4IN 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. 112 OF 2013 WITH JAIL PETITION NO.21 OF 2013

(From the judgment and order dated 21.04.2013 passed by the High Court Division in Death Reference No.10 of 2008 with Criminal Appeal No.915 of 2008 and Jail Appeal No.175 of 2008)

Md. Anwar Sheikh … **Appellant/Petitioner**
(In both the cases)

=VERSUS=

The State …… **Respondent**
(In both the cases)

For the Appellant /Petitioner (In both the cases)	**:Mr. A.S.M. Khalequzzaman, Advocate, instructed by Mrs. Shahanara Begum, Advocate-on-Record**
For the Respondent: (In Crl. Appl. No.112 of 2013)	**:Mr. S. M. Monir, Additional Attorney General,(appeared with the leave of the Court)**
For the Respondent: (In Jail P. No.21 of 2013)	**:Not represented**
Date of hearing and judgment on	**:The 2nd November, 2021**

J U D G M E N T

MD. NURUZZAMAN, J:

This criminal appeal at the instance of the accused appellant is directed against the judgment and order dated 21.04.2013 passed by the High Court Division in Death Reference No.10 of 2008 with Criminal Appeal No.915 of 2008 and Jail Appeal No.175 of 2008 confirming the death reference and dismissing the criminal appeal and jail appeal and thereby affirming the judgment and order dated 12.02.2008 passed by the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal, Faridpur, convicting the accused appellant under section 11(Ka)/30 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003) (shortly, 'Ain') and sentencing him to death with a fine of taka 1,000/- (Taka one thousand) in Nari-O-Shishu

Nirjatan Case No.101 of 2006 arising out of Modhukhali P.S. Case No.05 dated 06.05.2006 corresponding to G.R. No.62/2006.

Prosecution case, in brief, is that the informant's daughter namely victim Nasima Begum alias Bahana, was given in marriage to the accused Anwar about 10 years ago and Bahana gave birth to two sons. The victim, wife of the accused appellant Anwar was slightly crippled in left hand and right leg from her birth. After marriage, the accused persons often used to beat and torture her for dowry and send the victim back to her father's house. The informant gave cash Tk.80,000/-(Taka eighty thousand) on several occasions to the accused Anwar. Moreover, the informant arranged a job for Anwar as a guard in a company in Dhaka. But

torturing the victim continued. On 01.05.2006 at about 9.00 A.M., the accused Anwar along with his wife and kids came to the house of the informant and demanded Tk.10,000/- for dowry. But the father-in-law of Anwar i.e. the informant refused to fulfill the demand. Consequently, the accused Anwar left father-in-law's house with his wife and sons. At that night at about 11.45 hours, the informant heard from an unknown van driver that the victim Bahana was untraceable. On getting the message, the informant along with some persons rushed to the house of Anwar and inquired about the victim. But Anwar could not give satisfactory reply. The informant learnt from the local people that Anwar beat the victim. Thereafter, she became unconscious and on 06.05.2006, the

informant came to know from one Alam member that a dead body had been found in the septic tank. Accordingly, the informant intimated the matter to the Modhukhali Police Station. Subsequently, Police came to the spot and recovered the dead body of the victim from the place of occurrence and the informant identified the dead body of the victim. Hence, one Md. Abul Hossain (P.W.1), father of the victim as informant lodged a First Information Report (shortly, "FIR") on 06.05.2006 against the accused persons including the accused appellant under sections 11(Ka)/30 of the Ain before the Officer-in-Charge of Modhukhali Police Station, Faridpur. Accordingly, Modhukhali Police station Case No.05 dated 06.05.2006 corresponding to G.R. No.62 of 2006

under sections 11(Ka)/30 of the Ain was started against the accused persons including the accused appellant. Hence the case.

The police, completing the investigation, submitted Charge-sheet No.71 dated 03.08.2006 under sections 11(Ka)/30 of the Ain against the accused appellant and two others.

The case record was transmitted to the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal, Faridpur (in short, the 'Tribunal') and was renumbered as Nari-O-Shishu Case No.101 of 2006.

The Tribunal framed charge against the accused appellant including 5(five) others under sections 11(Ka)/30 of the Ain. The said charge was read over and explained to them to

which they pleaded not guilty and claimed to be tried in accordance with law.

The prosecution examined as many as 12(twelve) witnesses to prove its case and they were cross-examined by the defence. But the defence examined none.

After closing the prosecution evidences, the accused persons including the accused appellant were examined under section 342 of the Code of Criminal Procedure, 1898. Repeating their innocence and termed the evidences as false and declined to adduce any evidence in their favour.

The defence case as has been derived from the trend of cross-examination is of complete innocence and false implication.

After conclusion of trial, the Tribunal upon considering the evidence and other materials on record by its judgment and order dated 12.02.2008 convicted the accused appellant Md. Anwar Sheikh and Md. Awal Sheikh under section 11(Ka)/30 of the Ain and sentenced them to death with a fine of taka 1,000/- (Taka one thousand)only.

The Tribunal following the provision of section 374 of the Code of Criminal Procedure sent the death reference with connected case records to the High Court Division for confirmation of death sentence which was registered as Death Reference No.10 of 2008.

Feeling aggrieved by and dissatisfied with the judgment and order of conviction and sentence dated 12.02.2008 passed by the

Tribunal, the condemned appellant preferred the above mentioned Criminal Appeal and jail appeal before the High Court Division. The High Court Division, upon hearing both the parties and in consideration of the evidence on record, accepted the Death Reference No.10 of 2008 in part and dismissed the criminal appeal and jail appeal and thereby affirmed the judgment and order of conviction and sentence of the Tribunal by its judgment and order dated 21.04.2013.

Feeling aggrieved by the judgment and order dated 21.04.2013 of the High Court Division, the condemned appellant preferred the instant Criminal Appeal No.112 of 2013 along with Jail Petition No.21 of 2013 before this Division.

Mr. A.S.M. Khalequzzaman, the learned Advocate appearing on behalf of the condemned appellant in both the cases submits that there is no eye witness in the case and the prosecution witnesses are not reliable. He further submits that there is no independent and direct evidence in this case. He next submits that the trial Court as well as the High Court Division convicted and sentenced the condemned appellant merely upon conjecture and surmise, not upon legal evidences on record. He also submits that according to the statement of the condemned appellant Anwar Sheikh under section 164 of the Code of Criminal Procedure, Helena is the vital witness of this case but she was not examined; that is why, who is the actual murderer that was not ventilated

lawfully. He next submits that the Tribunal fell into error of law in finding the condemned appellant Anwar guilty of the charges leveled against him as the prosecution has miserably failed to prove the case beyond reasonable doubt. He submits that the allegation of killing the deceased Bahana is not believable and the condemned appellant has been implicated by the informant out of suspicion. The tainted relationship sought to be proved as a motive of the offence but such motive was not proved by cogent and credible evidence. He emphasizes that the sentence of death passed upon the condemned appellant is extremely harsh and severe. He added that the death sentence should not be passed as routine and this is not a case in which sentence of death is warranted. He

finally submits that the statement of condemned appellant Anwar Sheikh and witness Batashi Begum under 164 of the Code of Criminal Procedure are not corroborative with each other and, as such, those statements are not acceptable. The evidence of the prosecution witnesses are highly contradictory and discrepant and the prosecution case palpably suffers from its inherent improbabilities and, as such, the impugned judgment and order of the High Court Division is bad in law and, hence the same is liable to be set aside.

Mr. S.M. Monir, the learned Additional Attorney General appearing on behalf of the State-respondent in Criminal Appeal No.112 of 2013 with leave of the Court submits that the prosecution had successfully established its

case beyond any reasonable doubt and the ingredients of the aforesaid special provision of law having been attracted, the Tribunal duly found that the accused appellant had committed the offence. He further submits that there is no reason to disbelieve the witnesses nor the defence could shake the credibility of the witnesses. The story of the case clearly and exclusively suggests the involvement of the condemned appellant Anwar with the offence, that is, the condemned appellant Anwar tainted his relationship with the deceased over the demand of dowry. The accused appellant Anwar was demanding a proportionately large amount which the father of the victim was unable to pay. In this regard, the learned Additional Attorney General contends that the victim was

an innocent village housewife who did not have any enmity with anyone and that the defence has also failed to produce any evidence on that count. The alleged occurrence also took place after 10 years of the marriage as meted out by the condemned appellant Anwar. The learned Additional Attorney General in this regard insists that a close reading of the statements of the Prosecution Witnesses will also suggest that the condemned appellant Anwar is solely responsible for the murder of the victim. He finally submits that the Tribunal committed no error in law or facts in passing the judgment and order of conviction and sentence against the condemned appellant Anwar and, therefore, there is no justifiable reason to interfere

with the impugned judgment and order passed by the Tribunal.

We have considered the submissions of the learned Advocate and the learned Additional Attorney General of the respective parties. Perused the impugned judgment of the High Court Division and connected other materials on record.

Now let us evaluate the evidence on record, circumstances the case, and decision of the High Court Division, whether order of conviction is justified or any error which calls for interference by this Division.

From the depositions of the PW 1, 2, 3, 4, 8, 9, 10, 11 it clearly transpired that the dead body of the deceased Nasima Begum alias Bahana was recovered from the septic tank of

her husband Md. Anwar Sheikh, the instant appellant. It was too approved from the inquest report and testimony of PW 6's deposition.

There was no sign of personal or social or kinfolk-rivalry with the deceased Nasima Begum also known as (in short, aka) Bahana with anyone of her neighbouring area as it appears from the evidences adduced that could make such a heinous murder indictment of her life. In fact, we too endorse with the High Court Division's observation that she was a simple and innocent country housewife. Consequently, all the suspicions of the alleged murder focused on the inhabitants of her husband or in-laws house.

From the testimonies of the PWs. 1, 8 and 9 it was proved beyond all reasonable doubt

that the instant appellant left the PW.1's house with his wife Nasima Begum Aka Bahana along with their two sons before the alleged killing of her. This event eventually proved that Nasima alias Bahana before her death was in undeniably in the custody of her husband, the instant appellant. On 01-05-2006, it was reported that she was missing. On 06-05-2006, her corpse was recovered from the septic tank of her husband. The appellant in his confessional statement admitted aforesaid recovery. He not only knows the recovery of corpse, rather, knows about the killing, even though, he falsely searched for Nasima with other inmates of the house only to show publicly that Nasima was really missing which was not fact. The appellant's such a pretext

undoubtedly proved that he was fully aware about the murder. But he has measurably failed to take any step to save her life.

As such, the instant appellant as the husband is solely responsible and duty bound to explain as to how and when his wife, Nasima Begum alias Bahana was died. He was miserable failed to explain, even if, he was examined under section 342 of the Code of Criminal Procedure to that effect. Moreover, it was proved from the testimonies of the PW 1, 2, 3, 4, 8 that the present appellant not only concealed the fact of his wife's death but also misled them saying that the Djinn or Genie (some sort of supernatural creatures) picked up Nasima Begum aka Bahana in their realm. In addition he too Join the search with his in-

laws along with others present. Moreover, he continued his misleading tricks even in his exculpatory confessional statement incriminating his uncle co-accused Awal for the victim's murder.

As a result, concurring with the courts below we opine that it is the accused appellant who has committed the murder of his wife Nasima Begum aka Bahana.

From the conscientious reading of the judgment of the High Court Division it appears that the High Court Division affirmed the conviction of the present appellant on the settled cardinal principle enunciated by this division on the killing of wife cases. The principle enunciated by this Division in the case of Abdul Motaleb Howlader Vs. the State

reported in 5 MLR(AD)(2000) 362 it was held that-

> **"It is well settled that ordinarily an accused has no obligation to account for the death for which he is placed on trial. The murder having taken place while the condemned-prisoner was living with his wife in the same house he was under an obligation to explain how his wife had met with her death. In the absence of any explanation coming from his side it seems none other than the husband was responsible for causing death in question."**

Now, let us rethink the very fact that the brooding horror of hanging, tortures the present appellant detained in the condemn cell of jail for almost 14 years. There is no material shown by the State to indicate that the appellant cannot be reformed and is a continuing threat to the society. It is of course true that a period of anguish and suffering is an inevitable consequence of sentence of death.

In the case of Nalu vs State reported in 17 BLC(AD)(2012)204 this Division undertook young age, absence of any sort of Previous Conviction or Previous Record (PC/PR) of the offender and elongated staying in the condemn cell as Mitigating Circumstances and commuted

the offender's death gallows verdict to an imprisonment for life verdict.

In the case of Syed Sajjad Mainuddin Hasan vs State, 70 DLR (AD) (2018) 70] and Ataur Mridha alias Ataur Petitioner Vs the State, [15 SCOB (2021) (AD) 1, Criminal Review Petition No. 82 of 2017] this Division applied some modern sentencing tools such as Aggravating Circumstances, Mitigating Circumstance, Rarest of the Rare Test and Comparative Proportionality Test in disposing murder cases.

The killing of the victim was certainly terrible, however, there appears a few Mitigating Circumstance in the instant case, and these may be described as follows-

i) the deceased left 02 kids alive of 05 and 01 years of age. If the appellant,

that is the father of the said kids executed these kids of the circumstances will become orphans;

ii) the present appellant detained in the condemn cell of jail for almost 14 years;

iii) there is no Previous Conviction or Previous Record (PC/PR) of the offender;

iv) in the present case the impression of offence on society, state etc. are limited to a certain locality and no such cross country effect was recorded in any way;

v) absence of any material to believe that if allowed to live he poses a grave and serious threat to the society.

Accordingly, we opine that though there is no uncertainty that the appellant has committed a repulsive crime, even so for this we believe that internment for life will serve as sufficient punishment and penitence for his actions. We believe that there is hope for reformation, rehabilitation. Hence, we are inclined to impose imprisonment for life instead of capital punishment.

In the result, the Criminal Appeal no. 112 of 2013 is dismissed with modification of sentence.

The sentence of death of the appellant, Md. Anwar Sheikh, son of Saken Sheikh, of Village-Mirapara, Police Station-Madhukhali, District-Faridpur to suffer imprisonment for life and also to pay a fine of Tk. 10,000/=

(ten thousand), in default, to suffer rigorous imprisonment for 06 (six) months more. He will get the benefit of section 35A of the Code of Criminal Procedure in calculation of his sentence.

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

Jail Petition No.21 of 2013 is disposed of in the light of the judgment delivered by this Division in Criminal Appeal No.112 of 2013.

J.

J.

J.

J.

The 2nd November, 2021
Hamid/B.R/*Words 2,887*