

**Present:**

**Mr. Justice Md. Shahinur Islam**

**And**

**Mr. Justice Sardar Md. Rashed Jahangir**

**Criminal Appeal No. 7323 of 2022**

**with**

**Jail Appeal No. 154 of 2021**

Md. Zoni

.....Appellant-petitioners.

-Versus-

The State.

.....Respondent.

Mr. Md. Nasimul Hasan, Advocate

.....For the appellant.

Mr. M.D. Rezaul Karim, D.A.G with

Mr. Md. Mizanur Rahman, A.A.G

..... For the Respondent.

**Heard on: 19.03.2024.**

**Judgment on : 21.04.2024.**

**Md. Shahinur Islam, J:**

1. The instant jail appeal being number **154 of 2021 and Criminal Appeal being number 7323 of 2022** have arisen out of the judgment and order dated 22.11.2020 passed by the Additional

Sessions Judge, 4<sup>th</sup> Court Dhaka convicting and sentencing the convict-appellant under section 302, Penal Code and sentencing him there under to suffer rigorous imprisonment for life and also to pay a fine of Taka 20,000/-, in default to suffer imprisonment of further six (6) months.

2. At the midst of the hearing it has been found that the jail-appellant preferred a regular appeal too being Criminal Appeal No. 7323 of 2022.

3. In view of above, jail appeal and the criminal appeal have been heard together in order to dispose of the same by single judgment. Hearing eventually concluded on 19.03.2024 and then the matter was kept in CAV i.e. for delivery and pronouncement of judgment. Afterward, today i.e. 21.04.2024 has been fixed for delivery of judgment.

#### **Factual Matrix**

4. Prosecution case, in brief, as unfurled in trial is that the accused-appellant Md. Joni used to like Eva, the daughter of the informant Md. Abdullah's brother (victim Alimullah). The accused intended to get married with Eva. Knowing it victim Alimullah (guardian of Eva) , the elder brother of the informant

had talk over it with parents of accused Md. Joni and conveyed the decision that he was not agreed to get his daughter Eva married with the accused. Due to such negation rivalry cropped up between the accused Md. Joni and Alimullah. In consequence of such rivalry created, on 25.03.2017 at about 12:05 P.M. accused Md. Joni inflicted 'Batal' blow on right side of back of the victim finding him alone at the place in front of Kaji Badal's house at 49/A Baddanagar water tank, Moneswar lane. On hearing screaming, brother of victim Alimullah and locals came forward when the accused managed to escape. Injured victim was then taken to hospital and victim's brother lodged the First Information Report with Hajaribag police station on 11.04.2017 stating the event happened to set the law on motion. The victim who was taken to hospital eventually died on 12.04.2017 due to injury he sustained.

### **Investigation and submitting Police report**

5. Md. Jewel Rana, Sub-Inspector (P.W.08) working at Hajaribag police station at the relevant time was assigned with the task of investigation. During investigation he visited the place of occurrence, prepared sketch-map thereof with index, examined the witnesses and recorded their statement under section 161 Cr.P.C.

6. In course of investigation accused-appellant Md. Joni, being repented for the culpable act he committed surrendered and then he was sent to prison showing him arrested in connection with this case on 30.04.2017. The accused made confessional statement under section 164 Cr.P.C before the Magistrate, First Class. On conclusion of investigation the IO submitted police report under section 173 Cr.P.C recommending prosecution of the accused Md. Joni for the offence punishable under section 302 of the Penal Code.

7. On receipt of the case record the case was numbered as Metro Sessions Case no. 15141/2018 and cognizance of offence under section 302 of the Penal Code was taken and the case was sent to Additional Metropolitan Session Court, 4<sup>th</sup> court, Dhaka for trial and disposal.

### **Commencement of Trial**

8. The trial court framed charge against the accused under section 302 , Penal Code and the same was read over and explained to him when he pleaded not guilty and claimed to be tried according to law.

9. In course of trial, prosecution in order to prove the charge adduced and examined in all 11 witnesses and this phase of trial concluded on 20.02.2020. On closure of examination of prosecution witnesses the accused was examined on 25.02.2020 under section 342 of the Code of Criminal Procedure when he repeated innocence and declined to adduce evidence.

10. Defence case as can be extracted from the trend of cross-examination of prosecution witnesses and what the accused stated during examination under section 342 Cr.P.C is that he was not involved with the event leading to killing the victim Alimullah and on the day he had not been at the place of occurrence at the relevant time when the alleged event happened and that the victim Alimullah died due to accident.

### **Evidence of Prosecution Witnesses**

11. At the outset it is indubitably imperative to focus on what the witnesses testified in court for ascertaining the event arraigned and complicity and participation of the accused-appellant therewith. Thus, first let us eye on core essence of what the witnesses narrated in court.

**12. P.W.01 Abdullah**, the brother of victim Alimullah is the informant. He stated some pre-event facts and facts chained to the event arraigned. He stated that accused Md. Joni desired to get his brother's daughter Eva married. His brother Alimullah placed marriage proposal to the mother of the accused when Joni's mother disagreed it and then his brother refused Joni's desire.

13. P.W.01 in respect of the event arraigned stated that his brother (Alimullah) was on move outside, on the day the event happened and finding him alone near the shoe factory in front of their home accused Joni inflicted 'Rafi' blow on right part of the back of his brother Alimullah. On being informed of it, he rushed to the crime site and he along with his brother's son Sumon took away the victim to Dhaka Medical College to have medical treatment. The event happened on 25.03.2017 and his brother died on 12.04.2017 when he was under treatment in Dhaka Medical College Hospital. He lodged first information report after his injured brother got admitted in Medical College Hospital.

14. On cross-examination P.W.01 stated that he had been at home when the event happened. He heard the event from people when he rushed to the crime scene on hearing screaming and he found

his brother lying there in injured condition. He lodged the FIR on 11.04.2017.

**15. P.W.02 Sumon** is the son of the deceased victim Alimullah. In respect of the alleged act related to the event arraigned P.W.02 is a hearsay witness. However, he stated some pertinent facts chained to the event happened. He stated that on 25.03.2017 at about 12:00 noon his father had been in front of Hajaribag water tank when accused Joni inflicted 'Batal' (shoe making/repairing device) blow on right part of his father's back causing deep injury . On getting information he (P.W.02) rushed to the place of occurrence and took his father to Dhaka Medical College Hospital where he received treatment.

16. P.W.02 also stated that Joni proposed to get Eva married, but Alimullah refused the proposal and with this Joni being aggrieved killed his father. Accused Joni surrendered coming to police station and confessed his guilt. His father (victim) died on 12.04.2017 when he was undergoing medical treatment.

17. On cross-examination P.W.02 stated that he came to the crime scene from his shop at Kamrangir Char when his father was taken to Medical and then he too moved to Medical. His uncle (victim) died 16/17 days after the event happened.

**18. P.W.03 Md. Arif Islam** is the grand-son of deceased victim Alimullah. He stated that on 25.03.2017 at about 12:00/12:15 noon he was on move toward his work place when he saw the people encircling his grand-father and he found him lying there in injured condition due to injury he sustained on right part of his back. Their (P.W.04) home was about 10-15 feet far from the crime scene. He saw accused Joni inflicting blow on his grand-father's back and then he rushed to the spot but already accused Joni escaped there from. He then took his grand-father to Dhaka Medical. His grand-father died on 12.04.2017 in Dhaka Medical College Hospital. Police conducted inquest and he put his signature to inquest report.

19. On cross-examination P.W.03 stated in reply to defence question put to him that the accused Joni was alone when he inflicted blow to his grand-father Alimullah. However, defence does not seem to have been able to controvert what the P.W.04 stated in relation to the event arraigned.

**20. P.W.04 Asadullah Saron** is a hearsay witness. He stated that on 25.03.2017 at about 11:00 A.M. he was on move toward his business place when he heard that accused Joni inflicted 'Batal' blow on the back of Alimullah and he then moved to the place of



occurrence and saw him (victim) being taken to Dhaka Medical College Hospital. He (P.W.04) also heard that the victim died there on 12.04.2017. On getting information he rushed to hospital. P.W.04 proved his signature that he put in the inquest report. The dead body of Alimullah was buried at Azimpur graveyard, P.W.04 stated.

21. On cross-examination P.W.04 stated that injured Alimullah was taken to hospital by rickshaw by his younger brother Abdullah and grand-son.

22. **P.W.05 Billal Hossain** stated some crucial facts related to the event arraigned. He stated that on 25.03.2017 at about 12:00 noon when he was returning back from his work place he saw accused Joni running away having a blood stained 'Rafi'(Batal: a device used in shoe factory) in hand. He then saw neighbor Alimullah lying in injured condition and then his relatives took him away to Medical (Medical College Hospital) by rickshaw.

23. Defence does not seem to have made any effort to controvert what the P.W.05 stated in examination-in-chief in relation to facts related to the event happened. It remained unimpeached that at the relevant time the injured victim was lying at the crime scene

when the accused was fleeing away there from having a blood stained 'Rafi' in hand.

24. P.W.05 also stated that on 12.04.2017 he got information about death of victim and then he moved to hospital. He saw injury on the back of the victim. P.W.05 proved his signature he put in the inquest report.

25. On cross-examination P.W.05 stated in reply to defence question that he saw the accused Joni running away taking a blood stained 'Rafi' (Batal) in hand. He (P.W.05) did not see the event and he just heard it to happen.

26. Post mortem holding doctor **P.W.06 A.K.M Shafiuzzaman** stated that he conducted post mortem of the victim who died on 12.04.2017. He stated in the post mortem report that– **“In my opinion the death was due to shock as a result of spinal cord injury which was ante mortem and homicidal in nature caused by hard and blunt weapon for hard and blunt application.”**

P.W.06 proved the Post Mortem report as **Exhibit-3**.

27. On cross-examination P.W.06 stated that the victim had been in hospital since 25.3.2017 to 12.04.2017 and that he knew that the victim died due to lack of appropriate medical treatment.

28. It depicts from the version of P.W.06 made in cross-examination that the victim could have been survived if appropriate medical treatment was provided to him when he had been in hospital.

29. **P.W.07 Mahim Ali** is a mere formal witness. He simply stated on 12.04.2017 he took the dead body of the deceased for holding post mortem and handed over alamats of deceased to Police station.

**30. P.W. 08 Md. Jewel, police Inspector (now)** is the Investigation Officer. He stated that on 11.04.2017 he had been working in Hajaribag police station. Being assigned with the task, of investigation he visited the place of occurrence when he came to know that accused Md. Joni inflicted 'Rafi' blow on right part of back of victim Alimullah, the elder brother of informant, out of rivalry and then the victim was taken to Dhaka Medical College Hospital where the victim died on 12.04.2017.

31. P.W.08 also stated that he prepared inquest report of the deceased. He arrested the accused Md. Joni on 30.04.2017 and produced him before the Metropolitan Magistrate for recording his confessional statement under section 164 of the Cr.P.C. After recording his confessional statement he was sent to prison on

30.04.2017. On conclusion of investigation he submitted charge sheet.

32. On cross-examination P.W.08 stated that he obtained statement of witnesses under section 161 Cr.P.C before the victim died and also after he died. He recorded statement of informant Abdullah on 12.04.2017.

**33. P.W.09 Delwar Hossain** is the confessional statement recording Magistrate. He stated that by providing three hours time to the accused Md. Joni he recorded his confessional statement (**Exhibit-7**). In cross-examination P.W.09 denied defence suggestion that he did not tell the accused Joni that the confessional statement would go against him.

**34. P.W.10 Sohag is the son of victim Alimullah.** In addition to the event arraigned he stated one pre-event fact. He stated that his father Alimullah died on 12.04.2017 when he was under medical treatment. Accused Joni used to like his younger sister and proposed to get her married. But his father did not respond to such proposal as Joni was not a good person. With this Joni became heated. Joni used to work in a shoe factory in front of water tank opposite to their home. On 25.03.2017 accused Joni attacked his father and inflicted Rafi blow to him. Then his father was taken to

Dhaka medical College. He (P.W.09) signed the inquest report prepared by police.

35. On cross-examination P.W. 10 stated that at the time of the event happened he had been staying at home. He heard the event from people. He and his elder brother Sumon brought his father to hospital by rickshaw. His father (victim) died on 12.04.2017 when he had been staying in hospital to undergo medical treatment.P.W.10 also stated that accused Joni surrendered after lodgment of the case. His (P.W.10) father too disclosed the name of Joni (as the perpetrator).

**36. P.W. 11 Ramjan Joni is the grand-son of the victim.** He stated that on 25.03.2017 he had been at home and on hearing outcry he came out to the place of occurrence. Accused Joni inflicted Rafi blow on the back of his grand-father Alimullah out of previous rivalry. On arriving at the place of occurrence he saw injured Alimullah lying on road. On being asked Alimullah disclosed the name of accused Joni as the perpetrator. Then they brought Alimullah to Medical College Hospital by rickshaw. Alimullah died on 12.04.2017 in Medical College Hospital. He put his signature on the inquest report prepared by police

37. On cross-examination P.W.11 stated that their home was about 30-35 yards far from the place of occurrence. On hearing outcry he rushed to the crime site. They brought the victim to hospital by rickshaw.

### **Decision of the trial Court**

38. The convict-appellant has been found guilty of offence of 'murder' and has been sentenced to suffer imprisonment for life under section 302 of the Penal Code, by the trial court being aggrieved by which the convict-appellant has come up with the appeal, in addition to Jail Appeal.

### **Finding with Reasoning on Evaluation of Evidence**

39. **Mr. Md. Nasimul Hasan**, the learned Advocate for the convict-appellant submits that the appellant was innocent; that prosecution could not prove his complicity with the alleged culpable act and that the prosecution case suffers from reasonable doubt as the alleged confessional statement of the accused was not voluntary and true and thus it cannot be acted upon in finding him guilty of the alleged offence. It is the further contention of the learned Advocate appearing for the convict-appellant that the ingredients of section 300 of the Penal Code are not attracted in

the present case against the convict-appellant. Rather, it is under Exception 4 of section 300 of the Penal Code, if the alleged culpable act of accused is found to have been proved.

40. It has been contended too by the learned Advocate for the appellant that if it is accepted to be true that the accused committed the alleged culpable act constituting the offence of ‘culpable homicide’ it was not a pre-mediated attack on the deceased. Incident took place suddenly and not with intention to cause death. Thus, the accused could not be held guilty of offence punishable under section 302 of the Penal Code. At best he can be found guilty for the offence of ‘culpable homicide not amounting to murder’. The injury inflicted did not cause instant death of the victim. The victim was alive for 18 days at the hospital even after sustaining the injury. It thus shows that the injury inflicted by single ‘Batal’ blow was not likely to cause death of victim in ordinary course, although it ultimately resulted in death, 18 days after the event happened.

41. **Mr. M.D. Rezaul Karim**, learned Deputy Attorney General, with **Mr. Md. Mizanur Rahman**, learned Assistant Attorney General in course of hearing contended that the accused-appellant

made the confessional statement voluntarily and its contents were true as well. The accused-appellant by making such voluntary confessional statement admitted his guilt and stated that he himself on the date, time and at the place inflicted 'Rafi' blow on the back of the victim and then he fled away. The relatives of victim are the key witnesses who testified the facts chained to the event arraigned and two witnesses saw the accused fleeing from the crime scene taking blood stained 'Rafi' in hand. It could not be tainted that the victim eventually died due to injury he sustained. The accused knew that the injury he caused to victim was likely to cause his death.

42. It has been submitted too by the learned DAG that confessional statement of the accused together with testimony of crucial facts deserves to be acted upon in arriving at decision in finding the accused-appellant guilty of the offence of murder committed. The Court below did not commit any error in convicting the appellant for the offence of 'murder'. The trial court lawfully and based on evidence presented convicted and sentenced the accused-appellant for committing the offence of murder punishable under section 302 of the Penal Code.



43. Having heard the learned counsel appearing for the convict-appellant and the learned DAG and having gone through the materials on record, the only question that falls for our consideration is whether the conviction of the appellant herein for the offence punishable under Section 302 of the Penal Code is sustainable or whether it should be further altered to Section 304 Part II of the Penal Code.

44. On having due appraisal of evidence presented, post mortem report and confessional statement made by the accused-appellant we require to arrive at decision that the victim Alimullah sustained spinal cord injury resulting from 'Batal' blow inflicted to his back and the accused Md. Joni committed such culpable act either intending to cause victim's death or intending not to cause victim's death.

45. On cumulative evaluation of facts and circumstances unveiled in testimony of witnesses it remained uncontroverted that on 25.03.2017 at the relevant time victim Alimullah was attacked at the place of occurrence, nearer to the shoe factory where the accused Joni used to work. It depicts that the relatives, on hearing outcry instantly after the event happened rushed to the crime site, in front of the water tank and found the injured victim lying there

having infliction of 'Rafi' blow on his back and then instantly he was taken to Dhaka Medical College Hospital. The victim died there 18 days after the event happened.

46. Testimony of the relatives of victim demonstrates that the victim disclosed how and by whom he sustained injury. Such disclosure by the victim was natural and can be acted upon safely together with other circumstances. The relatives of the victim in testifying in court stated that the victim disclosed the name of accused Joni as the perpetrator. Defence could not impeach it in any manner, by cross-examining them.

47. It depicts patently from uncontroverted testimony of **P.W.10 Sohag**, the son of victim Alimullah that accused Joni surrendered after lodgment of the case. His (P.W.10) father (victim) too disclosed the name of Joni (as the perpetrator).

48. It appears that the accused Joni, on his surrender was shown arrested and then was brought before the Magistrate for recording his confessional statement. **P.W.09 Delwar Hossain** is the confessional statement recording Magistrate. He stated that by providing three hours time to the accused Joni he recorded his confessional statement (**Exhibit-7**). Defence does not claim that it was obtained under coercion, torture or threat.

49. Now, we require seeing whether the confessional statement made by the accused was voluntary and true and whether it was inculpatory. What the accused confessed and stated in confessional statement? It appears that the accused Joni stated in his confessional statement that –

“ আলীমুল্লাহর শালীর মেয়ের সাথে আমার সম্পর্ক হয়। আমি বিয়ের প্রস্তাব দেই। আলীমুল্লাহ এতে বাধা দেন। ইভা পরে অন্য এক লোকের সাথে ভেগে যায়। ইভাকে ভাগিয়ে নিয়ে যায় শামীম। .....এদিকে কারখানার লোকজন বলে তোর সাথে বিয়ে দিবেনা, তাই মেয়েকে তারা অন্য জায়গায় লুকিয়ে রেখেছে।.....হঠাৎ একদিন ইভাকে শামীমের সাথে আসতে দেখে আমার মাথা খারাপ হয়ে যায়। এরপর কারখানায় যাই। কারখানায় গিয়ে একটা রাফি বা বাটাল নিয়ে আলীমুল্লাহ এর পিঠে জোরে আঘাত করি। এরপর আমি পালিয়ে যাই।

50. It appears from the testimony of **P.W.09 Delwar Hossain**, the confessional statement recording Magistrate that sufficient time was provided to the accused to settle on whether he intended to make confessional statement. Thus and since such confessional statement was made after the accused surrendered it may be indubitably concluded that such confessional statement was voluntary in nature.

51. It appears too that the Magistrate being satisfied upon questioning the accused and by providing him sufficient time to decide and then recorded his confessional statement under section 164 of the Code. The accused did not raise any objection that he was tortured by the police or anybody else. Thus, the confessional statement of the accused-appellant was recorded by observing all legal formalities as envisaged under sections 164 and 364 of the Code, we deduce.

52. By making such confessional statement the accused Joni inculpated him with the attack arraigned. He admitted that he used to like Eva whom he desired to get married. But his desire was negated and on the day of the event, on seeing Eva moving together with one Shamim he could not control him and then finding Alimullah in from of the shoe factory he inflicted 'Batal' blow on the back of the victim.

53. Sworn testimonies of prosecution witnesses, the relatives of the victim and post-mortem report seem to be consistent with the contents of the confessional statement of the accused made under section 164 Cr.P.C which makes the confessional statement true.

54. In view of evidence as evaluated above together with confessional statement of the accused we arrive at decision that

the prosecution has been able to prove beyond reasonable doubt that the accused Joni, on the date and at the relevant time seeing the victim Alimullah walking through the road, in front of the shoe factory inflicted 'Batal' blow on his back and managed to flee. It also stands proved that due to injury the victim sustained caused his death, 18 days after the event happened.

55. Regarding cause of death, the doctor opined that, **“In my opinion, death was due to head injury caused by the above mentioned injuries which were ante-mortem and homicidal in nature.** So, it stands proved that the victim sustained spinal cord injury due to 'Batal' blow inflicted on his back which eventually resulted in his death, 18 days after the event happened.

56. The accused Joni is justifiably found to have committed an unlawful culpable act constituting the offence of 'culpable homicide'. However, now it is indispensable to resolve, considering the facts and circumstances divulged, as to whether the 'culpable homicide' as found to have been proved amounted to 'murder' or 'not amounted to murder'.

57. It is now settled that all murders are culpable homicides but all culpable homicides are not murder. Culpable homicide is a genus

and murders its specie. That is to say all murders are culpable homicide, but all culpable homicides are not murder. Keeping it in mind now the question comes to fore as to whether the act of accused-appellant constituted the offence of culpable homicide amounting to murder or not amounting to murder. In the case in hand, based on facts and circumstances unveiled in trial it is to be therefore deduced whether the culpable homicide committed amounted to murder or not amounted to murder.

58. What facts have been divulged in the case in hand? Admittedly, the convict-appellant used to love Eva the daughter of victim Alimullah's sister-in-law and desired to get her married. But Alimullah declined the desire the accused expressed. It made the accused dejected. In such circumstance on the day of the event happened the accused saw Eva moving along with a person Shamim whom she got married. Few times later the accused finding Alimullah at the place of occurrence inflicted single 'Batal' blow on his back, being heavily depressed and then he managed to escape.

59. The case pertinently rests on circumstantial evidence and confessional statement of the accused. Due and close marshalling

all these together is required to arrive at the conclusion that the accused Joni is responsible for the death of the deceased victim Alimullah.

60. Confessional statement of the accused together with the narrative made by the witnesses demonstrates patently that on seeing Eva moving along with one Shamim the accused lost his self-control and then finding Alimullah moving alone through the place of occurrence he inflicted 'Batal' blow on his back and then he managed to flee. It thus stands proved that the accused-appellant Joni was the perpetrator who on the day and at the relevant time committed such unlawful act by inflicting 'Batal' blow on the back of the victim finding him moving through the front of the shoe factory.

61. Why the accused committed such unlawful attack directing the victim? The evidence on record leads to an unerring conclusion that being imbued by grave depression the accused presumably could not control himself when he saw Eva (whom he desired to get married) moving along with other person and then suddenly and out of passion he lost his self control and then taking the 'Batal' inflicted blow on the back of Alimullah, whom the accused found moving through the place of occurrence at the relevant time. Such unlawful culpable act of the accused does not seem to be

premeditated and was not intended to cause death of the victim Alimullah.

62. What happened next? The injured victim Alimullah was then taken to hospital where he was undergoing medical treatment for 18 days and eventually he succumbed to injury he sustained. It appears that the accused few days later made him surrendered. Presumably, being heavily saddened and repented the accused did it. Afterward, he made confessional statement under section 164 Cr.P.C and thereby he admitted that he himself inflicted the 'Batal' blow on the back of Alimullah and he also expressed his depression that he had to face due to negation of his desire to marry Eva.

63. Ocular narrative in respect of facts chained to the event happened made by the P.W.05 and other witnesses, the relatives of the victim gets corroboration even from the confessional statement of the accused Joni. Thus, the confessional statement made by the accused was self inculpatory in nature and as observed already it is voluntary and true. We can thus safely act even solely upon the confessional statement in arriving at decision.

64. The facts emerged do not lead to conclude that the accused with intent to cause death of the victim inflicted 'Batal' blow to



him. The culpable act of the accused was not cool-headed and premeditated. In the circumstances of the case in hand the accused may be deemed to have acted with the knowledge that his unlawful culpable act may cause such bodily injury which was likely to cause death and thus there seems to be no reason why, in the circumstances unveiled, the appellant cannot be held liable under Section 304, part II, Penal Code. In this regard we recall the decision rendered in the case of **Alauddin (Md) and others vs. State reported in 7 BLC 54** which is as below:

“Considering the background and attending circumstances of the case, it appears that it was not a cool headed and premeditated murder, rather the fact of the case as disclosed that the incident that took place out of sheer passion and that has been taken into such circumstances to commit the alleged , offence or murder when intention to kill is lacking and is not culpable homicide amounting to murder and hence the alleged offence of murder does not fall within the provision of section 302 of the Penal Code, rather the alleged offence comes under the provision of section 304 Part II of the Penal Code.”

65. It is to be noted that to find an accused guilty of offence of murder punishable under section 302 Penal Code it must be

proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. But in the case in hand, we do not find the injury sustained by the victim was sufficient to cause his death. Injured victim however died in hospital 18 days after he sustained injury. The post Mortem doctor admits in cross-examination that no appropriate treatment was provided to injured victim when he had been in hospital.

66. It appears from the evidence on record that prosecution failed to prove any motive, pre-meditation, pre-plan or any conspiracy on the part of accused appellant to kill victim Alimullah. In the absence of any motive, conspiracy, pre-plan or pre-meditation on part of accused-appellant Joni while inflicting injury resulting the death of the victim 18 days after the occurrence, we find that the accused-appellant Joni had no 'intention to commit murder' but he committed the offence of 'culpable homicide not amounting to murder'.

67. It depicts patently from the culpable act perpetrated by the accused that if really he intended to kill or cause death of victim, repeated blows could be inflicted on the person of the victim. But

it was not done. Just by inflicting a sole 'Batal' blow on the back of victim the accused managed to escape from the site.

68. In the case in hand, it depicts that the injury caused by the accused-appellant was not the immediate cause of victim's death. Rather, the post mortem report speaks that the victim died due to spinal cord injury resulting from the injury inflicted by 'Batal' blow on his back. In the backdrop of attending facts and circumstances unveiled, it can be justifiably concluded that if the appellant really had any 'intention to cause death' of the victim, he could have inflicted repeated 'Batal' blows on vital part of the body of the victim. But the accused did not do it. Such sudden culpable conduct of the accused leads to the conclusion that he had no intention to cause victim's death by inflicting such single 'Batal' blow.

69. An act by an individual can be done intentionally, knowingly, recklessly, or negligently, which helps to ascertain the culpability of such an act. In the case in hand, no doubt offence has been committed by the accused- appellant Joni, but it is for the court of law to decide, on intrinsic appraisal of evidence adduced and circumstances divulged whether the allegation comes under

section 302 of the Penal Code or section 304 Part II of the Penal Code.

70. It is to be noted that to find an accused guilty of offence of murder punishable under section 302 Penal Code it must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. But in the case in hand, we do not find the injury sustained by the victim was sufficient to cause his instant death. Injured victim died in hospital 18 days after he sustained such injury. The post Mortem doctor admits in cross-examination that no appropriate treatment was provided to injured victim when he had been in hospital to undergo treatment.

71. In the case of **the State Vs Tayeb Ali and others [40DLR (AD) 6]** the difference between ‘murder’ and ‘culpable homicide’ has been articulated by the Appellate Division of Supreme Court of Bangladesh as below:

“.....All murders are culpable homicide but all culpable homicides are not murder. Excepting the General Exceptions attached to the definition of murder an act committed either with certain guilty intention or with certain guilty knowledge constitutes culpable homicide amounting to murder. If the

criminal act is done with the intention of causing death then it is murder clear and simple. In all other cases of culpable homicide, it is the degree of probability of death from certain injuries which determines whether the injuries constitute murder or culpable homicide not amounting to murder. If death is likely to result from the injuries it is culpable homicide not amounting to murder; and if death is the most likely result, then it is murder.....”

72. In the case in hand, we are constrained to infer indisputably based on facts and circumstances emerged in evidence together with the legal proposition enunciated in the case cited above that refusal to accused's desire to marry Eva prompted the accused to commit such culpable act which did not transgress the limit of rudeness and it happened out of sudden passion and depression.

73. Besides, victim was not struck on any vital part of his body, although he succumbed to injury he sustained on his back. It may be deduced that key purpose of such attack upon the victim was to protest the refusal to recognize accused's passion and desire of getting Eva married. It was thus a case of 'culpable homicide not amounting to murder'.

74. In our opinion, having regard to the totality of circumstances, viz., the single injury the victim sustained, that the victim died 18 days later, that the weapon (Batal) was not carried by the accused-appellant in advance, that there was no premeditation, that the accused could not control himself on seeing Eva whom he wanted to get married moving with one Shamim, one prudent person can only say that the accused-appellant must be attributed the knowledge that he was likely to cause an injury which was likely to cause death, but not with intention to cause death of the victim.

75. Therefore, it is profusely clear that the event arraigned happened not pursuant to any pre-arranged plan. The appellant thus at least could be imputed with knowledge that he was likely to cause an injury which was likely to cause death and not with the intention to causing death of the victim. Taking the facts and circumstances unveiled into consideration it becomes thus difficult to affirm the conviction of the accused-appellant under section 302 of the Penal Code.

76. On appraisal of the entire evidence including the post mortem report, we are of the unerring view that the conviction of the appellant cannot be sustained under section 302 of the Penal Code,

but the appropriate section under which the appellant ought to be convicted is section 304 Part II of the Penal Code.

77. Under the above circumstances, in our opinion, the accused-appellant is thus found guilty of an offence punishable under Section 304, Part II of the Penal Code and not under section 302 of the Penal Code. Therefore, we are of unanimous view that it would be just to alter the conviction of the appellant from section 302 of the Penal Code to section 304 Part II of the Penal Code.

78. Thus, the Criminal Appeal and Jail Appeal which have been heard together are **allowed in part with the modification of the sentence of the convict-appellant.** We, therefore, alter the conviction of the convict-appellant Joni from Section 302 to Section 304 Part-II of the Penal Code and reduce the sentence to **rigorous imprisonment for 10 (ten) years.**

79. The appellant will get the benefit of section 35A of the Code of Criminal Procedure, 1898 in calculating the sentence awarded as above.

80. Let copy of this judgment be transmitted to the concerned Trial court and also to the prison authority for information and due compliance.

Send down the trial court record at once together with a copy of this judgment.

.....  
**(Md. Shahinur Islam, J)**

I agree.

.....  
**(Sardar Md. Rashed Jahangir, J)**

**Wahid (B.O)**