not arise. He further submits that the petitioner was a minor boy and that there are mitigating circumstances which warrant conversion of death sentence to imprisonment for life.

9. Ms. Sara Hossain also tries to submit that the confession alleged to have been made by the petitioner was not true and voluntary and that it was obtained by torture.

10. We have considered the submissions of the learned Advocates of the review-petitioners, perused the impugned judgment and the materials on record.

11. The learned Advocates have drawn our attention as regards the age of the petitioner at the time of commission of the offence as found by the High Court Division in Death Reference No.29 of 2001 along with Jail Appeal No.2882 of 2001. The High Court Division found that the petitioner was merely a boy of 14 years old at the time of occurrence and 16 years at the time of trial of the case and therefore, he was a minor. The High Court Division further found that since no alternative sentence has been provided for the offence, it was left with no other option but to maintain the sentence if it believed that the prosecution had been able to prove the charge beyond reasonable doubt. The High Court Division observed that had the petitioner been tried for an offence punishable under section 302 of the Penal Code his sentence of death could have been commuted to imprisonment for life because of his tender age. The High Court Division observed that this was one of the extenuating circumstances for commuting his sentence. The High Court Division, however, hoped that it was a fit case, in which, the President of the Republic could consider the circumstances and commute the sentence in the light of the of the observation made by it provided the condemned prisoner would make such a prayer.

12. In Jail Appeal No.08 of 2004 arising out the judgment of the High Court Division, this Division held that the minimum sentence that could be given for committing an offence under section 6(2) of the Ain was death and death alone and as such, it was impossible to take a different view in the matter of sentence.

13. A review application was filed against the judgment delivered in Jail Appeal No.08 of 2004 and this Division observed that the condemned prisoner if so advised might seek mercy to the appropriate forum.

14. Having gone through the judgment of the High Court Division in the death reference, we find that it could not convert the death sentence to imprisonment for life as section 6(2) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 did not provide for any other sentence except death. The High Court Division was of the view that it was a fit case where the President of the Republic could consider the sentence and commute the sentence to imprisonment for life provided the petitioner would make such a prayer. In Jail Appeal No.08 of 2004 arising out of the judgment of the High Court Division and this Division could not commute the death sentence as section 6(2) of the Ain did not permit as such.

15. From the judgment delivered by the High Court Division in the death reference, we find that the petitioner was aged about 14 years at the time of occurrence and 16 years at the time of the trial and that he was a minor.

16. In the case of *Nalu vs. State, (2012) 17 BLC (AD) 204*, we have mentioned the grounds for which a death may be commuted to imprisonment for life. The mitigating circumstances mentioned in the above case are as follows:

- (a) The condemned prisoner has no significant history of prior criminal activity.
- (b) Youth of the condemned prisoner at the time of commission of the offence.
- (c) The condemned prisoner would not be likely to commit acts of violence if released.
- (d) Confinement of the condemned prisoner in the condemned cell from 09.06.2005 till date i.e. for more than 7 years during which period the sword of death has been hanging on his head.

17. In the case in hand, we find that the petitioner has no significant history of prior criminal activity and that he was aged 14 years at the time of commission of the offence and 16 years at the time of framing of charge. The petitioner has been in the condemned cell since 12.07.2001, that is, more than 14 years. Considering all aspects of the case, we are of the view that the death sentence of the petitioner be commuted to imprisonment for life.

18. Accordingly, this review petition is disposed of. The sentence of death imposed upon the petitioner is commuted to imprisonment for life.