IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain
Chief Justice
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

JAIL APPEAL NO.02(A) OF 2016

(Arising out of JAIL PETITION NO.02 OF 2016).

(From the judgment and order dated 05.07.2015 passed by the High Court Division in Death Reference No.38 of 2010 with Jail Appeal No.186 of 2010)

Md. Saheb Ali Fakir : Appellant.

=Versus=

The State Respondent.

For the Appellant: Mr. S.M. Aminul Islam, Advocate, instructed by the Court.

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

Date of hearing and judgment : 08-08-2021

JUDGMENT

Hasan Foez Siddique, J: Additional Sessions Judge, Court No.2, Bagerhat, convicted the appellant under section 302 of the Penal Code and sentenced him to death and to pay fine of taka 10,000/- in Sessions Case No.115 of 2008 arising out of G.R. Case No. 190 of 2007 corresponding to Mollahat Police Station Case No.14 dated

28.11.2007. A Division Bench of the High Court Division in Death Reference No.38 of 2010 heard analogously with Jail Appeal No.186 of 2010 affirmed the said judgment and order of conviction and sentence. Thus, the appellant has preferred this jail appeal.

The prosecution case, in short, was that at about 11.30 p.m. on 27.11.2007, Shewli Begom, wife of the appellant was allegedly killed by poisoning in the house of the appellant. Victim's father Sheikh Badsha Mia (P.W.1) lodged an F.I.R. with Mollahat Police Station against the appellant and some others for commission of offence punishable under Section 302/34 of the Penal Code. The Investigating Officer, holding investigation, submitted charge sheet against the appellant. The case was ultimately tried by the Additional Sessions Judge, Court No.2, Bagerhat who framed charges against the appellant and others for commission of offence punishable under the aforesaid provisions of law. The accused persons pleaded not guilty and claimed to be tried. In this case, prosecution examined 10 witnesses out of 12 witnesses cited in the charge sheet. From the trend of cross examination of

the P.Ws., it appears that the defence case was of innocence and that they had been implicated in this case falsely and the victim committed suicide by taking poison.

Out of the 10 prosecution witnesses, P.W.1, father of victim, in his testimony stated that upon receiving information through his nephew Abtar Sheikh, his wife Razia Begom and brothers Jamal, Kalam , Salam and he himself rushed to the house of the appellant and found the smell of poison coming out from the mouth of the victim. People present there, namely, Bellal Member, Bande Ali, Khaleq Chowdhury, Hero Mia and others told them upon responding their query that they were not aware about the incident. This witness said that at the relevant time, the appellant was present in his house. The villagers confined him. Getting information, Police went to the place of occurrence and arresting the appellant assaulted him. Daroga told this witness to be informant of the case and, accordingly, an F.I.R. was written and he put his signature in the F.I.R. (exhibit-1). Police holding inquest prepared a report of the dead body of the victim (exhibit-2) and seized her wearing apparels upon

preparing a seizure list (exhibit-3). In his cross examination, he said that he did not find any marks of violence on the person of the victim. P.W.2 Bande Ali Sheikh stated that he came to know that the wife of Saheb Ali had taken poison. Police prepared inquest of the dead body of the victim in his presence. In cross examination he said that he was not aware of the story of any ill relationship between the victim and the appellant and his family members. P.W.3 Khaleq Chowdhury stated that he heard that the victim had died taking poison. Similarly, P.W.4 Niru Miah stated that the victim had died drinking poison. P.W.5 Golam Kibria was tendered by the prosecution and defence did not cross examine him. P.W.6 Dr. Sudipta Kumar Mukharjee held autopsy of the dead body of the victim and submitted following report:

> "No external injury detected (post mortem staining on back and chest).
>
> On dissection: Stomach and its content, part of liver, half of each kidney, send for chemical examination. No internal injury detected."

Opinion was kept pending till arrival of the chemical analysis and pathological report. After receiving the report, the P.W.6 opined that,

"the cause of death was due to above mentioned poisoning. Which was suicidal and anti mortem in nature."

He proved autopsy report (exhibit-5) and his signature (exhibit-6(1). In cross examination he said that , "মৃতার শরীরে আঘাত বা যখমের চিহ্ন পাই নাই। রিপোর্ট দৃষ্টে ঘটনাটি আত্মহত্যা বলিয়া প্রমানিত হয়। বিষয়টি হত্যাকান্ড হলে রিপোর্ট আলাদা হত।" P.W.7 Md. Abdus Salam recorded the confessional statement of the appellant under section 164 of the Code of Criminal Procedure . He proved the said confessional statement (exhibit-7). The contents of the said confessional statement are reproduced herein below:

"গত পরশু ২৭/১১/০৭ দিবাগত রাতে ঘটনার স্হান পিতার বাড়ী আমার ভাবীরা চার বউ মেলে ঝগড়া বাধায়। আমি সহ তিন ভাই ধান বাধাতে যাই। তিন ভাই বলে তোর বউকে ঠিক কর নতুবা তোর বউকে মারব তোকেও মারব। তারপর আমার স্ত্রীকে মারে বড় ভাই ইলিয়াছ বিষ দেয় মারার পরে আমি ও ঘটনাস্হলে ছিলাম। ঝড়েতে ঘর ভেঙ্গে গেলে দোচালা ঘরের মধ্যে আমার স্ত্রীকে প্রথমে মারধোর করে তারপর বীষ প্রয়োগ করে আমি ও তাহাদের সাথে ঘটনার প্রথম থেকে শেষ পর্যন্ত ছিলাম। মারার পর আমার স্ত্রীকে আমি সহ ৪ ভাই মিলে আমার ঘরে নিয়ে যাই। ভাইরা মেরে চলে যায় আমি থাকি পরে এলাকার লোকজন আমাকে ধরে বেধে রাখে আমার স্ত্রীর (অপাঠ্য) পুলিশকে খবর দেয় ও পুলিশ

<u>বাধা অবস্হায় আমাকে মারে</u> ও মোল্লাহাট থানায় নিয়ে যায় ও তারপর আপনার কাছে নিায় আসে। এই আমার জবানবন্দি।" (underlined by us)

In his cross examination, P.W.7 stated that he was of the view that confessional statement was voluntary in nature.

P.W.8 Constable Md. Nurun Nabi accompanied the dead body of the victim while shifting the same to morgue of Bagerhat Sadar Hospital for holding autopsy . He proved the challan (exhibit-8). P.W.9 S.I. Alomgir held investigation of the case partly and P.W.10 S.I. Abdur Razzaque, upon completing the rest investigation, submitted charge sheet against the appellant and two others for commission of offence punishable under section 302/34 of the Penal Code.

The appellant was going to be unrepresented, so the State appointed Mr. S.M. Aminul Islam for representing him.

In his submission, Mr. Islam stated that confessional statement of the appellant was neither voluntarily made nor true nor was recorded following the provisions of section 164 and 364 of the Code of Criminal Procedure, the Courts below committed error of law in convicting the appellant relying upon such confessional

statement. He further submits that the story of killing of the victim had not been proved because the Doctor, who held post mortem examination, after receiving the chemical expert's opinion, opined that the victim had committed suicide. Since the murder had not been proved, the order of conviction and sentence of death of the appellant on the allegation of administering poison to the victim is bad in law.

Mr. Biswajit Debnath, learned Deputy Attorney General appearing for the State, submits that the Police, at the time of holding inquest of the deadbody, found marks of violence on the person of the victim and the victim died in the house of her husband, the appellant, in such circumstances, the learned Courts below rightly convicted the appellant on the charge of killing the victim by administering poison. He lastly submits that in his confessional statement, the appellant admitted his guilt which was consistent with the prosecution case, the Courts below rightly convicted and sentenced him on the basis of such confessional statement.

The sole question to be determined by us in the present appeal is whether the appellant had

caused the death of his wife Shewli by administering her poison or the wife had herself taken the poison.

Murder by poison is invariably committed under the cover and cloak of secrecy. Nobody will administer poison to another in the presence of others. In the case of Sharad Birdhi Chand Sarda Vs. State of Maharastra (AIR 1984 SC page 1622)Supreme Court of India has observed that in the case of murder by administration of poison the Court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction: (1)there is a clear motive for an accused to administer poison to the deceased; (2)that the deceased died of poison said to have been administered; (3) that the accused had the poison in his possession and (4) that he had an opportunity to administer the poison to the deceased. The sufficiency of evidence, direct or circumstantial, to establish murder by poisoning will depend on the facts of each case. In this case death of the deceased was caused by organo phosphorus poisoning.

Now we shall evaluate the evidence on record. There is no eye witness of the occurrence. None

of the witnesses claimed that he had seen the act of administering poison to the victim by the appellant. First Question is whether the victim had been killed or she had committed suicide . This vital question has not been specially resolved by the Courts below upon consideration of the evidence on record properly. From the post mortem report, it appears that P.W.6 Dr. Sudipta Kumar Mukharjee held autopsy of the dead body of the victim on 29.11.2007 and sent viscera for chemical examination and kept his opinion pending till chemical analysis and pathological report was received. From exhibit-5 it appears that chemical expert after examining the supplied specimen opined that “প্লাষ্টিকের পাত্র দুইটিতে রক্ষিত ভিসারায় “অর্গানিক ফসফরাস যৌগ (কীট নাশক বিষ) ” পাওয়া গিয়াছে।” P.W.6, Dr. Sudipta, considering the chemical expert’s report, opined that the cause of death was due to above mentioned poisoning which was suicidal and anti-mortem in nature. Due weight must be given to the findings at such examinations. From the evidence of P.W.6 it further appears that in his cross examination he has said, “মৃতার শরীরে আঘাত বা যখমের চিহ্ন পাই নাই। রিপোর্ট দৃষ্টে ঘটনাটি আত্মহত্যা বলিয়া প্রমাণিত হয়। বিষয়টি হত্যাকান্ড হলে রিপোর্ট আলাদা হত।” If the evidence in a particular case does not

justify the inference that death is the result of administering poison because of the failure of the prosecution to prove the fact of administering poison satisfactorily, either direct or by circumstantial evidence, then benefit of doubt will have to be given to the accused. There is nothing in the evidence on record that after the marriage, victim Shewli was subjected to repeated harassment or torture or ill treatment. There is no evidence that their relationship was not cordial. Similarly, we do not find any evidence the appellant had any strong motive to get rid of his wife for her inability to satisfy his demand.

P.W.1 father of the victim in his cross-examination has said, "এজাহারে কি লেখা হয় জানি না। --------- জামাইকে কেন এলাকার লোক ধরে রাখে বলতে পারব না। প্রথমে গ্রামের লোক, পরে পুলিশ জামাইকে মারে। সে বলে যে, সে কিছু জানে না। তখন পুলিশ বলে যে, জান আর না জান আমরা যাহা শিখাইয়া দেই তাই বলতে হবে।" We have already found that there was no marks of violence on the person of the victim. That is, no injury was caused due to alleged forcible administration of the poison . If it were forcible poisoning by using any kind of poison, there would be struggle and resistance from the victim. The prosecution has failed to

prove that the accused had the poison in his possession. In view of the post mortem report and the testimony of P.W.6 , it is difficult to hold that the victim was murdered. If really the accused is guilty of murdering his wife in presence of his brother and others by administering poison, then normal conduct of such an accused would be to screen himself from the eyes of all. The appellant did not do so. This conduct of the appellant is a relevant fact that can be taken into account while deciding the case based on circumstantial evidence.

In his confessional statement, the appellant specifically stated , "----------- পুলিশকে খবর দেয় ও পুলিশ বাধা অবস্হায় আমাকে মারে ও মোল্লাহাট থানায় নিয়ে যায় ও তারপর আপনার কাছে নিায় আসে।" (underlined by us). P.W.1 in his testimony has stated that " সাহেব আলী ফকির বাড়ীতে ছিল ।গ্রামের লোকজন তাকে ধরিয়া ফেলে। থানা থেকে দারোগা আসে। তাকে মারপিট করে।" That is, while making confessional statement the appellant stated that Police had assaulted him. P.W.1 father of the victim also stated that the Police had assaulted the appellant. So, it is apparent that the appellant could be said to have been pressurized, tortured and harassed by the

Police. If a statute has conferred to do an act and has laid down the mathod in which power has to be exercised, it necessarily prohibits the doing of that act in any other manner than that which has been prescribed. The provisions of sections 164 and 364 of the Code of Criminal Procedure empowered the Magistrate to record confessions and also the provisions thereof are safeguards for recording confessions. The guidelines provides in sections 164 and 364 have made it amply clear that the guidelines prescribed therein are for the purpose of safeguarding the accused and to ensure that the confession is voluntary and not made on account of any extraneous influence. The object behind the provisions of sections 164 and 364 is clear on the face of it. Those provisions require a Magistrate to record the confession only after removing all fear from the mind of the accused. The law requires that when the accused made the statement he should be free from the bias of any undue influence and inducement on his mind by extraneous agencies . In such view of the matter, it is difficult to rely upon the confessional statement of the appellant since the appellant,

while making confession, stated that Police had assaulted him. Since the confession was not voluntary therefore should be excluded from consideration. Moreover, the confessional statement is not consistent with the medical evidence. From the post mortem report , chemical expert's opinion and evidence of P.W.6 Dr. Sudipta as well as from the testimonies of P.W.1, 2 and 3, it appears that the victim died taking poison. P.W.1 Sheikh Badsha Mia father of the victim and P.W.6 in their testimonies stated that they did not find any marks of violence on the person of victim. In view of such circumstances, confessional statement needs to be eschewed from consideration for the reasons of admissibility and truthfulness. If the confession is excluded from consideration it is impossible to sustain the charge of murder.

Mr. Biswajit Debnath, learned Deputy Attorney General strenuously argued that in the inquest report it has been stated that there were marks of violence on the person of the victim. But inquest report is not conclusive evidence as to the nature of injuries allegedly received by the victim. Only the Doctor, who is the expert,

holding post mortem examination on the person of the victim may say specifically as to whether there was any marks of violence on the persons of the victim or not. We already held that neither the Doctor P.W.6 nor the informant P.W.1 in their testimonies stated that there was marks of violence on the person of the victim. In the light of the evidence it may be said that the deceased died of poison but it is difficult to conclude that the death was homicidal.

When the evidence shows that two views are possible- one pointing to the guilt of the appellant and other leading to his innocence and where circumstances are susceptible of two equally possible inferences, the Court should accept that inference which favours the accused rather than an inference which goes in favour of the prosecution. It may be very likely that the appellant may have administered the poison to victim Shewli but at the same time a fair possibility that she herself committed suicide cannot be safely excluded or eliminated. Hence, on this ground alone the appellant is entitled to get the benefit of doubt resulting in his acquittal.

Accordingly the appeal is allowed. The appellant Md. Shaheb Ali Fakir is acquitted of the charge. Consequently, the judgment and order dated 5.7.2015 passed by the High Court Division in Death Reference No.38 of 2010 and Jail Appeal No.186 of 2010 affirming the judgment and order dated 10.6.2010 passed by the Additional Sessions Judge, Second Court, Bagerhat in Sessions Case No.115 of 2008 arising out of G.R. Case No.190 of 2007 corresponding to Mollahat Police Station Case No.14 dated 28.11.2017 are hereby set aside. It is directed to release the appellant immediately if he is not wanted in connection with any other case.

C.J.

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The 8th August, 2021

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