Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice K M Zahid Sarwar

Death Reference No.134 of 2016
The State
Vs.
Most. Rahela Khatun.
...Condemned-convict.
With
Criminal Appeal No. 11568 of 2016
Most. Rahela Khatun.
.Convict-Appellant.
Vs.
The State ..Respondent.
Mr. Md. Nasir Uddin, Advocate
…For the appellant.
With
Jail Appeal No. 355 of 2016
Most. Rahela Khatun
.. Appellant.
Vs.
The State ..Respondent.
Mr. Md. Aminul Islam, D A.G. with
Mr. Mohammad Jahangir Alam,
A. A.G. with
Mr. Mohammad Humayun Kabir, A.A.G
…..For the State.
Heard on 26.05.2022, 29.05.2022 and 31.05.2022.
Judgment on 01.06.2022.

SHEIKH HASSAN ARIF, J:

1. This Death Reference No. 134 of 2016, under Section 374 of the Code of Criminal Procedure,

1898, has been sent to us for confirmation of death sentence imposed on the sole convict, Most. Rahela Khatun, vide judgment and order dated 28.09.2016 passed by the Additional Sessions Judge, Second Court, Rangpur in Sessions Case No. 426 of 2004, thereby, imposing sentence of death on her under Section 302 of the Penal Code and further sentencing her to seven (07) years' rigorous imprisonment under Section 201 of the Penal Code and to pay a fine of Tk. 10,000.00, in default, to serve further 01 (one) year rigorous imprisonment. The death reference has been taken up for hearing along with the Criminal Appeal No. 11568 of 2016 and Jail Appeal No. 355 of 2016 as preferred by the same-convict against the same judgment of conviction and sentence.

2. **Background Facts:**

2.1 The prosecution case is that the husband of the convict, Md. Lavlu Miah (P.W. 01) (informant), lodged FIR with Gangachara Police Station, Rangpur on 01.10.2004 alleging, inter alia, that he got married to convict about $2\frac{1}{2}$ years ago and that she used to get involved in quarrel with him and his family members. That a daughter, named Lucky, was born in their wedlock one year ago. That, because of such quarrels, his wife went to her father's house about 15/20 days ago. That on 13.09.2004, the brothers of his wife came to his house at 10.00 o'clock in the morning and informed him that on the night following 12.09.2004 after 11.00 pm, his daughter, Lucky, died of drowning in water. He then became suspicious about such death and, after report of doctor following Post Mortem,

came to know that his daughter was killed by strangulation. He then realized that the convict killed his daughter by strangulation because of such family quarrel and drowned the body in the pond to show that she died because of drowning.

2.2 The said FIR was registered as Gangachara Police Station Case No. 01 dated 01.10.2004, corresponding to G.R. Case No. 556 of 2004, under Sections 302/201 of the Penal Code. Thereupon, P.W. 5 (S. I. Md. A. Monayem) and P.W. 8 (S.I A.B.M Rezaul Islam) of the same Police Station investigated the case. During investigation, the convict was arrested. Accordingly, P.W. 8, the second investigating officer, submitted charge sheet against the convict, being Charge-Sheet No. 186 dated 19.10.2004, under Sections 302/201 of the Penal Code on the finding that the allegations

against her were found prima facie established in that she had killed the victim by strangulation and drowned the body in the pond. It may be noted that before filing of the aforesaid FIR, the brother of the victim (P.W. 7) lodged an Unnatural Death Case, being U.D. Case No. 6/04 dated 13.09.2004, with the averment that the victim had died by drowning in the pond. However, after post mortem report, it was found by the doctor that the victim was killed by manual strangulation. Accordingly, P.W. 9, S.I. Md. Tofazzal Hossain, who investigated the said U.D. Case, submitted final report on 03.10.2004 in order to facilitate the filing of the regular case with the lodging of the aforesaid FIR.

2.3 Be that as it may, after submission of the charge-sheet as aforesaid, the case, being ready for trial, was sent to the Court of Sessions

Judge, Rangpur and the same was numbered as Sessions Case No. 426 of 2004. Thereupon, learned Sessions Judge, Rangpur framed charge against the convict on 26.01.2005 under Sections 302/201 of the Penal Code and, accordingly, read over the charge to her to which she pleaded not guilty and demanded trial. Thereafter, the case was sent to the Court of Additional Sessions Judge, Rangpur for trial. During trial, the prosecution produced nine (09) witnesses and exhibited various documents including the inquest report and post mortem report. The witnesses were, accordingly, cross-examined on behalf of the accused. After completion of such recording of evidences, the accused was examined by the trial Court under Section 342 of the Code and, in such examination, the accused again pleaded not guilty and refused to give any evidence on her

behalf. Thereupon, the trial Court, after hearing the parties, delivered the impugned judgment dated 28.09.2016, thereby, taking the view that the prosecution had successfully proved the charges against the convict-appellant beyond reasonable doubt. Accordingly, the trial Court imposed death sentence on her under Section 302 of the Penal Code and further imposed a sentence of rigorous imprisonment under Section 201 for 07 (seven) years and a fine of Tk. 10,000.00, in default, to serve 01 (one) year rigorous imprisonment more. Accordingly, the case records were sent to this Court by the trial Judge in view of the provisions under Section 374 of the Code for confirmation of the said death sentence. The convict then preferred the aforesaid criminal appeal and jail appeal. The death reference, being ready for hearing, has been sent to this Bench by the concerned

Section of this Court for disposal along with the said criminal appeal and jail appeal.

3. **Depositions/Evidence:**

Before going into the merit of the case and addressing the legal points raised by the parties, let us first describe the available evidences on record. Accordingly, relevant parts of the depositions of the witnesses as well as the material evidences are described herein below:

P.W. 1 (Md. Lavlu Mia) is the informant of the case and husband of the convict. He deposed that the incident took place about 11/12 years ago. He identified the convict as his wife on the dock. According to him, he was at his own residence and his wife was at her father's residence as she went there about 10/12 days before the occurrence took place. He further deposed that the morning following the night of occurrence, his brother-in-law Rezaul

(brother of his wife) came to his residence and informed him that his child had died by drowning. He then rushed to this father-in-law's house and found his child being taken out from the pond-water. According to him, two other children had already died in the same pond. He, accordingly, proved his FIR by saying that "this is my FIR" (ইহা আমার এজহার) and proved his signature thereon (Exhibits-1 and 1/1).

This witness was declared hostile by the prosecution and, accordingly, he denied the suggestion given by the prosecution that because of his on-going conjugal life with the convict, he deviated from his earlier position. In response to question by the prosecution lawyer, he deposed that his wife stayed 15 days in her father's house after the occurrence and then she was in jail and, after release, she came to the informant's house after staying about 10/12 days in her parents' house. In reply to another question, he

deposed that his wife went to her father's house alone.

P.W. 2 (Md. Babor Ali) was not tendered by the prosecution and, accordingly, he was not cross-examined on behalf of the accused.

P.W. 3 (A. Sattar) deposed nothing important except that he heard that the brother-in-law of P.W. 01 had informed that the son (sic.) of P.W. 1 died by drowning. Accordingly, he was not cross-examined on behalf of the accused.

P.W. 4 (Md. Lal Miah) is the brother of the P.W. 01 (informant). He deposed nothing material except that he was present at the time when brother-in-law of the P.W. 01 told the P.W. 01 that his son (sic.) died by drowning. According to him, P.W. 01 then asked this witness to go with him to the residence of his father-in-law, but this witness did not go there. This witness

was also not cross-examined on behalf of the defence.

P.W. 5 (Md. A.I Monayem) is the first investigating officer of the case. He deposed that on the basis of the first information report lodged by the P.W. 01, the case concerned was registered and he started investigation as the same was entrusted upon him by the officer-in-charge. During his investigation, he examined the FIR, visited the place of occurrence and prepared sketch map & index thereof. He arrested the convict and questioned her and, during such questioning, she admitted her guilt and agreed that she would confess if she was sent to Court. Accordingly, this witness sent the convict to the Court for recording confessional statement. He further deposed that he had recorded statements of some witnesses including the investigating officer of the UD case concerned under Section 161 of the Code,

examined the post mortem report wherein it was mentioned that haematoma was found on the back part of the head of the victim and that some injuries were found on the belly and back of the shoulder of the victim. Accordingly, in his investigation, since he prima-facie found the allegations to be established against the convict, he submitted memorandum of evidence to the concerned authority. Thereafter, when he was transferred, he handed over the C.D. of the case. Accordingly, he proved the said sketch map and his signature thereon as Exhibits-2 and 2/1. In cross-examination, he identified the houses of Abdur Rahman, Shamsul and Ayub Ali from the sketch map as B, C and D, and deposed that since the said people, during questioning, did not reveal the correct information, he did not include them as witnesses in the charge-sheet. He further deposed that on 02.10.2004, the convict was sent to the Court for recording her 164 statement, but the same was not

recorded because of the time constraint and, thereafter, she was sent on 05.10.2004 to the Court for such recording, but she refused to give confession. He further deposed that he had prepared the sketch map at 05:30 P.M. at the place of occurrence on 02.10.2004.

P.W. 6 (Dr. Monsur Rahman) deposed as a formal witness as he was one of the doctors who conducted post mortem on the deceased. he deposed that he had conducted post mortem examination of the deceased, M**s.** Lucky Khatun, who was one year old, as per the identification done by one constable Md. Fazlul Haque. During his such examination, he found the following injuries:

> “1. One haematoma on the occipital scalp, size 1"x$\frac{1}{2}$" .

2. One abrasion on the front of abdomen, size $1\frac{1}{2}$".

3. One bruise on the front of upper part of neck, size 1"x$\frac{3}{4}$",

On detailed dissection, extravasation of clotted blood found present at the site of the injuries. Intracranial haemorrhage was present. Trachea and larynx were highly congested. All the viscera were congested. Stomach empty.

Death in his opinion was due to asphyxia as a result of manual strangulation and which was ante-mortem and homicidal in nature.

Accordingly, he proved the post mortem report and his signature thereon as Exhibits-3 and 3/1 respectively. During cross-examination, he deposed that the injuries on the neck of the deceased were not caused by any blow. He also deposed that the death

might have been caused by pressing fingers on the neck.

P.W. 7 (Md. Saju Miah) is the brother of the convict. He, accordingly, identified the convict on the dock and admitted that informant was his brother-in-law and that convict Rahela Khatun was his full sister and that his sister had a child. He further deposed that he lodged the U.D. case with the police station concerned and that he saw the dead-child. He, accordingly, gave statement to the investigating officer. In cross-examination, he deposed that their house was adjacent to the pond and that his child also died about one and half years ago in that pond. He further deposed that he did not find any sign of injuries on the neck and head of the deceased at the time of filing of the U.D. case.

P.W. 8 (Mr. A.B.M Rezaul) is the second and final investigating officer of the case. He deposed that he

took-up the investigation after transfer of P.W. 5. That he examined the records of the case, visited the place of occurrence and did not record the statements of same witnesses, who gave statements to the previous I.O. He saw the post mortem report, examined the surathal report. According to him, since he found the investigation done by the previous I.O. being correct and exact as per memorandum of evidence submitted by the said I.O., he submitted Charge-Sheet No. 186 dated 19.10.2004 under Sections 302 and 201 against the accused-Rahela Khatun. In cross-examination, he denied the suggestion that he did not conduct investigation properly or that had the investigation been done properly, the charge-sheet could not have been submitted against the accused.

P.W. 9 (Md. Tofazzal Hossain) was the investigating office of the U.D. case concerned. He deposed that

he was the A.S.I. of the Gangachara Police Station at the relevant time. That he prepared the surathal report and chalan form of the deceased and sent the body to the morgue. Accordingly, he proved the inquest report and his signature thereon as Exhibits 4 and 4-1. He also proved the form of dead body chalan and his signature thereon as Exhibits 5 and 5/1. He deposed that he submitted final report in the said U.D. Case No. 06/04 dated 13.09.2004. Accordingly, he proved the said final report as Exhibit 6 and his signature thereon as Exhibit 6/1. In cross-examination, he deposed that he did not find any sign of injuries on the head and neck of the deceased during inquest.

4. **Submissions:**

4.1 Learned Deputy Attorney General and Assistant Attorney General, appearing for the State, have placed the impugned judgment, depositions of all witnesses, exhibits and other materials on

record before this Court. Since the convict has preferred a separate criminal appeal by engaging a learned Advocate of this Court, we have heard the learned advocate for the convict-appellant first. Accordingly, Mr. Md. Nasir Uddin, learned advocate appearing for the convict-appellant, submits that there are huge inconsistencies in the sketch map and the statement of the convict given in answer to questions put to her during examination under Section 342 of the Code. According to him, the convict-appellant disclosed in such examination by the trial Court that the pond was adjacent to the veranda of the house, while the sketch map (Exhibit-2) prepared by the I.O. shows that the pond is far away from the house of the convict. Further referring to the sketch map (Exhibit-2) concerned, learned advocate submits that there are neighboring houses beside the house of the

convict, or alleged place of occurrence, but none of the neighboring witnesses was produced by the prosecution.

4.2 Putting emphasis on the inquest report (Exhibit-4), he submits that it is clear therefrom that no bodily injury was found on the victim during such examination. Therefore, according to him, the appellant was wrongly convicted and sentenced merely relying on post mortem report (Exhibit-5), which is contrary to the finding of the inquest report. Further referring to the depositions of the witnesses, learned advocate for the appellant submits that the prosecution has totally failed to prove any motive for the alleged killing and that none of the witnesses deposed that they saw the convict with the deceased baby on the night or in the evening before the night when the baby was allegedly killed.

4.3 Drawing our attention to the impugned judgment, he submits that the trial Court has wrongly relied on a reported decision of the High Court Division, namely the case of **Rahima Begum vs. The State as reported in 5 SCOB (2005)-88,** particularly when the conviction against Rahima Begum therein under Section 302 of the Penal Code was set aside by the High Court Division.

4.4 Again, drawing our attention to the relevant part of the examination of the accused under Section 342 of the Code, he submits that unreasonable and uncalled-for questions were put to the accused during such examination and answers given by the accused to such questions were used as the basis of conviction against her. Therefore, according to him, since the answers given by the accused during such examination

were not evidence, the Court below committed illegality in relying on such answers.

4.5 As against above submissions and in favour of confirmation of death sentence, Mr. Momammad Jahangir Alam, learned Assistant Attorney General, submits, at the outset, that this is a case of negative burden and, accordingly, the same has to be examined from that point of view as decided by this Court again and again in wife killing case. He submits that the prosecution has satisfactorily proved that the deceased child, aged one year, was in the custody of her mother (convict-appellant) on the dreadful night of alleged murder. Therefore, in a case like this, it is the convict-appellant who was required to explain as to how the dead body of the victim was found in the next morning. According to him, it was the convict-appellant who was required to explain under Section 106 of the

Evidence Act as to the nature of death of the deceased or as to how she died, particularly as to how she died an unnatural death when the post mortem report (Exhibit-3) was satisfactory proved by the prosecution through the doctor concerned, namely P.W. 6, before the trial Court which reveals that the stomach of the victim was empty and that she was killed by manual strangulation. According to him, since no explanation has been given by the convict, who was the custodian of the said infant-child and the explanation given by her as to the death of the victim by drowning turned up to be a false explanation in view of the post mortem report, the Court is required to draw inference under the law that the custodian of the child, namely the convict, killed her. In support of his such submissions, he has referred to a decision of our Appellate Division in **State vs. Khandker Zillul**

Bari and other, 57 DLR (AD)-129. As regards the proof of motive, he submits that in a case like this motive is not material at all, particularly when the convict failed to explain as to how the victim died. He has referred to the same decision in support of such submission in that in every case motive is not required to be proved.

4.6 As regards the propriety of the examination of the convict under Section 342 of the Code, learned AAG submits that even if there is any impropriety or illegality therein, the same cannot vitiate the ultimate conviction and sentence inasmuch as that even without relying on the answers given by the accused to the questions put to her by the trial Judge in the said examination, the prosecution case has been established inasmuch as that the convict failed to give any proper explanation as to the death of the victim.

5. **Scrutiny of Evidences:**

5.1 Before conducting the analysis and scrutiny of evidences on record, let us first address the issue raised by the learned advocate for the appellant as regards examination of the accused under Section 342 of the Code, in particular the point raised by him to the effect that the conviction of the trial Court was based on the answers given by the accused in reply to the questions put by the judge himself during such examination. It appears from such examination that the gists of the evidences recorded by the trial Court were placed before the accused one after another, and, after placing such evidences, the trial judge put ten specific questions to the accused to which the accused gave specific answers. For the convenience of our discussions that will follow, let us reproduce the said ten questions and answers herein below:

“১। প্রশ্নঃ আপনি দোষী নাকি নির্দোষ? উত্তরঃ- নির্দোষ।

২। প্রশ্নঃ ঘটনার সময় কোথায় ছিলেন? উত্তরঃ- বাবার বাড়িতে।

৩। প্রশ্নঃ সেইদিন আপনি স্বামীর সাথে বাড়িতে ছিলেন কিনা?

উত্তরে হ্যাঁ, স্বামীর সাথে একত্রে ছিলাম।

৪। প্রশ্নঃ আপনার বাচ্চার বয়স কত ছিল? উত্তরঃ ১ বছর।

৫। প্রশ্নঃ ১ বছরের শিশু লাকি হাঁটতে পারে কিনা? উত্তরঃ- না।

৬। প্রশ্নঃ মায়ের বাড়িতে আপনার শিশু লাকিসহ একত্রে ঘুমিয়েছিলেন কিনা? উত্তরঃ- হ্যাঁ ।

৭। প্রশ্নঃ উক্ত পুকুর বাড়ি থেকে কত দূরে ছিল?

উত্তরঃ- বাড়ির বারান্দার কাছে পুকুর।

৮। প্রশ্নঃ আপনার পিতা, ভাই আপনার স্বামীকে গ্রেফতার করে নাই কেন?

উত্তরঃ- আমরা বুঝতে পারি নাই। তাই মামলা করেন নাই।

৯। প্রশ্নঃ সাফাই সাক্ষী ও কোন কাগজপত্র দিবেন কিনা?

উত্তরঃ- আমার পিতা, ভাই কেহ সাফাই সাক্ষী দিতে আসবে না । ভাই পূর্বে সাক্ষী দিয়েছে। কোন কাগজপত্র দাখিল করবো না।

১০। প্রশ্নঃ আরও কিছু বলবেন কি?

উত্তরঃ- লাশ তোলার পরে আমাকে দেখায়নি। বাচ্চা মৃত অবস্থায় স্বামী ৩ দিন বাড়িতে ছিল। স্বামী বলে যে তালাকনামার কাগজ দিলে বাচ্চার দাফন হবে। লাশের দাফনের সময় স্বামী উপস্থিত ছিল।”

5.2 It now appears from the body of the impugned judgment that the trial Judge in fact relied on some of the above answers given by the accused in order to reach his conclusion as to the finding of guilt. Relevant part of the said judgment is also reproduced below for our ready reference:

> "আসামী মোছাঃ রাহেলা খাতুনকে The Code of Criminal Procedure, 1898 এর ৩৪২ ধারার পরীক্ষা পর্যবেক্ষণ করা হলো। অত্র আদালতে আসামীকে প্রশ্ন করা হয় যে আপনার গর্ভজাত ১ বৎসরের কন্যা লাকি খাতুন হাঁটতে পারে কিনা? তিনি উত্তরে না-সূচক বলেন। আপনার পিতার বাড়ি থেকে পুকুরের কতটুকু দূরত্ব আছে কিনা? উত্তরে বলেন তার পিতার বাড়ির বারান্দার সংলগ্ন পুকুর। তাকে প্রশ্ন করা হয় যে আপনার পিতা-মাতার বাড়ির খাট বা চৌকিতে শিশু কন্যাসহ আপনি একত্রে ঘুমিয়েছিলেন কিনা? তিনি উত্তরে হ্যাঁ-সূচক বলেন। তাকে প্রশ্ন করি যে আপনি নির্দোষ প্রমাণের জন্য কোন সাফাই সাক্ষী দিবেন কিনা? উত্তরে বলেন যে কেউ আসবে না। সর্বশেষ তাকে বলি আপনি আর কোন বক্তব্য দিবেন কিনা? উত্তরে বলেন যে লাশ তোলার পরে তাকে দেখায় নাই। বাচ্চা মৃত অবস্থায় স্বামী ৩ দিন বাড়িতে ছিল।

স্বামী বলে যে তালাকনামার কাগজ দিলে বাচ্চা দাফন হবে। বাচ্চা দাফনের সময় স্বামী উপস্থিত ছিল। The Code of Criminal Procedure, 1898 এর ৩৪২ ধারায় পর্যালোচনায় দেখা যায় যে আসামীর স্বীকৃত যে তার ১ বছরের শিশু কন্যা হাঁটতে পারে না।"

5.3 Thus it is evident that the trial Court has in fact relied on the answers given by the accused during such examination and has used those answers in connection with other evidences on record. The power of the trial judge to put questions has been recognized under Section 342 and Section 540 of the Code, although the contexts are different. The power of the Court to put necessary questions in order to discover or obtain proper proof of relevant facts has also been recognized by Section 165 of the Evidence Act, 1872. However, although such powers under Section 540 of the Code and Section 165 of the Evidence Act are enabling provisions, thereby, enabling the Judge to put necessary

questions in order to extort the truth as to the relevant facts, the provisions under Section 342 of the Code are provisions designed to enable the accused to explain any circumstances appearing in the evidence against him/her. For better understanding, the provisions under Section 342 of the Code are reproduced below:

> *"342- (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.*
>
> *(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them;*

but the Court may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused".

5.4 It appears from the very words used under sub-section (1) of Section 342 quoted above that the very purpose of this provision is to enable the accused to explain his or her position or any circumstances as against the evidences appearing against him/her during trial. Sub-section (2) makes it clear that the accused shall not render himself liable to any punishment by refusing to answer such questions, although the Court may draw such inference from such refusal or answers as it thinks fit. Sub-section (3)

further provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against him in any other enquiry or trial in respect of any other offence. Sub-section (4), however, puts a bar, thereby, prohibiting administration of oath to the accused during such examination.

5.5 Therefore, it appears from the above provision under Section 342 that this provision has been designed basically to enable the accused to explain any circumstances as appearing in the evidences against him during trial, and, in order to explain such circumstances, the accused can also give evidence on his/her behalf. Thus, the Court is empowered to put questions to the accused. However, the pertinent question is whether the answers given to such questions can be relied upon by the Court to reach a finding of guilt. In other words, whether the

answers given by the accused to such questions may be used as evidence. The answer, as held by different superior Courts of this sub-continent, is NO, for the very reason that the same is not given on oath and that the accused cannot be cross-examined unless and until he desires to give evidence in support of the defence case. Although there is no specific provision in our Code enabling the accused to give evidence or to depose like subsequently inserted provision under Section 315 of the Indian Code of Criminal Procedure, 1973, the practice in our jurisdiction is that after such examination, the accused is always asked whether he would like to give evidence in support of any defence case or in order to explain the circumstances as were appearing against him during trial.

5.6 In the instant case, it appears that the trial Court, in such examination under Section 342 of the

Code, put the above quoted ten specific questions to the accused to which she answered and gave some information as regards the age of the deceased child, or that the deceased child was not able to walk because of her tender age, and such information or answers given by the accused were used by the trial Court in order for reaching his conclusion of the finding of guilt against the accused. This aspect of the impugned judgment is totally unwarranted and uncalled-for as the same is not permitted by law. Although the provisions under sub-section (3) of Section 342 has allowed the trial Court to take into consideration the answers given to questions put by him during such examination, such answers cannot be treated as evidence in order to reach the finding of guilt for another reason that such answers are not ‘evidence’ within the meaning of Section 3 of the Evidence

Act, 1872. This position has been made clear by his Lordship Mr. Justice Shahabuddin Ahmed at paragraphs 22 and 23 of the reported case in **Shah Alam vs. State, 42 DLR (AD)-31** while he was giving his minority view. However, that part of his observation as expressed in his minority view in the said reported case was not disagreed or no contrary view was expressed thereto by the majority decision in the said case. In the said minority view, his Lordship observed as follows:

> *"22. .....Secondly, a statement of the accused under section 342 Cr.P.C. is meant for giving him an opportunity to explain the circumstances appearing against him in the evidence adduced by the prosecution. This is entirely for the benefit of the accused and the accused only. This statement cannot be used by the Court against him, nor is the prosecution permitted to use it to fill up any gap left in the prosecution evidence. Law on this point is well settled and there is no scope for any divergent opinion about it. In Devi Dyal v. The*

Crown, (1923) ILR, Lah, 50, the Lahore High Court set aside the conviction of the accused for defamation which was based on a statement of the accused under this section.....

23. .....A statement under this section is not evidence within the meaning of s.3, Evidence Act, but the court will consider the statement, along with the evidence and circumstances, and if the statement of the accused gets support from the evidence on record, the court must give due weight thereto……

(Underlined to give emphasis)

5.7 This position has also been repeatedly confirmed by various decisions of the Indian Supreme Court in **State of Maharashtra vs. R.B. Chowdhury, A.I.R. 1968 S.C. 110** (see Paragraph-5), **Ashok Kumar vs. State of Haryana, AIR 2010 S.C. 2839** (see paragraph-22), **Dehal Singh vs. State of Himachal Pradesh, AIR 2010 S.C. 3594** (see Paragraph-21), **Sujit Biswas vs. State of Assam, (2013)**

12 SCC 406 (see Paragraph-20), **Devender Kumar Singla vs. Baldev Krishan Singla, AIR 2004 S.C. 3084, Kale Khan vs. State of M.P., 1990 Crl.L.J. 1119** (see Paragraph-36) and **Mohan v. State of Madhya Pradesh, 2005 Crl.L.J. 79** (see Paragraph Nos. 17 and 19). It appears from the decisions in the above cited cases on this provision that it has been designed mainly for enabling the accused to explain the circumstances appearing against him. In such examination, although the trial judge concerned is empowered to put questions in order to seek clarifications as against such circumstances as appearing in evidence, such questions, like cross-examination, cannot be designed to fill up the gap in the prosecution case. Although the provision under Section 342 has allowed the Court to take into consideration the answers given by the accused in such examination, such

answers can only be used in order to clarify the circumstances appearing in evidence. In other words, in order to corroborate the circumstances appearing in evidence and such statement of the accused cannot be the basis of conviction as the same is not evidence in the eye of law. Therefore, in the instant case, the trial Court has committed gross illegality in relying on some of the answers given by the accused during such examination in reply to the specific questions put forward by the trial Judge to her, particularly when she replied that the child was not able to walk.

5.8 It may be noted that none of the prosecution witnesses has deposed before the trial Court that the child was not able to walk. Therefore, there was an apparent gap in conducting the case by the prosecution side in which they totally failed to extort specific information from

the prosecution witnesses either by way of examination-in-chief, or cross-examination of the hostile witnesses, to bring to light the fact that the child was not able to walk. Therefore, the exercise conducted by the trial judge by putting questions like a counsel not for seeking clarification of the accused as against the circumstances appeared against her through the prosecution evidences, but to extort specific answers from her in order to fill up the gap or failure of the prosecution, is not authorized by law.

5.9 Now, if it is found that without the information given by the accused in reply to the questions put by the trial Judge during such examination, the prosecution case will fail, only then we can hold that the conviction is vitiated because of such unauthorized exercise of the trial judge as

the same has prejudiced the accused to such extent that the conviction upon her cannot be sustained. Therefore, putting aside the said examination and the materials on record in respect of the said examination of the accused under Section 342 of the Code, let us examine whether the prosecution has been successful in proving the charge against her beyond reasonable doubt relying on other evidences/materials.

5.10 It appears from materials on record that there is no dispute that the victim was the child of the informant and the convict, and the age of the victim was one year. The age of the victim is apparent from the inquest report (Exhibit-4) itself and the defence did not challenge it. This age of the victim is also reflected in the post mortem report (Exhibit-3) as proved by the doctor (P.W.6), who conducted post mortem on the

victim's body. Therefore, there cannot be any dispute about the age of the victim at the relevant time, which was one year.

5.11 It appears from the deposition of P.W. 1, who was declared hostile, that he has clearly deviated from his earlier statement in the first information report. The reason for such deviation is understandable and is also reflected in his deposition before the Court. In reply to cross-examination, he deposed that his wife came back to him after 10/12 days of her release from jail. However, the deposition of P.W. 1 has clearly proved one very vital aspect of the case which is that the deceased child died and that the deceased child was with his wife and that his wife was at her father's house with the child. Along with this deposition of P.W. 1, we may examine the deposition of P.W. 7 i.e. the brother of the convict. He deposed before the Court that

he had filed the said UD case before the FIR was lodged. Although the said U.D. case was not exhibited before the trial Court, the final report of the same was exhibited as Exhibit-6 and P.W. 9, who was the investigating office of the said U.D. case, proved the same. His deposition, namely the deposition of P.W 9, has specific reference to the U.D. case concerned and the final report (Exhibit 6) as proved by him has also specific reference to the said U.D. case.

5.12 It further appears from the said final report (Exhibit-6) that the said U.D. case was in fact filed on the premise that the deceased child died by drowning in a pond. As against this, if we examine the post mortem report, as proved by P.W. 6 before the trial Court as Exhibit-3, it appears that although the case was initially started as a simple case of drowning, the doctor

conducting post mortem found following injuries on the dead body, namely

1. One haematoma on the occipital scalp size 1"X$\frac{1}{2}$" .

2. One abrasion on the front of abdomen size 1"X1".

3. One bruise on the front of upper part of neck size 1"X$\frac{3}{4}$ ".

On detailed dissection, extravasation of clotted blood found present at the site of the injuries. Intracranial haemorrhage was present. Trachea and larynx were highly congested. All the viscera were congested. Stomach was found empty.

5.13 It further appears from the said post mortem report (Exhibit-3) that the scalp of the deceased was found injured and that the

breathing vessels etc. were found highly congested. According to the doctor conducting post mortem, the death was due to asphyxia as a result of manual strangulation and which was ante-mortem and homicidal in nature. Therefore, it appears that the case took a u-turn after such post mortem conducted by the doctors concerned including P.W. 6. This post mortem report (Exhibit-3) further reveals that the stomach of the deceased child was found to be empty. Therefore, it is clear that the case in question was not as simple as it was started at the instance of the brother of the convict, namely P.W. 7, by filing the said U.D case. Rather, it was a case of killing of an infant child aged one year. Had it been the case of simple drowning, the stomach of the deceased could not have been found empty. In a case of

drowning of an infant child aged one year, the stomach must be found to be full of water. Apart from that, there are other conspicuous signs of injuries on the dead body, namely that bruise was found on the upper part of the neck. In addition to the extravasation of clotted blood found around such injuries, Trachea, Larynx and the breathing vessels were found highly congested. These are the signs of strangulation of a victim and exactly the same opinion has been given by the doctors conducting post mortem in that the death in their opinion was due to asphyxia as a result of manual strangulation which was antemortem and homicidal in nature. Therefore, we hold that this is a clear case of murder by strangulation of an infant child aged one year.

5.14 Now, as stated above, it has been proved beyond reasonable doubt by the prosecution side even from the statement of the hostile witnesses that the deceased victim was with her mother (convict) at the parental house of the said mother at the relevant time of occurrence. Therefore, this circumstance clearly leads us to a finding that the convict-mother was the custodian of the child at the relevant time and the child in question was in the safest custody of the mother. As suggested by the learned Assistant Attorney General, the custody of the mother of such an infant child is the best and safest custody in the world, but, unfortunately, the infant child

ended up with an unnatural death by strangulation. We fully agree with that.

5.15 It is clear from evidence that nobody has seen the convict-mother killing the child or strangulating the child. However, in a case of custodial killing like this, the prosecution will not have to prove as to the manner of killing or as to who killed such an infant child. Prosecution is only required to prove that the child was in the custody of the mother at the relevant time. The prosecution has been successful in proving that. Therefore, the burden of proof will now automatically shift to the mother, namely the convict, to explain as to how the infant child under her custody ended up with death. Initial explanation, as revealed from the U.D. case concerned, that she ended-up with death by drowning in a

pond has been knocked out by the post mortem report, which reveals that she was killed by manual strangulation. Therefore, the inference will be that the mother killed the child unless she can explain as to how the child was killed. In this case, the mother has remained totally silent except that she gave some replies to the uncalled-for questions put to her by the trial judge which we have discussed above and, accordingly, we are not taking into consideration those answers as pieces of evidence. Rather, we are considering this case as if no such answer was given by the convict as against the questions put to her by the trial judge except that she again claimed to be innocent. Even then, the burden lies on her to explain the circumstances of the killing of her infant child. Since she failed to explain any such

circumstance or since her case is not that the child was killed by somebody else, the inference would be that she had killed the child as the child was in her custody. This being so, we find support of such shifting of burden or negative burden, which we usually call it, in the case cited by the learned Assistant Attorney General, namely the case of **State vs. Khandker Zillul Bari, 57 DLR (AD)-129.** Although, the cited case was a wife killing case, we are of the view that similar principle will apply here since the prosecution has proved that the child was in the custody of the convict-mother. Accordingly, we hold that the conviction of the convict-mother under Section 302 of the Penal Code should not be interfered with by this Court in the criminal appeal and jail appeal filed by her. On the other hand, since for such non-

explanation by the convict as regards circumstances of killing of her infant child, she is bound to be held guilt for screening of the evidence and, accordingly, her conviction under Section 201 of the Penal Code should also sustain.

5.16 Now, the question of sentence. It appears from materials on record that the convict was first arrested on 02.10.2004 and she was granted bail on 10.07.2005. Thereafter, she remained present before the trial Court for long time, but, subsequently, her bail was cancelled by the trial Court vide order dated 29.01.2012. Finally, she surrendered on 01.02.2016 with an application for bail, but her bail application was rejected and she was committed to custody. There is another aspect of the case. The prosecution has totally failed to produce any witness after

framing of the charge for about 11 years. The charge was framed on 26.01.2005 and the first prosecution witness, namely P.W. 1, was examined on 18.02.2016, i.e. after a long gap of 11 years. In addition, the convict had to remain in jail for a long time and remained in condemned cell after death penalty for about 07 (seven) years. It further appears from order dated 01.02.2016 passed by the Court below that the convict, in the meantime, gave birth to two children. Considering this aspect of long incarceration in the condemned cell as well as the fact that she is a women and mother of two more children, we are of the view that death penalty imposed on her should be commuted to a sentence of life imprisonment. At the same time, for the reasons stated above, we are of the view that her sentence of seven years under Section

201 of the Penal Code should be served concurrently with her life sentence. We are also of the view that the convict should get benefit for her long custody in view of the provisions under Section 35A of the Code of Criminal Procedure, as held by our Appellate Division in **Ataur Mridha alias Ataur vs. The State, 15 SCOB [2021] AD-1**. Accordingly, the Death Reference should be rejected.

Orders of the Court:

In view of above, the orders of the Court are as follows:

(1) Death Reference No. 134 of 2016 is rejected.

(2) Criminal Appeal No. 11568 of 2016 is dismissed. Accordingly, the Jail Appeal No. 355 of 2016 is disposed of. However, the

death sentence of the convict is commuted to the sentence of life imprisonment.

(3) The life imprisonment of the convict shall be served by her concurrently along with her 7 (seven) years' imprisonment as imposed by the Court below under Section 201 of the Penal Code.

(4) The convict shall get benefit for her custody period in view of the provisions under Section 35A of the Code of Criminal Procedure.

(5) The authorities concerned are directed to withdraw the convict from the condemned cell immediately and shift her to the general prison.

Let an advance order be issued immediately containing the above result.

Send down the lower court records.

…….....
(Sheikh Hassan Arif, J)

I agree.

…….....
(K M Zahid Sarwar, J)