

**IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION**

PRESENT:

Mr. Justice Hasan Foez Siddique, C.J.

Mr. Justice Obaidul Hassan

Mr. Justice M. Enayetur Rahim

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.1140 OF 2017

(From the order dated the 15th to 16th October, 2012 passed by a Division Bench of the High Court Division in Death Reference No.34 of 2009, analogously with Criminal Appeal No.3258 of 2009 and Jail Appeal No.287 of 2009 heard analogously with Criminal Appeal No.4631 of 2009 and Jail Appeal No.286 of 2009)

Hazrat Ali : . . . Convict-Appellant
(In Jail)

-Versus-

The State, represented by the : . . . Respondent
Deputy Commissioner, Dhaka

For the Petitioner : Mr. Mansurul Haque Chowdhury,
Senior Advocate instructed by Mr.
Nurul Islam Bhuiya, Advocate-on-
Record

For the Respondent : Mr. Biswajit Debnath, Deputy Attorney
General instructed by Mr. Shamsul
Alam, Advocate-on-Record

Date of Judgment : **The 10th day of April, 2022**

J U D G M E N T

M. Enayetur Rahim, J: This criminal petition for leave to appeal is directed against the judgment and order dated 15th to 16th October, 2012 passed by a Division Bench of the High Court Division in Death Reference No.34 of 2009, heard along with Criminal Appeal No.3258 of 2009 and Jail Appeal No.287 of 2009, Criminal Appeal No.4631 of 2009 and Jail Appeal No.286 of 2009 rejecting the Death Reference commuting the sentence into imprisonment for life of the petitioner and another and to pay a fine of taka 10.000/- each, in default, to suffer rigorous imprisonment for a period of 3(three) months and

thereby allowed Criminal Appeal No.3258 of 2009 in part while Jail Appeal No.287 of 2009 and Criminal Appeal No.4631 of 2009 and jail appeal No.286 of 2009 were also allowed in part.

The present convict-petitioner along with 4 others were put on trial before the Sessions Judge, Narayanganj in Sessions Case No.126 of 2002 and charge was framed against them under sections 120B/302/34 of the Penal Code. At the time the present petitioner was absconsion.

The prosecution case as projected in the First Information Report, in short, is that deceased Abdul Awal hails from Mamudpur village under Fatulla Police Station of Narayanganj District; he was a broker of land who on 14.01.1999 at 5.00 p.m had left his house for Sanirakhra. But in the night following 14.01.1999 he did not return back to his residence. On the following morning on 15.01.1999 the near relations of Abdul Awal had searched him heather to thither and at 9.00 a.m., Sukkur, a rickshaw puller, of the same village informed the informant Md. Shahid Alam, the son of Abdul Awal that the dead body of Abdul Awal had been lying on the Southern slope of Dhaka-Chittagong highway near Rahim market, Sanarpar; hearing the said information the informant and the other nearest and dearest one having been gone to the said place found the slaughtered dead body of Abdul Awal with the cut injuries on the veins of his legs and hands; Md. Shahid Alam, the son of the deceased lodged an FIR with the Siddirgonj Police Station through one Mozaffar Ali Member narrating the above facts and accordingly, Siddirganj Police Station Case No.11 dated 15.01.1999 was started.

The police after completing investigation submitted charge sheet against 05(five) persons including the present petitioner under section 302/34 of the Penal Code.

Prosecution in order to prove the charge against the accused persons examined 22 witnesses.

On conclusion of the trial the learned Sessions Judge, Narayanganj by his judgment and order dated 15.03.2004 convicted all the 5 accused including present appellant under sections 302/34 of the Penal Code and awarded sentence each of them to death by hanging.

In view of the provision of section 374 of the Code of Criminal Procedure the learned Sessions Judge, Narayanganj made a reference to the High Court Division for confirmation of the death sentence awarded against the convict persons and said reference was registered as Death Reference No.31 of 2004. A Division Bench of the High Court Division after hearing the said reference by its judgment and order dated 29.08.2007 set aside the judgment and order of the learned Sessions Judge, Narayanganj and sent back the case on remand for fresh trial with a direction to appoint state defence lawyer on behalf of the absconding accused in order to cross-examine all the prosecution witnesses already examined.

The learned Sessions Judge, Narayanganj upon receiving the case record transferred the same to the Court of Additional Sessions Judge, 2nd Court, Narayanganj for trial. The trial Court in view of the direction of the High Court Division had appointed state defence lawyer to defend the absconding accused who cross-examined the witnesses and at one stage of the trial the charge was amended and fresh charge was framed under section 120B and 302/ 34 of the Penal Code against all the accused persons. The amendment charge was read over to the accused persons present in the dock to which they pleaded not guilty. At the stage of argument, on 18.10.2008 on behalf of the prosecution an application was filed for recording evidence of charge sheeted witness No.14

Abdur Rahman and 22 S.I. A.K.M. Azad and the Court allowed the said prayer and witness Abdur Rahman was examined as P.W-23 and he was duly cross-examined by the defence.

On conclusion of the trial, the trial Court found the present convict-appellant guilty along with 4 others under sections 120B/ 302/ 34 of the Penal Code and awarded sentence to death to the present appellant along with 2 others and sentenced 2 other accused to suffer imprisonment for life with a fine of Tk.20,000/- in default to suffer rigorous imprisonment for 6(six) months more.

The learned Additional Sessions Judge, 2nd Court, Narayangonj made a reference for confirmation of death sentence to the High Court Division which was registered as Death Reference No.34 of 2009. High Court Division after hearing the said Death Reference by the impugned judgment and order dated 15.10.2012 and 16.10.2012 rejected the reference with modification of the sentence and death sentence of the present convict was commuted to imprisonment for life with a fine of Tk.1,000/- in default to suffer rigorous imprisonment for 3 (three) months more.

Being aggrieved by and dissatisfied with the impugned judgment and order the convict-petitioner has filed this leave petition.

Mr. Mansurul Haque Chowdhury, learned Senior Advocate, appearing for the convict-petitioner submits that the learned Judges of the High Court Division failed to appreciate that the previous Death Reference arising out of the same occurrence was rejected only to afford the unattended accused persons an opportunity to get the protection of law as per provisions of Section 540 of the Code of Criminal Procedure read with 6th Paragraph of Chapter XII of the Legal Remembrances Manual, 1960 but trial court in addition to that, withdrew the case from argument stage for recording of prosecution witnesses and examined

one Abdur Rahman alleged eye witness, as P.W-23 only to fill up the lacuna, which came to light during argument stage and pronounced its judgment mainly relying upon the evidence of P.W-23, ignoring vital contradictions and admissions leading to absurdity of the story of P.W-23, which cannot be sustained in law and equity.

The learned Advocate for the petitioner further submits that save and except the evidence of P.W-23 there is no other evidence against the present petitioner to connect with the alleged murder and it is not safe to rely on the evidence of P.W-23 who was examined by the investigating officer after a long laps of time.

On the other hand Mr. Biswajit Debnath, learned Deputy Attorney General, having supported the impugned judgment and order passed by the High Court Division submits that P.W-23 was a charge sheeted witnesses and in recalling him the trial court did not commit any error or illegality. He further submits that it is now well settled that conviction can be well maintained on the evidence of a solitary witness, if his testimony is found to be true and trustworthy as such the trial Court as well as the High Court Division did not commit any error in convicting the present petitioner relying on the evidence of P.W-23.

We have considered the submissions of the learned Advocate for the respective parties, perused the impugned judgment of the High Court Division, the evidence and other materials as placed before us.

In view of the rival submissions of the learned Advocates for respective parties in the instant case the moot question is whether relying on the evidence of P.W-23, Abdur Rahman the conviction of the present convict-petitioner can be sustained or not.

It is true before sending the case on remand by the High Court Division in Death Reference No.38 of 2004 at the trial P.W-23, Abdur Rahman was not examined. The High Court Division at the time of disposing of the Death Reference No.38 of 2004 directed the trial Court to appoint state defence lawyer to defend accused-Firoj Miah, Hazrat Ali, Zulhas and Kuddus. Trial Court was also directed to allow the state defence lawyer to cross-examine the witnesses already examined by the prosecution witnesses.

When the case was sent on remand, on behalf of the prosecution an application was filed before the trial court to examine the charge sheeted witness No.14, Abdur Rahman and the trial court on elaborate discussion and assigning reasons allowed the application of the prosecution and examined said charge sheeted witness No.14 as P.W-23.

The objection as has been raised by Mr. Mansurul Haque Chowdhury, learned Advocate, for the petitioner that when the case sent back on remand with a direction to give the defence an opportunity to cross-examine of the prosecution witnesses there is no scope to examine any new witness.

We have perused order No.88 dated 14.10.2008 by the which the learned Additional Sessions Judge allowed the prayer of the prosecution for examining charge sheeted witnesses No.14 (P.W-23). It appears to us that the learned Additional Sessions Judge after hearing the respective parties, considering the legal proposition and facts and circumstances of the present case allowed the prayer of the prosecution to examine the said charge sheeted witnesses. Relevant finding of the said order is as follows:

“On perusal of the record, it appears to the Court that victim Aowal was murdered brutally. But it is the duty of the prosecution to prove the charge beyond any shadow of doubt. It appears from the record

that in this case witness No.14 is the only eyewitness of the case and he made graphic statements of murder under section 164 of the Cr.P.C before the Magistrate of First Class, Narayanganj. The recording Magistrate was examined and the statement made by the charge sheeted witness No.14, was also marked as Exhibit. It is settled by apex of the Country that the statement made before the Magistrate by witness is not evidence it may be corroborated under section 155 by the prosecution or contradicted by the accused under section 145 of the Evidence Act. There is no doubt that this witness Abdur Rahman is a very vital witness in this case but prosecution could not secure his attendance at the time of trial held earlier which is candidly admitted by the then public prosecutor Mr. Nabi Hossain who came in assistant of learned APP Mr. Khandaker Azizul Haque Hantu.

After considering the facts and circumstances of case and the decision made above the Court firmly believe that the evidence of the witness only Abdur Rahman is vitally important, necessary and essential for arriving just decision in this sensational murder case and if he is brought before this court to depose obvious the accused will get the opportunity to cross him as to his earlier statement made before the Magistrate. Therefore, there is no scope on the part of the accused to be prejudiced. In the above circumstances the case is withdrawn from the list of hearing argument. Accordingly issue summons to witness Abdur Rahman fixing 17.11.08 for further trial. Thus I dispose of the petition dated 8.10.08.”

Upon perusal of the said order we have no hesitation to hold that the order was well founded and explained. Further, the defence has cross-examined the said witnesses, so the question of prejudiced does not arise at all. Moreover, it is our considered view that the learned Judge of the Trial Court passed the said order within the ambit of section 540 of the Code of Criminal Procedure.

In the case of **Md. Abdul Khaleque Biswas and another Vs. the State, 1996 16BLD (AD), 108** this Division held that:

“under section 540 Cr.Pc the Sessions Judge or any court has the power to examine or re-examine a witness at any stage of the proceeding if the evidence of such witness appears to him essential for the just decision of the case.”

In the case of **Hemayatuddin @ Auranga Vs. State 46 DLR (AD) 186** this Divisional also held that-*“section 540 of the Code of Criminal Procedure is expressed in widest possible term and it cannot be said that the intention of the section is to limit its application to court witnesses only.”*

Having regard to the fact that in the instant case save and except P.W.-23 there is no eye-witness of the alleged occurrence.

Now, let us consider the evidence of P.W-23, Abdur Rahman.

P.W-23 in his deposition has stated that he used to reside at Bhuiyan Bari at the time of occurrence and to drive van. He made statement as to the occurrence before the Magistrate under section 164 of Cr.P.C; the day was Thursday and it was 26th Ramjan. On the following night of 26th Ramjan at 7.30 to 11 P.M, the occurrence took place 8/9 years, ago. On that day he pulled cart at Nobabpur, Dhaka and got on bus for Shanarpara and accordingly got down at Shanarpara. At that time Magreb azan was announcing; thereafter, he took his ifter in a shop. At that time he was in his rented house alone. He managed to

send his wife to his village home for her delivery as she was pregnant. There was no electricity in the house. He used country made lamp (কুপি বাতি) in his house; while he was taking preparation for offering his prayer at that time at about 7/7.30 P.M. on the invitation of accused Kalu he opened the door when Kalu, Hazrat Ali and Julhash had entered into his house, Hazrat was addressed by him as ‘Mama’, maternal uncle. He found 2 knives at Kalu’s hand; Hazrat and Julhash were armed with Pistol. When he asked whether those pistols are used for game then accused Kalu made a filthy language to him and told him to touch the same, seeing the pistol he was trembling. They assured that he had no fear. They informed them they would take gaza. Hearing the same and he sat on a ‘Jalchowki’. After few moments the door of the house was knocked then, Kalu opened the door. Then he saw victim Awal and accused Firoz came; after entering into the house Awal had pressed Hazrat to execute bainapatra. At that time the accused persons told that they would execute baina. The P.W.-23 further deposed to the effect:

“তখন হযরত মামা আউয়াল কাকার গলায় চেপে ধরে। কালু আউয়াল চাচার মাফলার দিয়ে হাত পা প্যাচ দিয়ে বেধে ফেলে। ফিরোজ মাথা এবং মুখ চেপে ধরে খাটের থেকে নীচে ফেলে দেয়। কালু পা চেপে ধরে। ফিরোজ মুখ ও মাথা চেপে ধরে। পরে হযরত মামা বুকুর উপর ডান হাটু দিয়ে ছুরি দিয়ে গলায় জবেহ করে দেয়। গলার সামান্য কিছু অংশ বাকি থাকে। তারপর গর গরাইয়ে রক্ত পড়তে থাকে। তখন ভিকটিম এর দেহটি লাফাতে থাকে। কালু ছুরি দিয়ে হাত পায়ের কজ্জি ও রগ কেটে ফেলে। বুকুর আশে পাশে ছোঁরা দিয়ে পার দেয় অর্থাৎ কোপ দেয়।”

Seeing the scene he became senseless for a bit. Then Kalu pushed him by his legs. Then he regained his sense. Kalu was telling to kill Abdur Rahman by shooting. Kalu addressed him as ‘খানকির পোলা’; He also stated ‘কালু বলে আমাকে মেরে না ফেললে আমি সকলের নিকট ঘটনার বিবরণ দিয়ে দিব এবং সকলকে জানিয়ে দিব। আমি তখন হযরত

মামার পায়ে ধরি'; thereafter as per the direction of Kalu he removed the blood stained of bed sheet and 'Khata'. Thereafter, Firoz went to the house of Quddus saying that work had been done. While P.W-23 went to fetching water he found the light, then Kalu said there was no fear that they were their men who using the light. He threw the Khata and Chadar (bed sheet) at the pond; at night 11 $\frac{1}{2}$ to 12 pm one knocked to the door. Then Kalu opened the door. He has further stated that:

“কালু একটা চৌকাট যাহা ৭/৮ হাত লম্বা এবং গাছ টানার রশি নিয়ে আসে। বাহিরের লোকদের থেকে ঐগুলো আনে। ১ টা থেকে ১ $\frac{1}{2}$ দিকে লাশ উপর করা হয়। লাশকে তিনদিকে দিয়ে বাধে এবং বে কাঠ রশির মধ্যে ঢোকায়। লাশ বাহির করে আমি, আসামী কালু, হযরত মাম, জুলহাস কাধে করে বিশ্ব রোডের দিকে নিয়ে যাই। তখন অনুমান রাত ১ টা হতে ১ $\frac{1}{2}$ টার সময় হবে। পুলিশের গাড়ী দেখে লাশ বিশ্ব রোডের ঢালের কিনারে রাখে। কালু তখন রশি কেটে এবং চৌকাট নিয়ে ঘটনাস্থলে অর্থাৎ বাসায় চলে আসে। পরে চৌকাট ঘরে ঢালের উপর এবং রশি খাটের নিকট ছুরে মারে।”

In the morning while Moazzin had been pronouncing Azan for Fazar prayer Kalu took him at Saydabad by way of a Taxi. Due to the request Hazrat, Kalu instead of killing him Kalu took him at Saydabad and got on a Sundarban Bus. Thereafter he went his village home Telegati, Moralganj, Bagherhat by Bus for Khulna. After going home he informed the incident to his local Chairman, local elites, U.P. members and his relatives and he also told them that he would not go again to Dhaka. He told them he would be killed, if he had gone to Dhaka. After 7/8 months CID visited in his area. CID took him to Narayangonj. He narrated the incident to CID. CID officer recorded the statement. Thereafter,

he was taken to the Court of Magistrate and narrated the occurrence before a female Magistrate. Magistrate recorded his statement and read over to him and he put his signature on it. He did not get the notice from the Court. He has stated “আমি আসামীদের হুমকির ভয়ে চট্টগ্রাম গিয়ে রিকসা চালাই।” He identified the accused Hazrat, Kawsar and Julhash.

In his cross he has stated that he did not know the name of the owner of the house but the owner is called Bhuiyan Saheb. He was in the house before 7/8 months. In his cross he has stated that the accused lived in Mizmizi area. His cousin Joynal lives in Mizmizi area and he is still there. He went to the house of Joynal. He also visited the dead body of victim Awal; the owner of the cart (ভ্যান গাড়ী) was Kamal Saheb who has an Electric shop in Nobabpur market. He has stated that “ঘটনার বাংলা ও ইংরেজী তারিখ বলতে পারবে না। তবে ২৬ তারিখ ঘটনা।” He could not say the time when CID took him to Narayanganj. He denied the suggestion that he was not a tenant of Bhuiyan Saheb or he did not reside in the alleged house where occurrence took place. He denied the suggestion that he did not see the occurrence.

From exhibit-8, post mortem report, it reveals that following injuries were found by the Doctor Pw-16, who held the autopsy of deceased Awal.

1. One, incised wound size about 4`X2`` up to vertebral column placed transversely in mid anterior neck.

2. One incised wound size about 3'' X $1\frac{1}{2}$ '' X bone depth, present on posterior aspect of lower leg (both Rt & left)
3. One incised wound size about $2\frac{1}{2}$ '' X $1\frac{1}{2}$ '' X bone depth present anterior aspect of both forearm.
4. Several incised wounds of deferent size and shape present in head & other parts of the body.
5. One ligature mark size about 4'' X $\frac{1}{2}$ '' present on left lateral aspect of upper neck.

On Deep dissection: (1) Trachea, Oesophagus, Blood vessels, Nerves, Muscles, blood vessels, Nerves & other soft tissue of others wound areas are incised & congested. (3) Both lungs are congested.

P.W-16, Dr. Jasimuddin who held the autopsy proved the said post mortem report, exhibit-8.

If we consider the statement of the P.W-23 couple with the post mortem report, exhibit-8 then it would be clear that the manner of killing by the accused persons has been proved beyond reasonable doubt.

Further, his statement as to place of recovery of the dead body of deceased Awal is very much consistent with P.W. Nos.-1,2,3,4,12,13 who deposed that dead body of deceased Awal was recovered on the slope of Dhaka-Chittagong High Way.

This Division in the cases of **Abdul Hai Sikder Vs. State, 43 DLR (AD) 95 and Abdul Quddus Vs State 43 DLR (AD) 234** has held that conviction of an accused can safely be based on the solitary evidence of an eye witness, if evidence is found full, complete and self-contained and further, the testimony of the solitary eye-witness could not be shaken in any manner by the defence in cross-examination. Upon perusal of the evidence of PW.23, we have no hesitation to hold that he being the eye-witness of the occurrence is a natural, trustworthy and competent witness. Said witness in his deposition has given a vivid picture of the alleged occurrence i.e. manner of killing of deceased Awal, which supports the post mortem report. Defense cross-examined him, but has failed to shake his testimony in any manner. He also deposed that due to threat of dire consequence by the accused persons he went to hiding.

Thus, we find no illegality in convicting Hazrat Ali relying on the evidence of P.W.-23.

It is well known maxim, which is a golden Rule, that '**evidence has to be weighed and not counted**'. Thus, evidence on a point is to be judged not by the number of witnesses produced but by its inherent truth.

Further, it also appears from the record that after the occurrence convicted Hazrat Ali was absconded for a long time. It is well settled that mere abscondence by itself does not prove any offence against any person unless such abscondence is substantiated by evidence in favour of his guilt incompatible

with his plea of innocence. In the instant case if we consider the evidence of PW-23 couple with the factum of the abscondence of convict Hazrat, then we can safely come to a conclusion that abscondence of convict Hazrat Ali is a strong circumstances as to his guilt. This pertinent fact also presumed that he is guilty of offence.

This Division in the case of **Amir Husain Hawlader Vs. State 1984 BLD (AD) 193** has observed that-“absconsion of an accused is corroboration of direct evidence of eye-witness connecting the accused with the crime.”

Having considered and discussed as above, we find no merit in the leave petition.

Accordingly, the leave petition is dismissed.

C.J.

J.

J.