7 SCOB [2016] HCD 40

High Court Division
(Criminal Appellate Jurisdiction)

Death Reference no. 22 of 2010

The State

Versus

1. Md. Nurul Amin Baitha,
2. Anjumanara Begum,
….. Condemned-accused.

Mr. Forhad Ahmed, D.A.G. with
Mr. Bashir Ahmed, A.A.G. and
Mr. Kazi Md. Mahmudul Karim, A.A.G.
.... For the State.
Mrs. Syeda Maimuna Begum, Advocate,
..... For the condemned accused.

Heard on: 07-05-2015, 10-05-2015, 12-05-2015, 13-05-2015
and
Judgment delivered on 14-05-2015

Present:
Mr. Justice Syed Md. Ziaul Karim
And
Mr. Justice Sheikh Md. Zakir Hossain

Fundamental principles of criminal jurisprudence and justice delivery system:
Fundamental principles of criminal jurisprudence and justice delivery system is the innocence of the alleged accused who should be presumed to be innocent until the charges are proved beyond reasonable doubt on the basis of clear, cogent and credible evidence and that onus of proving everything essential to the establishment of charge against the accused lies upon the prosecution which must prove charge substantially as laid to hilt and beyond all reasonable doubt on the strength of clear, cogent credible and unimpeachable evidence. In a criminal trial, the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and on its failure, it cannot fall back upon the evidence adduced by the accused in support of his defence to rest its case solely thereon. Proof of charge must depend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny. Prosecution version is also required to be judged taking into account the overall circumstances of the case with a practical, pragmatic and reasonable approach in appreciation of evidence. ... (Para-52)

We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged with crime, the following principles should be taken into consideration.

a) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.

b) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused.

c) In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffer.

d) There must be clear and unequivocal proof of the corpus delicit.

e) The hypothesis of delinquency should be consistent with all the facts proved.

... (Para-54)

Evidence Act,1872
Section 106:
Presence of the accused Baitha at the material time is supported by the evidence on record. Thus the death of the deceased was in the special knowledge of the accused Baitha. He knew how she met with death. Ordinarily an accused has no obligation to account for the death for which he is placed on trial. But in a case like the present one where the accused has special knowledge of the death of the deceased, under section 106 of the Evidence Act, he is under obligation to explain how the deceased died. If he fails to explain the death of the deceased or if his explanation is found false the irresistible inference would be that none besides him caused the death of the deceased. ... (Para-59)

When it is established that the husband and wife were residing in the same house at the relevant time, the husband is duty bound to explain the circumstances how his wife met her death and in absence of any explanation coming from the husband, irresistible presumption is that it is the husband who is responsible for her death. ... (Para-63)

Nari-O-Shishu Nirjatan Daman Ain, 2000
Section 11(ka)
Penal Code, 1860
Section 302:
The case is hand, although, tried by a Tribunal constituted under the Ain of 2000 that Tribunal was, also, the court of Sessions. In the judgment, learned Judge was described as Additional District and Sessions Judge, as well as Nari-O-Shishu Nirjatan Daman Tribunal no.2. Judgment demonstrates that learned Additional District and Sessions Judge has been, also, exercising the power and Jurisdiction of the Nari-O-Shishu Nirjatan Daman Tribunal. Fate of the convicts and result of the case would have been the same whether it would have been tried either as a Nari-O-Shishu case by the Tribunal or as a sessions case by learned Sessions Judge and if section 11(ka) of the Ain of 2000 was not attracted in respect of convicts the offence of section 302 the Penal Code could be very much pressed into service against the convicts, and they could be conveniently tried and convicted for offence of section 302 of the Penal Code.
... (Para-74)

How weight to be attached to the testimony of witness:
The weight to be attached to the testimony of witness depends in a large measure upon various consideration some of which are in the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility, it is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because of some suggestion against truthfulness of the witness. ... (Para-87)

With regard to the sentence imposed upon convicts we are of the view that sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that

the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice. ... (Para-104)

Judgment

Syed Md. Ziaul Karim, J:

1. This death reference under Section 374 of the Code of Criminal Procedure (briefly as the Code) has been made by learned Judge of Nari-O-Shishu Nirjatan Daman Tribunal no.2, Sherpur (briefly as Tribunal), for confirmation of death sentences of condemned-accused.

2. The learned Judge by the impugned judgment and order of conviction and sentence dated 19-04-2010, in Nari-O-Shishu Nirjatan Daman Case no. 143 of 2005 convicted the condemned-accused Md. Nurul Amin Baitha under section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (briefly as Ain 2000) and condemned accused Anjumanara Begum under sections 11(Ka), 30 of the Ain, 2000 and sentenced both of them to death by hanging.

3. Condemned accused Md. Nurul Amin Baitha remained absconding since institution of the case and condemned accused Anjumanara Begum after being enlarged on bail remained absconding. Both the accused were represented by the State defence lawyer.

4. The prosecution case as projected in the first information report (briefly as FIR) and unfurled at trial are that Hasna Begum aged about fifty years, daughter of late Rustum Ali of village Basuralga, Police Station-Nakla, District-Sherpur (since deceased) (briefly as deceased) was married with Md. Nurul Amin Baitha (condemned accused) (briefly as accused) son of late Abdus Samad of the same village before thirty years. Since marriage she used to stay at her conjugal home i.e. husband house at village Basuralga (briefly as place of occurrence i.e. P.O.). During their wedlock two sons and two daughters were born and at then she was carrying for five months. Since marriage her accused husband used to demand dowry for Tk.50,000/-, on her failure to bring the same she was subjected to physical torture. Prior to the occurrence the accused married one Anjumanara Begum (condemned accused) as second wife. On 18-02-2005 corresponding to 6th Falgun, 1411 B.S. Friday at 4:00 p.m. she asked about the second marriage but her accused husband answered in a furious manner and again demanded Tk.50,000/- as dowry. On her again refusal to pay her accused husband and his second wife Anjumanara Begum inflicted fists blows causing severe injuries upon her person leaving her in a critical condition at the court-yard. Later, village doctor Aminul Islam was called for treatment and according to his advise on the following day at 8:00 a.m. she was admitted at Nakla health Complex wherein on 19-02-2005 at 11:30 a.m. she succumbed to the injuries. Then both the accused carried her dead-body at the P.O. and fled away. With these allegations on 26-02-2005 her younger brother Md. Abdul Mannan (P.W.2) as complainant filed a complaint in the Court of Magistrate (Cognizance), Sherpur which was referred to the local Police Station for investigation. Prior to it the relations of deceased reported the incident to Chandraghona Investigation Center wherein the incident was recorded as GDE no. 407 dated 19-02-2005. After inquiry and consultation of inquest and

post mortem report S.I. Md. Kazi Amirul Islam(P.W.1) as informant lodged the FIR which was recorded as Nakla P.S. Case no. 04 dated 05-04-2005 corresponding to G.R. no. 44 of 2005 under sections 11(Ka),30 of the Ain, 2000.

5. During investigation accused Anjumanara Begum was arrested on 11-04-2005 from village Raipura and on 12-04-2005 she made confession recorded under section 164 of the Code.

6. After investigation Police submitted charge-sheet accusing Md. Nurul Amin Baitha and Anjumanara Begum as accused.

7. Eventually, accused were called upon to answer the charge under Sections 11(ka), 30 of the Ain 2000, which was not read over to them as they were absconding.

8. In course of trial, the prosecution in all examined twelve witnesses out of seventeen charge-sheeted witnesses. The defence examined none.

9. After closure of the prosecution case, the accused were not examined under section 342 of the Code as they were absconding.

10. The defence case as it appears from the trend of cross-examination of the prosecution witnesses by the learned State defence lawyer are that of innocence and false implication. It is divulged in defence that the accused did not beat the deceased rather she met a natural death.

11. After trial the learned Judge of Tribunal by the impugned judgment and order of conviction and sentence convicted the accused holding :

(a) The prosecution successfully proved the charge against the accused by corroborative evidence;
(b) The evidence against the accused was consistent, uniform and corroborative in nature; and
(c) The accused failed to explain the cause of death of deceased.

12. The learned Deputy Attorney General appearing for the State supports the reference and submits that it is a wife killing case and all the prosecution witnesses by corroborative evidence proved that the victim Hasna Begum died at the custody of her husband in her conjugal home. So the accused is under obligation to explain the cause of death. He adds that the doctor in his postmortem report specifically opined the cause of death and the ocular evidence also indicates that the death was homicidal in nature as the body bore multiple injuries upon the cadaver. He further submits that P.Ws.1(ka)-7 were the eye witnesses of assaulting the victim and they also stated that prior to the occurrence the accused used to torture the victim for the cause of dowry. He submits that the circumstances also proved that the accused had the complicity with the crime of murder of his wife and the learned Judge of the Court below after considering the materials on record rightly convicted the accused which calls for no interference by this Court.

13. In support of his contentions he refers the following cases:

(a) In the case of Ramnaresh and others Vs. The State of Chhattisgarh (2012)4, Supreme Court cases -257 at paragraph 52 wherein it was observed:

″It is a settled principle of law that the obligation to put material evidence to the accused under Section 313 CrPC is upon the Court. One of the main objects of recording of a statement under this provision of CrPC is to give an opportunity to the accused to explain the circumstances appearing against him aswellas to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313 CrPC, insofar as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law. ″

(b) In the case of State of U.P. Vs. Krishna Gopal and another (1988)4 Supreme Court Cases -302 wherein at paragraph -24 it was observed:
″It is trite that where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the orality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudiced making any other evidence, including medical evidence, as the sole touch stone for the test of such credibility. The evidence must be tested for its inherent consistency and the interest probability of the story; consistency with the account of their witnesses held to be creditworthy ; consistency with the undisputed facts; the credit of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. ″

(c) In the case of Dayal Singh and others Vs. State of Uttaranchal (2012)8 Supreme Court cases 263 wherein at paragraph 14 it was observed:
″ This Court has repeatedly held that an eyewitness version cannot be discarded by the court merely on the ground that such eyewitness happened to be a relation or friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, examine the possibility of discarding such statements. But where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the court to discard the statements of such related or friendly witness. ″

(d) In the case of Abul Kalam Azad alias Ripon (Md) Vs. State 58 DLR(AD)-26 held:
″ Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain (XVIII of 1995)
Section 10(1)
Even if there is no specific mention of demand of dowry in Material Exhibit I(c) but as the trial Court has observed on reading the writings in the diary in its entirety it cannot be said that the fact of torturing the victim for not meeting the demand of dowry was totally absent.

(e) In the case of Md. Abdul Majid Sarkar vs. The State 40 DLR-83 held:
″ Penal Code (XLV of 1860)
Section 300, Exception 4 read with Evidence Act (I of 1872)
Section 105

S. 105 of the Evidence Act casts a burden upon the accused to prove the existence of circumstances bringing the case within any special exception or provision contained in any other part of the Penal Code. There has been complete failure on the part of the defence to prove those circumstances.

14. The learned counsel sought to argue before us that Exception 4, to section 300 is attracted in the facts of the present case and as such the appellant ought to have been convicted for culpable homicide not amounting to murder. This argument can hardly be considered by us now when evidently no endeavor was made on behalf of the appellant to plead the aforesaid Exception at any stage earlier. Section 105 of the Evidence Act casts a burden upon the accused to prove ″ the existence of circumstances bringing the case.....within any special exception or proviso contained in any other part of the same (Penal) Code ″.

15. There has been a complete failure on the part of the defence to prove or bring on record those circumstances which would bring the case within the aforesaid Exception 4. Except the denied suggestion there is nothing on record to show that the offence was committed in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. In the absence of any foundation of fact it is now idle to suggest that Exception 4 is attracted. Indeed, as already noticed, it has never been argued before that the offence committed by the appellant was one of culpable homicide nor amounting to murder.

16. The learned counsel also made an argument that since the deceased died in the hospital admittedly 14 days after the occurrence, the nature of the injury was not obviously such as was likely to cause death and as such the appellant should have been convicted under section 304 Penal Code. ″

17. The learned Advocate appearing for the condemned accused opposes the reference and seeks to impeach the impugned judgment and order of conviction and sentence on five fold arguments:

18. **Firstly:** There is no specific evidence against the accused that he demanded dowry. Prior to the occurrence the victim did not disclose such facts of demanding dowry to her relations. So according to her, the demand of dowry to her was not proved by evidence.

19. **Secondly:** The prosecution although produced seven alleged eye witnesses namely PWs. 1(Ka)-7 but their presence at the P.O. were doubtful inasmuchas the other witnesses in their evidence did not support the presence of such alleged eye witnesses.

20. **Thirdly:** The prosecution failed to produce the independent witnesses and all the witnesses were inter related. So their evidence should not be relied and if the independent witnesses be examined they would not have supported the prosecution case.

21. **Fourthly** The evidence on record clearly indicates that their was no motive in committing such offence, rather, the murder was not premeditated.

22. **Fifth and lastly:** The judgment and order of conviction and sentence based on misreading and non consideration of the evidence on record which cannot be sustained in the eye of law.

23. In support of her contentions she refers the following cases:

(a) In the case of The State vs. Mofazzal Hossain Pramanik 43 DLR(AD) 64(A) held:

″ Burden of proving alibi in a wife-killing case-It is true that the burden of proving a plea of alibi or any other plea specifically set up by an accused-husband for absolving him of criminal liability lies on him. But this burden is somewhat lighter than that of the prosecution. The accused could be considered to have discharged his burden if he succeeds in creating a reasonable belief in the existence of circumstances that would absolve him of criminal liability, but the prosecution is to discharge its burden by establishing the guilt of the accused. An accused's burden is lighter, because the court is to consider his plea only after, and not before, the prosecution leads evidence for sustaining a conviction. When the prosecution failed to prove that the husband was in his house where his wife was murdered, he cannot be saddled with any onus to prove his innocence.″

(b) In the case of C.K. Raveendran Vs. State of Kerala 2000 Supreme Court Cases (crl.) 108 held:

″ Penal Code, 1860-Ss. 302 and 201- Uxoricide or suicide- The doctor issuing post-mortem certificate reserving his opinion as to the cause of death pending the result of chemic al analysis- In the final report issued on getting the report of Chemical Analyser, the doctor stating that it was not possible to say whether the injuries on the dead body were ante-mortem or post-mortem- The deceased was allegedly last seen in the company of the accused as long as 27 days before the dead body was found- In such circumstances, held, High Court erred to holding that the death was homicidal.″

(c) In the case of Atahar and others Vs. State 62 DLR-302 held:

″ Defence plea- There is a basic rule of criminal jurisprudence that if two views are possible on the evidence adduced in a case of circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the Court should adopt the view favorable to the accused. If we consider the entire evidence we can safely conclude that the prosecution has totally failed to prove its case, moreso the version put forward by the defence has a reasonable possibility of being true. Hence the accused is entitled to get benefit of doubt, not as a matter of grace but as a matter of right.

24. In the instant case, if we place defence version and its supporting evidence and circumstances and the prosecution case side by side in order to arrive at a correct decision, it will appear to us that the defence version of the case will come our prominently in order to defeat the prosecution case but the learned trial Court did not virtually outsider the defence version. If the defence put forward in alibi on behalf of the accused which seems to be true the accused is entitled to a verdict of benefit of doubt.

25. In order to appreciate their submissions we have gone through the record and given our anxious consideration to their submissions.

26. Let us now weigh and sift the evidence on record as adduced by the prosecution to prove the charge.

27. P.W.1 S.I. Kazi Amirul Islam, informant of the case. He deposed that on 05-04-2005 he was posted at Nakla Investigation Centre. He received an inquest report and post-mortem report in connection with General Diary no. 407 dated 19-02-05 regarding beating of victim by her husband within 18-02-2005 to 19-02-2005 at 11:30 a.m. There are two accused in this

case. One is Nurul Amin Baitha and another his second wife. Since marriage accused husband of victim used to torture for dowry. After serious beating she was sent to Nakla health complex wherein on 19-02-2005 at 11:30 she succumbed to the injuries. Accordingly S.I. Samir held inquest and after post mortem examination he lodged the F.I.R. (Exhbt.1) and his signature on it Exhbt. 1/1. The deceased used to stay at her conjugal home.

28. P.W.1(ka), Abdul Mannan Mia, younger brother of deceased and eye witness to the occurrence. He deposed that on 26-02-2005 he filed a complaint in the Court. In consequence of that case on 05-04-2005 FIR was lodged by S. I. Amirul Islam. His elder sister deceased Hasna Banu was married with Nurul Islam Baitha before 25/30 years. During their wedlock two sons and two daughters born. The occurrence took place on 18-02-2005 at 12:00 p.m. to 4:00 p.m. Prior to four days of occurrence his sister was sent to their home for bringing for Tk.50,000/- as dowry. On her refusal her accused husband threatened for second marriage before 2/3 days of the occurrence. He (accused) married one Anjumanara Begum for the second time. On query by his deceased sister about second marriage, the accused again demanded dowry for Tk. 50,000/- and assaulted her by inflicting fists and blows. He was then ploughing at the boro field at south to P.O. and witnessed the occurrence. On hearing hue and cry he rushed to the scene and tried to rescue the deceased but he was chased by the accused. Then he rushed to Chairman and reported the incident who assured for proper justice. In the evening village doctor Aminul came and according to his advise she was taken to Nakla health Complex on the following day, wherein doctor declared her dead. Then his deceased sister was brought to her conjugal home from-where both the accused fled away. He caught hold accused Anjumanara Begum and produced her to the Police. He witnessed the occurrence. Nurul Islam Baitha and his second wife assaulted his deceased sister and other witnesses also witnessed the occurrence.

29. In cross-examination he stated that he was working 50 cubits away from the home of accused on the day of occurrence. He witnessed the beating to his sister. Both the accused were assaulted her at 12’0 clock. He denied the suggestion that he did not witness the occurrence and the accused did not demand dowry and deposing falsely.

30. P.W. 2, Rana Mia, a local witness and eye witness to occurrence. He deposed that on 18-02-2005 at 12 ’0 clock he was working in a boro field south to P.O. On hearing hue and cry he went there and found that the accused was inflicting fists and blows to victim Hasna Banu and his second wife was assisting him. He did not protest. He had no knowledge on which reason the accused was beating. At the P.O. Anjumanara, Gendu and Mannan were present. On the following day victim was taken to hospital wherein the doctor declared her dead.

31. In cross-examination he stated that he found Mannan at the P.O. who tried to rescue the deceased from beating, he did not hear about demanding dowry but subsequently heard it. He denied the suggestion that accused Anjumanara did not assist the accused for assaulting and he was deposing falsely.

32. P.W. 3 Gendu Mia, cousin of deceased and eye witness to occurrence. He deposed that the occurrence took place on 18-02-2005 at 1:00 p.m. At that time he was working at his agricultural field. On hearing alarm he went to the P.O. and found that accused Nurul Amin Baitha seriously beating his wife Hasna Banu. He did not notice Anjumanara Begum. The accused assaulted the deceased for the cause of dowry. Then he left the P.O. After sometime

he came back and found that accused Baitha and accused Anjumanara were pouring water on head of victim, at that time the other children were weeping. He was examined by the Police.

33. In cross-examination he stated that he was working at 400/500 cubits from the P.O. He found Munsur, Asaduzzaman, Manna, and Mizan member at P.O. The father of deceased used to give Tk.2/4/5 thousand to accused. After death of father of deceased her brother also gave money. He however did not see assaulting of deceased by Anjumanara. He denied the suggestion that Anjumanara and Baitha had no complicity for murdering deceased and deposing falsely.

34. P.W. 4 Asaduzzaman is cousin of deceased and eye witness to occurrence. He deposed that on 18-02-2005 at 12/1:00 O'clock he was working in irrigation pump. On hearing alarm he rushed to P.O. and found that Mannan was beating the victim Hasna Banu for cause of dowry for Tk. 50,000/-. Earlier father of deceased used to pay money to accused. On the same day at 4'0 clock he heard that accused also assaulted the deceased. Later the deceased was taken to hospital wherein she died. He was examined by the Police.

35. In cross examination he denied the suggestion that accused Baitha and Anjumanara assaulted the victim and he was deposing falsely.

36. P.W. 5 Md. Jarifuddin, a local witness and eye witness to occurrence. He deposed that on 18-02-2005 at 11/13 '0 Clock he found that accused Baitha was beating his wife, nobody came forward to rescue her. He found Azbahar, Akkas, Rana,Gendu, Asaduzzaman and Azahar were at the P.O. The victim was senseless and lying on the ground. Then victim was taken to hospital wherein she died. The second wife assisted for assaulting the victim.

37. In cross-examination he denied the suggestion that accused Baitha and Anjumanara did not assault the victim.

38. P.W. 6 Azahar Ali, a local eye witness of the occurrence. He deposed that on Friday at 11/12 '0 Clock the occurrence took place. He was ploughing at south side to accused Baitha. On hearing screaming he went to P.O. and found that accused Baitha was beating his wife. The victim was about to undress, many peoples assembled there. They tried to resist but accused Baitha did not allow any one to come forward. At afternoon he found the victim Hasna Banu in critical condition and she was taken to hospital wherein she died. The locals arrested second wife of Baitha. After second marriage accused Baitha used to demand dowry to victim.

39. In cross examination he stated that he heard about demanding of dowry from the brother of deceased. The deceased died after severe beating and second wife of Baitha assisted the accused for beating. He denied the suggestion that he was deposing falsely.

40. P.W. 7 Monsur Ali, a local eye witness. He deposed that he was working at the paddy field beside the P.O. On hearing alarm he went to P.O. at 10:30 a.m. and found that accused Baitha and Anjumanara were beating victim Hasna Banu. Then he left from P.O. again he happened there at 4'O clock and found that accused were beating the deceased. On the following day the deceased Hasna Banu was taken to hospital wherein she died. The deceased Hasna Banu was carrying for five months. After occurrence the dead-body of Hasna Banu was kept at P.O. and both the accused fled away.

41. In cross-examination he denied the suggestion that he did not see the occurrence and deposing falsely.

42. P.W. 8 A.S. Mainul Islam,Upazila Nirbahi Officer, Sherpur deposed that on 12-04-2005 he recorded the confession of accused Anjumanara after completion of all legal formalities. He proved the same as Exhbt. 3 and his signature on it Exhbt. 3/1.

43. In cross- examination he denied the suggestion that at the pressure of Police the accused made confession.

44. P.W. 9 Dr. Jatindra Chandra Mondal. He deposed that on 20-02-2005 he was attached as Residential medical officer(RMO) in the Sherpur sadar hospital and held autopsy upon the cadaver of deceased Hasna Banu and found the following injuries:

1. Multiple ecchymosis on the both sided face. On the both lips, on the nose, on the both mandiblular both sub mandiblular region. On the anterior aspect of the neck, on the both lateral aspect of upper and middle part of the neck, on the posterior aspect of the neck, on the right side forehead, on the anterior aspect of the upper and middle part of the right side of the chest.
2. Multiple ecchymosis on the left fronto partial region of the head, on the upper and middle part of the back on the left arm, left fore arm on the dorsum of the left hand of the right forearm, on the middle of the arterial aspect of both thighs, on the anterial aspect of the right side of upper abdominal region.

45. He opined that death was due to asphyxia, resulting of suffocation from above mentioned injuries which were antimortem and homicidal in nature. He proved the post mortem report as Exhbt. 4 and his signature on it as Exhbt. 4/1.

46. In cross- examination he denied the suggestion that he did not held autopsy correctly.

47. P.W. 10 S.I. Md. Sahidullah, He deposed that he recorded the FIR and filled up its form. He proved his signature as Exhbt. ½ and 1/3 and inquest was held by S.I. Sagiruddin and after then he retired. He proved the signature of S.I. Sagir as Exhbt. 2/2.

48. P.W. 11 S.I. Kazi Amirul Islam. He deposed that on 05-04-2005 he was attached at Nakla Station Investigation Centre and the case was entrusted to him for investigation. He visited the P.O. , prepared the sketch map with index, recorded the statement of witnesses under section 161 of the Code. After investigation he submitted charge-sheet accusing Nurul Amin Baitha and Anjumanara as accusesd.

49. In cross examination he denied the suggestion that without proper investigation and in perfunctory manner submitted charge-sheet.

50. These are all of the evidence on record as adduced by the prosecution to prove the charge.

51. Now the question calls for consideration how far the prosecution could proved the charge against the appellants. Such question along with the submissions of the defence should be answered in the following manner:

> In approaching and answering to the points drawn up, the cardinal principles of criminal jurisprudence in awarding conviction followed by sentence upon an indicted

person demands meditation. A legal survey of law, appraisal of evidence, browsing eye on materials brought on record, analysis of fact and circumstance of the case, inherent infirmities disturbing and striking facts of prosecution case are also required to be taken into consideration. Rival contentions surged forward from both sides shall be also addressed and considered by us.

52. Fundamental principles of criminal jurisprudence and justice delivery system is the innocence of the alleged accused who should be presumed to be innocent until the charges are proved beyond reasonable doubt on the basis of clear, cogent and credible evidence and that onus of proving everything essential to the establishment of charge against the accused lies upon the prosecution which must prove charge substantially as laid to hilt and beyond all reasonable doubt on the strength of clear, cogent credible and unimpeachable evidence. In a criminal trial, the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and on its failure, it cannot fall back upon the evidence adduced by the accused in support of his defence to rest its case solely thereon. Proof of charge must depend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny. Prosecution version is also required to be judged taking into account the overall circumstances of the case with a practical, pragmatic and reasonable approach in appreciation of evidence.

53. It is always to be remembered that justice delivery system cannot be carried away by heinous nature of crime or by gruesome manner in which it was found to have been committed and graver the charge is greater is the standard of proof required. It should also bear in mind that if the accused can create any doubts by adducing evidence or cross examining the PWs in the prosecution case, the accused is entitled to get benefit of doubt. It is conveniently observed that though sad, yet is a fact that in our country there is a tendency on the part of the people to rope in as many people as possible for facing trial in respect of any criminal case. It has been even found that innocent person, including aged infirm and rivals, are booked for standing on dock. Some are acquitted by the Court of first instance and some by appellate Court, but only having been in incarceration for years. Such efforts on the part of relatives of victim and other interested persons invariably is done and thus it becomes difficult on the part of a Court to find out the real culprit. Under such circumstances and in view of the prevalent criminal jurisprudential system, a judge is to find out the truth from a bundle of lies and to shift the grain out of chaff. A Judge does not preside over a criminal trial merely to see that no innocent person is punished. A Judge, also presides to see that guilty man does not escape. Both are public duties. Law therefore, cannot afford any favour other than truth and only truth.

54. We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged with crime, the following principles should be taken into consideration.

a) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.

b) The evidence must be such asto exclude to a moral certainty every reasonable doubt of the guilt of the accused.

c) In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffer.

d) There must be clear and unequivocal proof of the corpus delicit.

e) The hypothesis of delinquency should be consistent with all the facts proved.

55. Inspite of the presumption of truth attached to oral evidence under oath if the Court is not satisfied, the evidence inspite of oath is of no avail.

56. On going to the materials on record it transpires that the prosecution in all examined twelve witnesses, of them P.W. 1 and P.W. 11 are the same person who deposed as informant and investigation officer respectively of this case. P.W. 1(Ka) is brother of deceased. P.W. 2 is local witness. P.Ws. 3 and 4 are cousins of deceased, P.Ws. 5, 6 and 7 are also local witnesses. P.Ws. 1(Ka), 2, 3,4,5, 6 and 7 are the eye witnesses of the occurrence. They were working beside the P.O. and happened at scene on hearing screaming from the homestead of accused Nurul Alam Baitha. P.W. 8 is Magistrate, first Class, recorded the confession of accused Anjumanara, P.W. 9 held autopsy upon the cadaver of the deceased, P.W. 10 recording officer of the case.

57. On meticulous examination of the evidence on record we find that instant case is absolutely rest upon the evidence of P.W. 1(ka). Abdul Mannan Mia, younger brother of deceased, an eye witness of occurrence. P.Ws. 2,3,4,5,6,7 are also eye witnesses, they were examined along with other official witnesses to corroborate P.W.1(ka). He deposed that on the day of occurrence he was ploughing at boro field beside south of P.O. On hearing alarm he rushed to there and found that Baitha along with his second wife Anjumanara were mercilessly beating his elder sister victim Hasna Banu wife of accused Baitha. He along with other witnesses tried to resist the accused but the accused chased them. He, then reported the incident to local Chairman. P.W. 1(ka), 3, 4, 5, 6, and 7 categorically in one voice stated that accused Baitha and his second wife Anjumanara Begum mercilessly beat his first wife victim Hasna Banu. They inflicted fists blows at her vital organ for which she subsequently on the following day succumbed to the injuries at hospital. P.W. 9 Dr. Jatindra Chandra Mondal who held autopsy upon the cadaver of deceased also found that the body bore multiple injuries which were antimortem and homicidal in nature and death was due to such injuries. Althogh P.Ws. 3 and 4 did not state anything about the accused Anjumanara relating to beating of deceased but on close analysis of their evidence it appears to us that the occurrence took place since morning to evening and those witnesses came after beating by both the accused.

58. It is pertinent to point out that the accused Baitha mercilessly assaulted his first wife deceased Hasna Banu at 12-0 clock then also at 4:00 p.m. So in both the time second wife of Baitha Anjumanara participated and assisted his husband Baitha. So it is very unsafe to say that both the accused had no premeditated/preplaned for assaulting the victim to death.

59. Undisputedly the deceased, who was the first wife of accused Baitha, met with death in the conjugal home, while she was living with her accused husband. Presence of the accused in the house at the material time is not disputed. No plea of alibi has been taken. Moreover presence of the accused Baitha at the material time is supported by the evidence on record. Thus the death of the deceased was in the special knowledge of the accused Baitha. He knew how she met with death. Ordinarily an accused has no obligation to account for the death for which he is placed on trial. But in a case like the present one where the accused has special knowledge of the death of the deceased, under section 106 of the Evidence Act, he is under obligation to explain how the deceased died. If he fails to explain the death of the deceased or if his explanation is found false the irresistible inference would be that none besides him caused the death of the deceased. With this regard reliance may be placed in the cases of (1) Abdul Motaleb Howlader vs. State 5 MLR (AD) 362= 6 BLC(AD)1, (2) Elais

Hossain vs. State, 54 DLR (AD) 78, (3) Golam Mortuza, vs. State, 2004 BLD (AD)201=9 BLC (AD)229, (4) Gouranga Kumar Shaha, vs. State 2 BLC (AD) 126, (5) Dipak Kumar Sarker, Vs. State 40 DLR (AD), 139, (6) State Vs. Mofazzal Pramanik, 43 DLR(AD)65, (7) State Vs. Shafiqul Islam, 43 DLR(AD) 92, (8) State Vs. Kalu Bepari, 43 DLR(AD) 249, (9) Shamsuddin vs. State, 45 DLR 587, (10) Abdus Salam vs. State, 1999 BLD 98, (11) Abdus Shukur Miah vs. State 48 DLR 228, (12) State vs. Afazuddin Sikder, 50 DLR 121, (13) Abul Kalam Molla vs. State 51 DLR 544, (14) Joynal Bhuiyan vs. State 52 DLR 179, (15) Fazar Ali vs. State, 5 MLR 351= 5 BLC 542, (16) State Vs. Azizur Rahman 2000 BLD 467= 5 BLC 405.

60. In the case of Abul Hossain Khan vs. State 8 BLC(AD) 172, it is held-

> "The un-denied position is that death of petitioner's wife occurred in the house of the petitioner. It is not the case of the petitioner that he was away from the home while death occurred to his wife or that some miscreants whom he could not resist caused death of his wife. The petitioner tried to explain the cause of death by stating that the deceased committed suicide by hanging. The explanation offered as to how death occurred to the petitioner's wife was found to be not correct because of the evidence of P.Ws. 12 and 13, the Medical Officers who held post-mortem examination of the dead-body of petitioner's wife. The Medical Officers have stated that cause of death of the victim was homicidal and not suicidal. Since death to the wife was caused while she was residing in the house of her husband, the convict petitioner, is competent to say how death occurred to his wife and that the explanation which he offered having been found untrue, the conviction and sentence that was passed by the learned Sessions Judge has rightly been affirmed by the High Court Division.

61. The facts and circumstances of the above case are fully consistent with those of the case in our hand and as such the principle of law enunciated in that case is applicable in this case.

62. It is pertinent to point out that the accused has no obligation to account for the death for which he is placed for trial. The murder having taken place while the wife was with the custody of her husband, then the accused husband under Section 106 of the Evidence Act, is under obligation to explain how his wife had met with her death. In absence of any explanation coming from his side it seems, none other than the accused husband was responsible for causing death.

63. It is well settled that when it is established that the husband and wife were residing in the same house at the relevant time, the husband is duty bound to explain the circumstances how his wife met her death and in absence of any explanation coming from the husband, irresistible presumption is that it is the husband who is responsible for her death. In this regard reliance can be placed in the case of State Vs. Aynul Huq 9 MLR 393= 9 BLC 529. This view receives support in the case of Gouranga Kumar Saha vs. State 2 BLC (AD) 126. Abdul Mutaleb Howlader vs. State 5 MLR(AD)92= 6 BLC(AD)1, Dipok Kumar Sarkar vs. State reported in 40 DLR(AD) 139 and Sudhir Kumar Das alias Khudi Vs. State 60 DLR-261.

64. In the case State vs. Azam Reza 62 DLR(AD) 406 held:

> "Wife killing case- The deceased was the wife of the accused who met with death in the bed-room of the accused, while she was living with the accused. The presence of the accused in the house of the material time is not disputed rather is supported and proved by evidence on record and the death of the deceased was within the special knowledge of the accused."

65. On appraisal of the evidence on record therefore, we find that the evidence of the prosecution witnesses regarding staying of the victim with her accused husband at her conjugal home are consistent, uniform and corroborative with each other. There is absolutely no reason to disbelieve those competent witnesses, therefore, the same are invulnerable to the credibility.

66. It is very significant to us that all the eye witnesses categorically stated about assaulting/ beating the victim at the relevant time of occurrence by both the accused for which she met with the tragic end of life but from their evidence we failed to discover any such events of demanding dowry to her before such occurrence. P.W. 1Ka i.e. younger brother of the deceased also failed to disclose such facts and other witnesses had no direct knowledge of demanding dowry for confirmation of marriage between accused Baitha and deceased. Therefore, the prosecution failed to prove the charge of demanding dowry as provided in Ain 2000, but there are consistent, uniform and corroborative evidence in murdering the deceased by those accused.

67. The condemned accused stood charged and convicted for offence of sections 11(ka), 30 of the Ain 2000. Section 11(ka) enjoins that if the husband of a woman or father, mother, guardian, relation or any other person on behalf of the husband for dowry cause death to a woman or ventures to cause death or causes hurt or have a try to cause hurt that husband, father, mother, guardian, relation or the person (a) shall stand sentenced to death for causing death or shall stand sentenced to imprisonment for life for mounting endeavour to cause death and in both the counts he shall be, also, liable to pay fine and (b) shall be sentenced to imprisonment for life causing hurt or be sentenced to rigorous imprisonment for a period not more than 14(fourteen) years and less than 5(five) years for striving to cause hurt and in both counts shall be liable to fine.

68. In order to attraction 11(Ka) of the Ain 2000, it is to be proved that death was caused in view of demand of dowry put forward from the side of husband or father, mother, guardian, or relation of the husband or any person for and on behalf of husband.

69. From circumstantial evidence it has come to light that convicts had caused the death of deceased and a clear case of murder had been brought home to the door of convicts.

70. This takes us to a legal debate of fundamental character, which is,

i. Whether the convicts can be graced with a verdict of acquittal when charge of section 11(ka) of the Ain of 2000 could not be pressed against him;

ii. When a clear case of murder has been established by circumstantial and medical evidence against them whether the convicts can be convicted for the offence of murder punishable under section 302 of the Penal Code.

iii. Whether the case is required to be sent back to Tribunal or Court of sessions for fresh-trial.

71. Section 25 of The Ain of 2000 postulates that Tribunal defined in section 2(Gha) shall be treated as Court of Sessions and Tribunal shall be able to exercise all powers of Sessions Court in holding trial of an offence.

72. Section 26 of The Ain 2000 enshrines that Tribunal so constituted shall be recorded as Nari-O--Shishu Nirjatan Daman Tribunal and shall be constituted with one Judge and Judge of Tribunal shall be appointed from amongst District and Sessions Judge to the Government, if necessary, shall appoint any District and Sessions Judge as Tribunal Judge in addition to his charge. Section 20 further enjoins that under the section Additional District and Sessions Judge shall, Also, stand included as District and Sessions Judge.

73. From the above it becomes manifestly clear that a Tribunal trying a case under the Ain of 2000 is, also, a Court of District and Sessions Judge. When a Judge sits in a Tribunal or Special Tribunal Case holding trial of an offence under a Statute or Special Statute is a Tribunal or Special Tribunal and a Judge when sits in Sessions Case trying an offence punishable under Penal sections of Penal Code sits as Sessions Judge.

74. The case is hand, although, tried by a Tribunal constituted under the Ain of 2000 that Tribunal was, also, the court of Sessions. In the judgment, learned Judge was described as Additional District and Sessions Judge, as well as Nari-O-Shishu Nirjatan Daman Tribunal no.2. Judgment demonstrates that learned Additional District and Sessions Judge has been, also, exercising the power and Jurisdiction of the Nari-O-Shishu Nirjatan Daman Tribunal. Fate of the convicts and result of the case would have been the same whether it would have been tried either as a Nari-O-Shishu case by the Tribunal or as a sessions case by learned Sessions Judge and if section 11(ka) of the Ain of 2000 was not attracted in respect of convicts the offence of section 302 the Penal Code could be very much pressed into service against the convicts, and they could be conveniently tried and convicted for offence of section 302 of the Penal Code.

75. In the case of Asiman Begum vs. The State 51 DLR(AD)-18 held:

> "When it is found after a full trial that there was a mis-trial or trial without jurisdiction, the Court of appeal before directing a fresh trial by an appropriate Court should also see whether such direction should at all be given in the facts and circumstances of a particular case.
>
> It is found that there was no legal evidence to support the conviction then in that case it would be wholly wrong to direct a retrial because it would then be a useless exercise. Further, the prosecution should not be given a chance to fill up its lacuna by bringing new evidence which it did not or could not produce in the first trial."

76. As regards remand of the case, we may profitably refer the above decision in the case of Asiman Begum vs. state reported in 51 DLR(AD) 18 wherein it has been decided that the remand order for trial of the case as a Sessions case in the particular circumstances of the case will be a mere formality because Nari-O-Shishu Case no.2 of 1996, although tried under Bishes Bidhan Ain, 1995 by a Bishesh Adalat, the presiding officer was no other than the Sessions Judge himself and, as such, it was unlikely that the result would be anything different if the case was tried by him as a Sessions case. Appellate Division, thus sent the appeal to High Court Division to consider the case on merit and to pass whatever order or orders it might think appropriate in the interest of justice.

77. In State vs. Abul Kalam , 5 BLC 230 one Abul Kalam stood convicted for offence of section 10(1) of The Ain of 1995 for murder of his wife for dowry by learned Sessions Judge and Special Tribunal no.1, Noakhali. Consequential sentence was death. Condemned-prisoner preferred Jail appeal and, also, regular Criminal appeal before High Court Division. There had been, also, Death Reference. A Division Bench of High Court Division heard Death Reference, Jail appeal and Criminal appeal together and disposed of those by a common Judgment. High Court Division found that there had not been cogent evidence asto committing murder for dowry and no evidence had been led as to the real cause of killing of wife by husband and held that the case did not come under section 10(1) of The Ain of 1995 and the case comes under section 302 of the Penal Code. The High Court Division further held that Sessions Judge, in fact, was the Special Tribunal no.1 who tired the case and for no fault of the accused the case had been tried as Special Tribunal case. High Court Division instead of sending the case back for fresh trial under Section 302 of The Penal Code by learned Sessions Judge disposed of the appeal. High Court Division altered conviction from section 10(1) of The Ain,1995 to one under section 302 of the Penal Code. Sentence of death was altered to one of imprisonment for life. The High Court Division in rendering decision took into account the case of Asiman Begum vs. State (Supra).

78. In the case of Shibu Pada Acharjee vs. State reported in 56 DLR 285, accused-appellant was convicted for offence of section 4© of The Ordinance of 1983 for commission of rape upon victim Ratna Rani but ingredients of section 4© of the Ordinance of 1983 could not be brought home to accused-appellant. In the case is had been laid down:

> "To take the prosecution out of Court on a question of technicality, will be a travesity of Justice and technicality must bend to cause of justice inasmuch as ends of law is Justice."

79. Accused-appellant can be fastened for offence of section 376 of the Penal Code and conviction under section 4(c) of the Ordinance of 1983 can be altered to one of section 376 of The Penal Code.

80. In the said case conviction under section 4(c) of The Ordinance of 1983 was altered to one of section 376 of the Penal Code.

81. In the case of The State vs. Mahbur Sheikh alias Mahabur ILNJ 139 i.e. I The Lawyers & Jurist 139 held:

> " Since offence of murder punishable under section 302 of Penal Code was carried to the door of convicts they can be very much convicted for offence of Sections 302, 34 of the Penal Code and as such we convert the offence of section 11(Ka) of the Ain 2000 to offence of sections 302, 34 of the Penal Code. Convicts, thus stands convicted for offence of sections 302, 34 of the Code.

82. In the event of sending the case either to Tribunal or Court of Sessions for fresh trial proceeding would be protracted which cannot be allowed in the interest of true dispensation of criminal Justice.

83. Since offence of murder punishable under section 302 of the Penal Code was carried to the door of convicts they can be very much convicted for offence of sections 302, 34 of the Penal Code and as such we convert the offence of section 11(ka) of The Ain of 2000 to offence of sections 302, 34 of Penal Code. Convicts, thus stands convicted for offence of sections 302, 34 of the Penal Code.

84. Legal debate stands solved in the following terms and language:

i. Convicts cannot be graced with a verdict of acquittal;

ii. Convicts can be convicted for the offence punishable under sections 302, 34 of the Penal Code.

iii. Case is not required to be sent either to Tribunal or Court of Sessions for fresh trial.

85. We find that PWs. 1(Ka), 3 and 4 are the close relation of deceased. They were the eye witnesses of occurrence. Their evidences are uniform and corroborative with each other in murdering deceased by both convicts.

86. The credit to be given to the statement of a witness is a matter not regulated by rule of procedure, but depends upon his knowledge of fact to which he testifies his disinterestedness, his integrity and his veracity. Apportion of oral evidence depends on such variable in consistence which as a human nature can not be reduced as a set formula (40 DLR 58).

87. The weight to be attached to the testimony of witness depends in a large measure upon various consideration some of which are in the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility, it is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because of some suggestion against truthfulness of the witness.

88. Evidence of close relations of the victim cannot be discarded more particularly when close relations does not impair the same. Straightforward evidence given by witness who is related to deceased cannot be rejected on sole ground that they are interested in prosecution. Ordinarily close relation will be last person to screen real culprit and falsely implicate a person. So relationship far from being ground of criticism is often a sure guarantee of its truth (40 DLR 58).

89. We also find that during investigation the accused Anjumanara made a confession (Exhbt. 3) wherein she stated that some facts which are not consistent with the prosecution case.

90. For the convenience of understanding the same reads as hereunder:

Sh¡eh¢c

অনুমান দেড় মাস আগে শুএক্রবার দুপুর অনুমান ১.০০ টার সময় আমার সতীনের লগে আমার স্বামী বৈঠা কাইজ¡ বাধাইছে। এই কাইজা বাধায় সতীনের ও বৈঠার মেয়ে জামাইরে টাহা পয়সা দেওয়া নিয়ে z ®hW¡ hলে শনিবারে মাছ বেইচ্যা টেকা পাঠায় ¢cjz ¢L¿ºসতীনের টেহা পাঠাই দিবার কয় । এই নিয়ে তাদের মধ্যে মোহামুহি হয় । সতীনে স্বামী বৈঠারে গালি গালাজ করে । স্বামী বৈঠা সতীনরে গালিগালাজ পাড়ে । আমি তাগো হাতে পায়ে ধরে মুহামুহি করতে না করি কিন্তু তারা শোনে নাই। বৈঠা সতীনরে দুই হাত দিয়ে ঘুষা ঘুষি করছে, মারছে আমি ঠেকাইতে গেছি আমারে ঠেলা দিয়ে বৈঠা ফেলাই দিছেz a¡lfl ®hW¡ আমার সতীনের চুলের মুঠি ধরে এপাশে ওপাশে মাটিতে আছড়াইছে । মারছে এক সময় আমার সতীন অজ্ঞান হইয়া গেছে । ®hW¡l ®R¡V ®f¡m¡(q¡¢hh) aqe আসে তার মার চুলের মুঠি ধরে উচু করে মাটিতে ছেরে দিল বলে, শুয়ারের বাচচা আমার বাপের লগে ঝগড়া কর। তারপর বৈঠা সতীনরে ঘরে নিয়ে গেল । আমাকে পানি আনতে কইলে পানি আনি । সতীনের মাথায় আমি পানি ঢালছি, বৈঠা কেরোসিন দিয়ে হাতে পায়ে মালিশ করতেছি । আমি বলি কেরুসিন মালিশ দিলে ভাল হইত না । HV¡ ডাক্তারের কাম । তার পর সেদিন রাত ৮.০০ টার সময় একজন ডাক্তার আনছে । ৫০০ পাওয়ারের সেলাইন দিছেz pa‡e ®Q¡M মেলে চাইছে। সে আমারে তার মাথাতে পানি ঢালতে বলে । এপাশ ওপাশ কাত করাতে বলে । রাতে সতীনের অবস্থা খারাপ qu z Lu Bj¡l X¡e¡ LC WÉ¡w LC z B¢j aMe X¡e¡ WÉÉe dরে দেখাই । পর দিন সকাল ৮.০০ টায় নকলা হাসপাতালে

নিয়ে আসে । ডাক্তার সেলাইন দিছে । অনুঃ বেলা শনিবার ১২.০০ টার সময় সতীন হাসপাতালে মারা যায় বৈঠা সতীনের লাশ নিয়ে বাড়ীতে এনে দহলে রাখে । রুটি খায় । কিছু কাগজ দেখায় বলে পুলিশে আমারে কি করবো । আমারে স্বামী বৈঠা বলে ভাগো । আমি কই আমি ভাগবো কেন তুমি মারছো, আমি বলি আমি ভাগবোনা। সতীনের বোনে ও ভাইয়ে আমাকে তাদের বাড়ীতে নিয়ে যায়। এই আমার জবানবন্দি ।

ৎVf‡pq ü¡/- ApØf‡ÛV
B ‘ u¡l¡ 12-04-05
(H, He, Hj, jDem Cpm¡j)
১ম শ্রেনীর ম্যাজিষ্ট্রেট, শেরপুর ।

91. On careful analysis of aforesaid confession. We find that the same are not in terms of prosecution case but there are sufficient ocular evidence against her in respect of beating /assaulting the deceased Hasna Banu. Those eye witnesses were extensively cross examined by the defence, in respect of participation of convict Anjumanara, but nothing could be elicitated to shake their credibility in any manner whatsoever.

92. It further appears to us from the above evidence on record regarding assaulting/beating the victim by both the convicts and subsequent at the P.O. by bringing the same from hospital are consistent, uniform, self independent and corroborative with each other with all materials particulars. There is absolutely no reason to disbelieve those competent witnesses in any manner whatsoever. So the same are invulnerable to the credibility.

93. From the evidence on record we further find that convict Baitha remained absconding since very beginning of the case, his first wife died, so he had the responsibilities to explain his position regarding further act and convict Anjumanara although appeared in the Court but later she also remained absconding. She had also some duty to explain her position, as there were severe allegations against her complicity into occurrence.

94. From the materials on record we find that soon after the occurrence the convicts fled away and remained absconding during trial, and trial was held in absentia. Abscondence of an accused is an incriminating circumstances connecting him in the offence and conduct of a person in abscondence after commission of crime is an evidence to show that he is concerned in the offence (Vide PLD 1965 Lah. 656). Therefore, anything, which tends to explain his conduct and furnishes a motive other than a guilty conscience, will be relevant under the Evidence Act. Failure to explain reason for absconding after occurrence fovours prosecution (39 DLR 437). Abscondence of accused is a relevant fact. Unless accused explain his conduct, abscondence may indicate guilt of accused (33 DLR 274). Where accused absconded immediately after occurrence and remained out of reach of hand of law for more than years without showing any convincing reason for his absence, it would be an important factor going against absconder accused (AIR-1998 SC-107). Abscondence immediately after incident and till today is a strong incriminating circumstances while can be considered sufficient corroboration of his participation in commission of crime(11 BLT 155).

95. From the materials on record, we failed to discover any express motive of accused in the crime of murder, for such cause prosecution will not fail, since motive is not ingredient of

offence, prosecution is not bound to prove the motive of the accused for committing the crime (42 DLR(AD)31; 10 MLR(AD)175}.

96. Motive does not play an effective role when premeditated and cold blooded murder is committed and established my irrefutable evidence. What is important is the nature of evidence and not the motive which may or may not be proved. None proof of motive cannot be a ground to discard the unimpeachable evidence (PLD 2001 SC 333}.

97. Proof of motive or previous ill feeling is not necessary to sustain conviction when court is satisfied that convicts are assailants of the victim, but once motive was setup it was to be proved by the prosecution beyond doubt and failure to furnish cogent and reliable evidence could lead to adverse inference against prosecution (PLD 2000 Kar 128). Absence of motive is not ground for acquittal (PLD 1999 Lah 56). Particularly when ocular evidence is reliable and corroborated by medical evidence (AIR 2003 SC 3975). Appellate Division repeated the same view { 57 DLR(AD)(2005)75}.

98. When offence proved motive is immaterial. Weakness of the motive alleged, though a circumstances to be taken into account, cannot be a ground for rejecting the direct testimony of ocular witness which is otherwise of a reliable character. If the offence has been satisfactory proved by direct evidence than it is immaterial as to whether the motive has been established or not (1968 P Cr. LJ 1251). 7 MLR (2002) 119. If there is no sufficient direct evidence motive may be matter for consideration specially when the case is based on circumstantial evidence (51 DLR 103).

99. Motive is a matter of speculation for what moves a person to take the life of another is within his special knowledge and does not constitute a necessary ingredient of the offence of murder,(1968 Cr.LJ 962).

100. In the case of Noor Md. Vs. State 1999 MLD (Pakistan Monthly Law Digest) -60 held:

> "Eye witnesses were natural witnesses of the occurrence who had not only furnished convincing account of incident in details, but had also withstood hard test of cross-examination successfully- No rancour had been ascribed to appellant-Relationship of eye witnesses with the deceased was not by itself sufficient to discredit their testimony – Record did not indicate any sign to support the idea of substitution of accused with real culprit, if any- ocular account was fully supported by medical evidence and attending circumstances-conviction of accused was upheld in circumstances.

101. In the case of Md. Azeem Vs. State 1998 Pakistan Criminal Law Journal-175 held:

> Eye–witnesses who had no ill-will or motive against the accused had plausibly explained their presence at the spot and had corroborated their version given in

their statements before the police-Ocular testimony was not in conflict with medical evidence- Prosecution had, thus, proved its case against accused beyond doubt- Conviction and sentence of death awarded to accused by trial Court were confirmed in circumstances

102. Therefore, we find that the prosecution successfully proved the charge of murder against the convicts by cogent, convincing, unimpeachable evidence and beyond all reasonable doubt.

103. At the event of aforesaid situation, we also find support of our views by the following decisions.

(1) When there is enough material to prove the commission of offence of murder by the accused and that the evidence of eyewitnesses, though declared hostile, was reliable to some extent, the accused could be convicted for murder – Deepak v. State 1989 Cr.L.J. 143(MP).

(2) If the evidence of the solitary witness to murder is corroborated by medical evidence and FIR is promptly filed and there is absence of any evidence of grave and sudden provocation, the accused can lawfully be convicted for murder- Radhakrishnan v State (1989)1 Crimes 721(Mad)(DB).

(3) If there is consistent evidence of two eyewitnesses and FIR is lodged quickly naming the accused and there is corroborative medical evidence, the Supreme Court will not interfere to disturb the conviction- Bikkar v State(1989) 2 Crimes 1(SC).

(4)If the evidence of the eyewitnesses is corroborated by the circumstantial evidence, the accused must be convicted for murder- Harish v State (1989) 2 Crimes 72 (Del) (DB).

(5) Supreme Court will not interfere in appeal against order of conviction for murder passed by Sessions Judge and upheld by the High Court, when prosecution case was consistent with medical evidence and there was no delay in lodging F.I.R.- Amrik Singh V. State of Punjab 1981 Cr.L.J. 634; AIR 1981 SC 1171; 1981 SCC (Cr.) 252; 1981 Cr.L.J.(SC) 158.

(6) If circumstantial evidence is absolutely conclusive and clinching, conviction for murder will not be set aside merely on ground that murder-spot and recovery of some ornaments were not proved- Murari Lal v State of U.P. 1980 Cr.L.J. 1408; AIR 1981 SC 363(1979) SCC 612.

(7) If the circumstantial evidence against the accused in a murder case is firmly established and the circumstances unerringly point to the guilt of the accused and form a complete chain proving the guilt, the Supreme Court will not interfere with the concurrent findings except in case of grave injustice- Ashok V State 1989 Cr.L.J. 2124, AIR 1989 SC 1890; (1989)2 Crimes 423.

104. With regard to the sentence imposed upon convicts we are of the view that sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice.

105. Moreover, the impugned judgment and order of conviction and sentence so far as it relates to the Ain, 2000 is not well founded but murdering of the deceased Hasna Banu by the convicts have been proved by evidence. Therefore, we failed to discover any merit in the submissions advanced by the learned Counsel for the defence. On the contrary the submissions advanced by the learned counsel for the State in respect of evidence prevails and appears to have a good deals of force.

106. In the light of discussions made above and the preponderant Judicial views emerging out of the authorities referred to above we are of the view that the impugned Judgment and order of conviction and sentence under sections 11(ka) and 11(ka), 30 of the Ain 2000 suffers from legal infirmities, but the same will be proper under sections 302, 34 of the Penal Code. Therefore, the ends of justice will be met if the sentence is altered of sentence of imprisonment for life. The condemned accused Md. Nurul Amin Baitha and Anjumanara Begum thus stand sentenced to imprisonment for life.

107. In the result:-

(a) Death reference no. 22 of 2010 is rejected;

(b) The impugned judgment and order of conviction and sentence dated 19-04-2010 passed by the learned Judge of Nari-O-Shishu Nirjatan Damon Tribunal no.2, Sherpur, in Nari-O-Shishu Nirjatan Daman Case no. 143 of 2005 is modified to the effect that the condemned-accused Md. Nurul Alam Baitha and Anjumanara Begum each of them is convicted under sections 302, 34 of the Penal Code and sentenced to suffer imprisonment for life and also to pay a fine of Tk.10,000/-each in default to suffer rigorous imprisonment for six months more.

(c) As both the condemned accused are now absconding, the learned Judge of the Court below shall take appropriate step for securing their arrest and to commit them to jail to serve out their sentences.

108. The Office is directed to send down the records at once.