

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Muhammad Imman Ali

Mr. Justice Hasan Foez Siddique

Mr. Justice Md. Nuruzzaman

Mr. Justice Obaidul Hassan

CRIMINAL APPEAL NO.28 OF 2013

(From the judgment and order dated 13.05.2008 and 14.05.2008 passed by the High Court Division in Death Reference No.172 of 2004 with Criminal Appeal No. 61 of 2005)

Md. Anowar Hossain : ...Appellant

=Versus=

The State : ...Respondent

For the Appellant : Mr. Mushfique Uddin, Advocate, instructed by Ms. Sufia Khatun, Advocate-on-Record.

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

Date of hearing : 09.11.2021 and 10.11.2021

Date of judgment: 14.11.2021

J U D G M E N T

Hasan Foez Siddique, J: Appellant Md. Anowar Hossain was convicted and sentenced to death under section 302 of the Penal Code by the learned Sessions Judge, Bagerhat, in Sessions Case No.10 of 1998 arising out of Bagerhat Police Station Case No.22 dated 22.11.1994 corresponding to G.R. No.334 of 1994.

Prosecution case, as transpires from deposition of informant PW.2, in short, is that on 21.11.1994 at about 2.15 P.M. Monira Parvin and her elder sister P.W.3 Shamsunnahar, both daughters of the informant, had been working in their ‘panboroj’ (betel field). At that time accused Delawar, Anowar, Mohammad, Akub Ali, Alimuddin, Moshiur, Mizan, Aziz, Latif, Atiar and others being armed with deadly weapons entered into

their 'Panboraj', and started picking up betel leaves from the betel plants. Injured victim Shamsunnahar forbade them. Accused Mohammad Ali then gave order to finish her. Accordingly, accused Delowar gave dao blows to Shamsunnahar causing serious cut injuries in her hand, face and back. Monira then implored them not to inflict more injuries to her elder sister since she was a B.A examinee. At this, appellant Anowar dealt a severe 'Ram Dao' blow to Monira which resulted in cutting of right jaw up to the throat of Monira and she died there instantaneously. Hearing hue and cry, mother of the informant P.W.13 Rahima Khatun, younger daughter of the informant P.W.5 Most. Nurunnahar Mala, P.W.9 Ayub Ali Paik, Taleb Ali and other local people rushed to the spot. Injured victim P.W.3 Most. Shamsunnahar was taken to the Bagerhat Sadar Hospital for treatment. Thereafter, on the following day hearing about the occurrence from the injured victim and other witnesses, the informant father lodged FIR (exhibit-1) in Bagerhat Police station narrating the entire occurrence where a case punishable under Sections 147/148/447/326/302/114 of the Penal Code was recorded and investigation was undertaken by S.I. Ilias and on his transfer by P.W.16 S.I. Khitish Chandra Sen.

While she was receiving treatment in Bagerhat Sadar Hospital, the injured victim PW.3 gave a dying declaration (exhibit-3) with an apprehension of death since injuries caused to her were equally alarming. The dying declaration was recorded by P.W.10, the learned Magistrate, 2nd Class, Bagerhat but ultimately PW.3 survived and the statement made by her recorded purportedly under section 32(1) of the Evidence Act had lost its efficacy and turned into a mere statement made by the injured victim recorded by the learned Magistrate, Bagerhat.

During the course of investigation, Investigating Officer visited place of occurrence, prepared inquest report of the dead body and sketch map with index of the place of occurrence, seized alamat under seizure list (exhibit-6) and recorded the statement of the witnesses under section 161 of the Code of Criminal Procedure. Ultimately he submitted charge sheet under section 173 of the Code of Criminal Procedure against the accused persons for committing the offence, referred to above.

During the course of trial charge was framed against 10 accused persons for committing the offence punishable under sections 147/148/149/447/323/307/326/302/114 of the Penal Code where they pleaded not guilty and claimed to be tried.

The defence case as it transpires from the trend of cross-examination and suggestion put to the prosecution witnesses is that all of them have been falsely implicated in this case out of enmity over the physical possession of the 'Panboroj'.

The trial of the appellant Md. Anowar Hossain was held in absentia since he was absconding.

The prosecution examined 16 witnesses out of which 14 witnesses were cited in the charge sheet and other six witnesses mentioned in the charge sheet were not examined. Among the witnesses, PW-9 and PW-12 were not cited in the charge sheet but were examined before the trial court.

The trial Court convicted and sentenced the appellant as stated earlier. The learned Sessions Judge sent the case record in the High Court Division for confirmation of sentence of death of the appellant under section 374 of the Code of Criminal Procedure, which was registered as

Death Reference No.172 of 2004. A Division Bench of the High Court Division by the impugned judgment and order dated 13.05.2008 and 14.05.2008 accepted the reference, thereby, upheld the judgment and order of conviction and sentence awarded by the trial Court to the appellant. The High Court Division, however, acquitted the co-convicts Mohammad Ali and Mizan.

The police arrested the appellant on 17.01.2013. Thereafter, the appellant has preferred this Appeal.

Mr. Mushfiqul Islam, learned Advocate appearing with Ms. Sufia Khatun, learned Advocate-on-Record for the appellant Anowar Hossain submits that the High Court Division has committed an error of law in upholding the order of conviction without taking into consideration of the contradictions and discrepancies of the alleged eye witnesses of the occurrence, thereby, convicted the appellant which has caused a total failure of justice. He next submits that the prosecution has failed to prove the case by examining any disinterested independent eye witnesses of the occurrence. He submits that P.Ws.3, 5 and 6 are the siblings of the victim. P.W.9 is not charge sheeted witness and P.W.13 is grandmother of the victim. Those witnesses claimed to be eye witnesses of the occurrence. Since those witnesses are closely related with the victim and informant P.W.2, the High Court Division has committed an error of law in relying upon the testimonies of those witnesses, thereby, erroneously upheld the order of conviction and sentence passed by the trial Court. He lastly submits that the injured witness P.W.3 in her dying declaration did not say that Anowar Hossain inflicted knife blows on the person of the victim but in her testimony she stated that the appellant Anowar Hossain inflicted

knife blows on the person of the victim, therefore, the High Court Division erred in law in relying upon the testimony of P.W.3.

Mr. Biswajit Debnath, learned Deputy Attorney General appearing for the State submits that the occurrence took place in broad day light and P.Ws. 3, 5, 6, 9 and 13 witnessed the occurrence of brutal killing of the victim Monira, the learned Courts below upon proper appreciation of the evidence on record convicted and sentenced the appellant. He further submits that the contradictions and discrepancies of the evidence of the eye witnesses are minor. The courts below rightly ignored those contradictions and discrepancies. He lastly submits that on the date of occurrence the appellant absconded and police arrested him after disposal of the death reference in the High Court Division. Such absconsion itself is a circumstance connecting the appellant with the occurrence, the learned Courts below did not commit any error of law in convicting and sentencing the appellant.

We have heard the learned Advocate for the appellant and learned Deputy Attorney General for the respondent and perused the impugned judgment of the High Court Division and other materials on record.

Out of 16 prosecution witness, P.W.1 Md. Saifullah Khan was the officer-in-charge of Bagerhat Police Station on the date of occurrence, that is, on 21.11.1994 who recorded the F.I.R. and entrusted S.I. Ilias Hossain for holding investigation in the case. He proved the F.I.R. (exhibit-1). P.W.2 Abdul Quddus Paik is the father of the victims deceased Monira and injured Shamsunnahar. In his testimony PW.2 narrated the prosecution case as stated earlier. He was not eye witness of the occurrence. He heard about

the occurrence from the people present at the place of occurrence. He specifically stated that accused appellant Anowar Hossain dealt a 'Ramda' blow on the head of victim Monira and she resisted the same. But the said blow injured the right jaw of the victim severely and the cut reached to the throat of the victim Monira who died on the spot. P.W.3 Most. Shamsunnahar is the injured witness of the occurrence. In her testimony she stated that accused Delowar, Anowar, Mohammad Ali, Alimuddin, Mizan, Akub Ali, Moshiar, Latif, Atiar, A. Aziz entered into the betel leaf 'boraj' for cutting betel leaves. This witness and others requested them not to cut any betel leaf. Then accused Mohammad Ali passed an order to kill the victims including this witness. Accused Delowar inflicted "Ramda" blow on the head of this witness who resisted the same by her left hand and her index finger got separated, her nose and lips got severely injured. She showed her amputated finger to the Court at the time of recording evidence and the Court took note of that. This witness further said that accused Mohammad Ali inflicted 'ramda' blow aiming her head which caused cut injury in her right shoulder. Accused Delwar again inflicted 'ramda' blow aiming her head which hit her throat and caused injury there. At that time victim Monira requested the accused persons not to assault this witness. Then accused Mohammad Ali again passed an order to kill them. Pursuant to the order given by accused Mohammad Ali appellant Anowar Hossain inflicted 'ramda' blow on the head of victim Monira. Consequently, her right jaw got severely injured and she felled down on the ground. Thereafter, Delwar and Mohammad Ali assaulted Monira mercilessly. The victims raised alarm and other witnesses rushed to the place of occurrence and the accused persons left the place. P.W.4 Dr. Khan Habibur Rahman in

his testimony stated that he examined P.W.3 Shamsunnahar and found the following injuries on her person (as per medical certificate):

1. Incised wound on the upper boarder of the left scapula size 3" X 1" bony injury.
2. Incised wound on the upper part of the medial aspect of the right scapula extending to the right clavicle and vertebral boarder of the right scapula size 5"X 2 $\frac{1}{2}$ " bone depth.
3. Incised wound on the posterior neck extending to the left lateral neck transversely size 5"X 2"X bony injury.
4. Incised wound on the tip the left index finger with fully separation at the level of terminal phalanges and incised wound on the dorsum of the left middle finger size $\frac{1}{2}$ "X $\frac{1}{4}$ "X bone.
5. Incised wound on the bridge of the nose size 1"X $\frac{1}{8}$ "X skin.
6. Incised wound on the middle upper lip size $\frac{1}{2}$ "X $\frac{1}{4}$ "X lip.
7. Incised wound on the palm of the right hand size $\frac{1}{2}$ "X $\frac{1}{8}$ "X skin.

He issued medical certificate (exhibit-2). P.W.5 Most. Nurunnahar, another eye witness of the occurrence, in her testimony stated that her elder sisters P.W.3 Shamsunnahar and victim Monira were working in the betel leaf 'boroj' when accused persons entered there and started to pick the betel leaves. P.W.3 requested them not to pick any betel leaf. At that time pursuant to the order given by accused Mohammad Ali, accused Delowar inflicted 'ramda' blow on the head of the P.W.3 who resisted the same by hand, consequently her index finger got separated and she received severe injury on her nose. Then, Mohammad Ali dealt a 'ramda' blow on the right side of the back of Shamsunnahar. Accused Delowar inflicted a blow on the back side of her throat. Deceased victim Monira requested the accused

persons not to assault her sister P.W.3 Shamsunnahar saying that she was a B.A. examinee. Then accused Mohammad Ali again passed an order to kill victim Monira. Pursuant to that order accused Anowar Hossain inflicted 'ramda' blow on the face of victim Monira causing severe cut injury on the right side of her jaw. This witness denied the defence suggestion that she did not see the occurrence. P.W.6 Abul Kalam Azad stated in his testimony that accused Anwar Hossain inflicted a 'ramda' blow targeting the head of the victim Monira which caused severe injury on the right jaw of victim and the victim felled down on the ground. At that time accused Mohammad Ali inflicted 'ramda' blow on her person. Accused Delwar also inflicted 'ramda' blow on the person of victim Monira. He stated that he saw the occurrence. P.W.7 Abdul Jabbar Paik went to the place of occurrence hearing hue and cry and found the victim Monira dead and victim Shamsunnahar seriously injured. P.W.8 Keramat Ali Sheikh went to the place of occurrence hearing that victim Monira had been murdered and saw the dead body of Monira lying on the ground and injured victim Shamsunnahar in her grandmother's lap. P.W.9 Ayub Ali Payek is an eye witness of the occurrence. In his testimony he stated that accused Anwar Hossain inflicted a 'ramda' blow on the head of the victim Monira which caused severe cut injury on the right jaw of the victim. Victim Monira felled down on the ground and accused Delwar and Mohammad Ali assaulted her indiscriminately. He also stated that siblings of PW-3 Shamsunnahar, namely, PW-5 Mala nad PW-6 Azad were present at the place of occurrence. P.W.10 A.B.M. Sharif Uddin was a Magistrate 2nd Class of Bagerhat at the time of occurrence. In his testimony he stated that he recorded the statement made by P.W.3 Shamsunnahar on 21.11.1994 at

8 p.m. at Bagerhat Sadar Hospital. At that time the condition of Shamsunnahar was very serious. He proved the recorded statement (exhibit-3) and his signatures on it (exhibit 3/1 to 3/5). P.W.11 Dr. Gour Priyo Majumder held autopsy of the dead body of victim Monira and found following injuries on her person:

1. One deep incised injury on the right side of the face extending downwards from front of upper part right ear cutting, skin, muscles and bones of faces and the upper jaw completing with upper lip in its middle part 5" X 3" X $2\frac{1}{2}$ ".
2. One deep incised injury over right side of lower jaw cutting mandible completely along with skin, muscles & lower lip transversely extending from rt. side of neck up to middle part of lower jaw 3" X $1\frac{1}{2}$ " X 1".
3. One deep incised injury over rt. side and upper part of neck of placed transversely $2\frac{1}{2}$ " X $1\frac{1}{2}$ " cutting skin, trachea, & esophagus.
4. One incised injury in the scalp 2" behind rt. ear cutting a circumscribed area of skin 1" X 1".
5. One deep incised injury in front of lower part of left forearm the wrist and palm 3" X 1" X $\frac{2}{3}$ ", muscles and tenders exposed.
6. One incised injury behind rt. wrist size 1" X $\frac{1}{2}$ " X skin.

He opined that the death was due to haemorrhage and shock caused by above mentioned injuries which were ante-mortem and homicidal in nature. He proved the post-mortem report (exhibit-4). P.W.12 Yar Ali

Sheikh is one of the witnesses of the inquest report. He proved the inquest report (exhibit 5) and his signature on it (exhibit 5/1). P.W.13 Rahima Khatun is another eye witness of the occurrence. In her testimony she stated that accused Mohammad, Delowar and Anwar Hossain attacked her. She further stated that since the accused persons assaulted the victim Monira, she rushed there and caught Monira but she died. People present there took Shamsunnahar (P.W.3) to the local hospital. P.W. 14 Syed Abdul Halim and P.W.15 Mahfuz Sheikh are seizure list witnesses. P.W.16 Khitish Chandra Sen was the Investigating Officer of the case.

From the testimonies of the PWs. 3, 5, 6, 9 and 13 it appears that they are the eye witnesses of the occurrence. All of them stated that the appellant Anwar Hossain inflicted 'ramda' blow targeting the head of the victim Monira which had caused severe cut injury on the right jaw of the victim. She died in the spot. We do not find any earthly reason to disbelieve the testimonies of P.Ws.3, 5, 6, 9 and 13 who are natural witnesses of the occurrence. Of them, P.W.3 Shamsunnahar is an injured witness, who in her testimony stated that accused person at first assaulted her and thereafter killed the victim Monira.

Learned Advocate for the appellant submits that there are contradictions and discrepancies in the evidence of prosecution witness but we do not find any contradiction in the evidence adduced by the prosecution in which witnesses testified that victim Monira was assaulted by the appellant Anwar Hossain and his 'ramda' blow caused fatal injury in the right jaw of the victim leading to her instantaneous death. It is true that PW-3, 5 and 6 are siblings of the deceased victim Monira and PW-13 is her grandmother. They are close relatives of each other. But at the same

time, they are the most natural witnesses of the occurrence as the place of occurrence was only about 150 yards away from their homestead as per charge sheet. Mere close relationship among the victims and witnesses cannot render the testimonies of them untrustworthy when it appears that they are the most natural witnesses and their testimonies are supported by the medical evidence. As regards another eyewitness PW-9 who was not cited in the charge sheet as a witness we find that PW-12 who was a witness of inquest report also was not cited as a witness in the charge sheet. It indicates that the I/O did not put much effort and was not careful in preparing the charge sheet. This type of negligence on part of the I/O should not be allowed for the sake of justice. From the materials on record we find that on 11.07.2001 prosecution submitted a petition before the trial Court under section 540 of the Code of Criminal Procedure for issuing summons upon some of the witnesses and court allowed the same. Thereafter, PW-9 was examined as a witness though he was not cited as same in the charge sheet. From the deposition of PW-9 we find that he is an eyewitness of the occurrence. For ensuring justice the Court has power under section 540 of the Code of Criminal Procedure to issue summons upon any person. The Supreme Court of India held in **Mohanlal Shamji Soni Vs. Union of India (UOI) and Ors., AIR 1991 SC 1346** as under:

“It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions

of Section 540 of the Code (Section 311 of the New Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.”

In the instant case the trial Court exercising its discretionary power under section 540 of the Code of Criminal Procedure allowed PW-9, who happens to be an eyewitness of the occurrence but was not cited in the charge sheet as a witness, to testify before the Court to unveil the truth for paving the way of doing justice and in our consideration, it has done nothing wrong in doing so. Therefore, the argument of the learned Advocate for the appellant that the prosecution has failed to prove the case by examining any disinterested independent eyewitness is devoid of any substance.

The further contention of the learned Advocate for the appellant that the PW-3 in her dying declaration did not say that Anowar Hossain inflicted knife blows on the person of the victim but in her testimony she stated that the appellant Anowar Hossain inflicted knife blows on the person of the victim Monira, therefore, the High Court Division erred in law in relying upon the testimony of P.W.3 is also devoid of substance

inasmuch as the alleged dying declaration of PW-3 is not a dying declaration at all in view of section 32(1) of the Evidence Act, 1872 as after the declaration the victim did not die. The first and foremost condition of a declaration for according it the status of a dying declaration is that the declarant has to die after the declaration. In the instant case the survival of the declarant has made the declaration a mere statement recorded under section 164 of the Code of Criminal Procedure as that had been recorded by a Magistrate and going through that statement we find that PW-3 did not say anything about who had assaulted deceased Monira. From her testimony before the Court we find that she came to know about the death of her sister Monira after getting release from hospital. Obviously, considering her condition her kith and kins did not disclose the fact of death of Monira on the spot. Therefore, being ignorant of the fact that her sister had already died she might have abstained from saying anything about who had attacked her sister Monira. In any case, her statement recorded under section 164 of the Code of Criminal Procedure does stand in the way of proving that the appellant gave fatal "ram dao" blow to the deceased Monira in view of consistent evidence of the eyewitnesses to that effect. Moreover, on the day of occurrence the appellant absconded and his trial was held and conviction and sentence was confirmed by the High Court Division while he was still on the run. When he was arrested, by then long eighteen years had passed. This is a relevant fact under section 8 of the Evidence Act unerringly pointing to the guilt of the appellant.

In such facts and circumstances, we are of the view that the learned Courts below rightly relied upon the testimonies of P.Ws.3, 5, 6, 9 and 13 and rightly convicted the appellant Anowar Hossain.

However, considering the facts and circumstances of the case we are of the view that the sentence of the appellant may be commuted from death to imprisonment for life.

Accordingly, the appeal is dismissed. The sentence of the appellant is commuted from death to one of imprisonment for life and he is ordered to pay a fine of Tk.10,000/-, in default, to suffer rigorous imprisonment for a period of 6(six) months more. He will get the benefit of section 35A of the Code of Criminal Procedure and other remissions as admissible under the Jail Code.

The concerned Jail Authority is directed to shift the appellant to the normal jail from the condemned cell forthwith.

J.

J.

J.

J.

The 14th November, 2021.

M.N.S./words-/