

IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(CRIMINAL APPELLATE JURISDICTION)

*Present:*

*Mr. Justice S M Kuddus Zaman*

*And*

*Mr. Justice Fahmida Quader*

**Death Reference No.40 OF 2017**

The State

... Petitioner

-Versus-

Etua Mura

... Respondent/condemn prisoner

**With**

**Criminal Appeal No.4494 OF 2017 and**  
**Jail Appeal No.139 OF 2017**

Etua Mura

... Convict-Accused-Appellant

-Versus-

The State

... Respondent

Mr. Md. Hafizur Rahman, State Defense  
Lawyer

... For the Convict - Accused -

Appellant in Criminal Appeal No.4494 of  
2017.

Mr. S.M. Fazlul Haque, Deputy Attorney General

... For the State.

**Heard and Judgment on 23.11.2022**

**S M Kuddus Zaman,J:**

This Death Reference under section 374 of the Code of  
Criminal Procedure, 1889 (hereinafter referred to as the Code)

has been submitted by the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal, Moulvibazar for confirmation of sentence of death imposed upon the condemned prisoner namely Etua Mura, in Nari-O-Shishu Nirjatan Daman Case No.82 of 2003 arising out of Komolgonj Police Station Case No.20 dated 28.10.1999 corresponding to G.R. Case No.645 of 1999 (Komol) under Section 6(4) of Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995.

As against aforesaid judgment and order of conviction and sentence the condemned accused-appellant preferred Criminal Appeal No.4494 of 2017 and Jail Appeal No.139 of 2017.

Above Death Reference, Criminal Appeal and Jail Appeal have emerged out of the self-same judgment and order of conviction and sentence and the question of law and facts involved in those reference and appeals are common and same and hence, above Death Reference, Criminal Appeal and Jail Appeal are being disposed of by this single consolidated judgment.

Facts in short are that victim Jahera Khatun a poor woman of 45 years of age used to earn livelihood by collecting fire woods from Kalachara Reserve Forest and selling the same in the local market. On 27.10.1999 at 9.00 P.M. Kasim Ali and Amina Khatun, children of above victim came to the shop of the informant and stated that their mother went to Kalachara Reserve Forest at 8.00 A.M. for collecting fire woods but she did not return home. All endeavors for search and find out victim Jahera Khatun ended in the failure Muktar Ali and Syed Miah disclosed to the informant that the dead body of above victim was lying in the Kalachara Forest Tila. The informant rushed to the above place and identified the dead body of his sister with marks of injury on the face, head and other areas of her body. The neck of the victim was tied with her wearing apparel. He heard from the local people that on 27.10.1999 at 11.00 A.M. one woman raised alarms and sought

help to save her life. In the noon forest Headman convict appellant Etua Mura was found loitering in above area. He suspects that the guards of above forest were involved in the commission of rape and murder of her sister.

Stating above facts Md. Rowshan Ali brother of victim Jahera Khatun lodged an ejahar with Komolgonj Police Station on 28.10.1999 at 14.15 hours. Dulal Chandra Das, Officer-in-Charge of Komolgonj Police Station filled up formal columns of FIR and instituted this case.

The investigation of the case was assigned to PW12 Mr. Soliamen Ahmed, Officer-in-Charge of above Police Station, who in course of investigation visited the place of occurrence prepared a sketch map of same alongwith an index thereof, prepared an inquest report of the dead body of victim Jahera Khatun and forwarded above dead body for post-mortem examination and seized alamats of the above offence by dint of a seizure list and recorded statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898..

In the above investigation offence punishable under Section 6(4) of the Nari-O-Shishu Nirjatan Daman (Bishesh Bidan) Ain, 1995 having prima facie proved against five accused persons namely convict-appellant Etua Mura and acquitted accused persons Badal Mura, Putam Mura, Ershad Ali and Pachu Mura he submitted charge sheet No.45 dated 29.06.2000 against them.

The learned Judge of the Nari-O-shishu Nirjatan Daman Tribunal, Moulvibazar framed charge against above five accused persons under Section 6(4) of the Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 and read over the same to above mentioned five accused persons who claimed to be not guilty and demanded trial.

At trial prosecution examined 12 witnesses who were cross examined by the defense and tendered two witnesses whose cross examinations were declined. Documents and materials produced and proved by the prosecution were

marked as Exhibit No.1 series, Exhibit No.2 series, Exhibit 3 series, 4 series, 5 series, 6 series and material Exhibit Nos. I-V respectively.

On conclusion of prosecution evidence above accused persons were examined under Section 342 of the Code of Criminal Procedure to which above accused persons reiterated their claim of not guilty and declined to adduce any evidence in support of the defense case.

The defense version of the case as it transpires from the trend of cross examination of Prosecution Witnesses is that the accused persons are innocent and they have been falsely implicated in this case.

On consideration of the facts and circumstances of the case and evidence on record the learned Judge of the Nari-O-Shishu Daman Tribunal, Moulvibazar convicted accused Etua Mura under Section 6(4) of the Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 and sentenced him thereunder to death and acquitted other four co-accused persons namely Pachu Mura, Badal Mura, Kutum Mura and Ershad Ali as mentioned above.

Mr. S.M. Fazlul Haque, learned Deputy Attorney General took us through the First Information Report, Post-Mortem, seizure list, charge sheet, evidence of the prosecution witnesses and the impugned judgment and order of conviction and sentence passed by the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal, Moulvibazar and submitted that since the convict appellant and acquitted accused persons were on security duty in the Kalachara Reserve Forest on the date and time of the occurrence and they could not provide any explanation as to how a third party could enter into the Reserve Forest and committed the above offence of rape and murder the learned Judge of the Trial Court has rightly held that all the five accused persons collectively committed rape on victim Jahera Khatun and to destroy the evidence of above offence murdered her.

But since PW1 Md. Rowshan Ali, PW2 Abdul Gani, PW3 Abul Hossain, PW5 Abdul Matin, PW6 Sukur Ali and PW7 Siddiq Miah have consistently disclosed the name of the condemned appellant Etua Mura alone the learned Judge of the Trial Court has rightly and legally convicted and sentenced the appellant as mentioned above which calls for no interference.

Mr. Md. Hafizur Rahman Khan, learned State appointed Defense Lawyer for convict appellant Etua Mura submits that in this case there is no eye witness who saw the commission of rape and murder of victim Jahera Khatun. The appellant did not make any confessional statement under Section 164 of the Code of Criminal Procedure. Nor any statement of any other competent person was recorded under above provision of the Code. No prosecution witness has stated that convict appellant was involved in the commission of rape and murder of victim Jahera Khatun. PW1, PW2, PW3, PW4, PW5 and PW6 have merely expressed their dobut and speculation as to who committed the murder of rape of the victim. Their statement cannot be treated as legal evidence against the convict appellant.

The learned Judge held that all five accused persons collectively raped and murdered the victim but acquitted four co-accused persons and convicted and sentenced only the convict appellant without assigning any reason whatsoever. The impugned judgment and order of conviction and sentence stands not on a single piece of legal evidence, but on the contradictory assumption, presumption and speculation which is not tenable in law.

This is a case of no evidence and the impugned judgment of conviction and sentence against the appellant is liable to be set aside and he is entitled to be acquitted of the charge. As such, the Death Reference may be rejected and both the Appeals may be allowed, concluded the learned Advocate for the appellant.

We have considered the submissions of the learned Advocates for respective parties and carefully examined the FIR, charge sheet, evidence, the impugned judgment and order of conviction and sentence and other materials on record.

We now turn to examine and analyze the evidence on record in order to appreciate the legality and rationality of above submissions of the learned Advocates for respective parties.

PW1 Md. Rowshan Ali is the informant of this case and brother of the victim Jahera Khatun. He stated that on 27.10.1999 at 9.00 P.M. Kasim Ali and Amina Khatun, children of victim Jahera Khatun informed him that their mother did not return home. He started to search and find out his sister. Mukter Ali and Syed Miah informed him that the dead body of his sister was lying inside the Kalachara Reserve Forest. He rushed to above location and identified the dead body of victim Jahera with marks of injuries on head, face and various parts of her body. Many people came to see the dead body who disclosed that at 11.00 A.M. they heard alarms raised by a woman from the occurrence place. Stating above facts he lodged an oral ejarah to the Police Station. The witness proved the FIR and his signature of the same which are marked as Exhibits-1, 1/1 and 1/2 respectively. He believes that on duty forest guards had raped his sister and to destroy evidence murdered her. In cross examination he stated that he did not see who raped and murdered his sister. In above forest beat there are about 200 persons who are forest department employees and villagers. Accused persons are guards of the above forest.

PW2 Abdul Gani stated that the occurrence took place on 27.10.1999 at 11.00 A.M. in the Kalachara Reserve Forest. At above time he was grazing his cows beside the hill and he heard alarms raised by a woman. He did not go to the above place of occurrence. On the next morning he heard that

unknown persons have murdered victim Jahera Khatun in the above hill. In cross examination the witness stated that he could not say who murdered victim Jahera Khatun and by what means.

PW3 Abul Hossain stated that the occurrence took place in the Kalachara Reserve Forest on 27.11.1999 at 11.00 A.M. At above time he was on the above hill and heard alarms raised by woman. But he did not go to above place. He found accused Etua Mura in the resting place of forest employees. He asked Etua Mura as to above alarms who said that he was coming from above place and above alarms was without any reason. At 10.00-11.00 P.M. he heard about the murder of victim Jahera Khatun. In cross examination the witness stated that he did not see where and how victim Jahera was murdered.

PW4 Arab Ali was tendered by the prosecution whose cross examination was declined by the defense.

PW5 Abdul Matin stated that on 27.10.1999 at 11.00 A.M. he was going to the west with his cattle when accused Etua Mura alongwith other 4/5 persons were going towards the east. They met before the Bagmara hill inside the Kalachara Reserve Forest. They were passing quickly and they were on duty. On the next day he heard that victim Jahera Khatun was raped and murdered. In cross examination the witness stated that he did not see where and how victim Jahera was murdered.

PW6 Shukur Ali stated that after about  $1\frac{1}{2}$  months from the occurrence he heard that the accused persons raped and murder of victim Jahera Khatun. The witness was declared hostile by the state and cross examined. In his cross examination by the state the witness denied that he was giving false evidence to protect the accused persons. In cross examination by the defense he stated that the accused persons are not his relatives.

PW7 Siddiq Miah stated that on 17.10.1999 at 11/12 o'clock he was passing by the hill of the place of occurrence. He saw accused Etua Mura alongwith 4/5 persons in the above hill. They were passing quickly. On the next day he heard that victim Jahera Khatun was raped and murdered. In cross examination he stated that the accused persons performed sentry duty in the above hill. He heard that the accused person committed rape and murder of victim Jahera Khatun, but he cannot mention the name from whom he learnt that.

PW8 Dr. Sosimol Sinha is the Medical Officer who performed post-mortem examination of the dead body of victim Jahera Khatun on 29.01.1999 and found following injuries:

- (1) Body as a whole is swollen and emits foul smell, soaked in Kerosin Oil.
- (2) Facial region is swollen and stained with extravasated blood and left side of facial region is grossly congested.
- (3) One L/W on the right maxillary area, measuring  $1\frac{4}{3}$ " X  $1\frac{1}{2}$ " X  $1\frac{1}{2}$ " bone depth.
- (4) One incised wound on the upper part of occipital region, measuring  $2\frac{3}{4}$ " X  $1\frac{1}{2}$ " X bone depth in oblique direction.
- (5) Neck was grossly swollen and one leguteremark (post mortem) around the neck prominat anteriorly  $\frac{1}{4}$ " broad, which is deficient posteriorly.
- (6) Multiple abression and echymosis of different sizes and shape on anterior and left lateral aspect of lower chest field and abdomen.



(7) Difuse echymosis on the left side of facial region, on dissection soft tissues and muscles are grosly congested.

(8) Vagina was grossly lacerated and congested Death.

In his opinion death was due to combined effect of haemorrhage, shockded and asphyxia resulting from injuries mentioned on head, neck and throat which were antemortem and homicidal in nature. Vaginal injury mentioned was due to forceful sexual intercourse and antemortem in nature.

The cross examination of the above witness was declined by the defence.

PW9 Moni Begum was tendered by the prosecution whose cross examination was declined by the defence.

PW10 Constable Abdul Ahad stated that on 28.10.1999 he carried the dead body of victim Jahera Khatun to Moulvibazar Sadar Hospital for post-mortem examination. The cross examination of the witness was declined by the defense.

PW11 Dulal Chandra Das is the Recording Officer of the case. He stated that on 28.10.1999 on receipt of an oral ejahar from PW1 Md. Rowshan Ali he filled up formal columns of the FIR and instituted this case. The witness proved the FIR and his signature on above document which was marked as Exhibits-1, 1/3, 1Ka and 1Ka/1 respectively. The defense declined cross examination of above witness.

PW12 Solaiman Ahmed is the Investigating Officer of this case. The witness stated that the Officer-in-charge of the Police Station handed over the case to him for investigation. In course of investigation he visited the place of occurrence prepared a sketch map of the same alongwith an index thereof prepared an inquest report of the dead body of victim Jahera

Khatun and forwarded the same for post-mortem examination by a chalan and seized alamat by a seizure list and recorded statement of the witnesses under Section 161 of Code of Criminal Procedure. In above investigation offence punishable under Section 6(4) of the Nari-O-shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 having prima facie proved against five accused persons he submitted charge sheet No.40 on 29.06.2000 against them.

In cross examination the witness stated that he seized a dao from the occurrence place. But he could not say who owned or possessed above dao. At 'Dha' Marked place in the sketch map is a house but he could not examine any inmate of above house. In this case there is no eye witness. All the accused persons are forest guards and villagers. He did not examine any witness from the Forest Office about the occurrence of this case.

PW13 Abdul Quiyum @ Kahir Mia is a witness to the inquest report of the dead body of victim Jahera Khatun. The witness proved above inquest report and his signature on the same which was marked as Exhibit-4 and 4/Kha respectively.

PW14 Md. Soleman Hossain is the witness of the seizure list of the alamat seized by the Investigating Officer of this case. The witness proved the seizure list, his signature on the above document and some articles as the alamat of the offence which were marked as Exhibit-6/Kha and Material Exhibits-I, II, III, IV and V respectively. In cross examination the witness stated that he does not know the place from where above articles were recovered and seized. Nor he knows who produced above articles or Materials.

Above is all about the evidence oral and documentary adduced by the prosecutions to bring home the charge leveled against five accused persons under Section 6(4) of the Nari-O-Shishu Nirjatan Daman (Bishesh bidhan) Ain, 1995.

As mentioned above the prosecution has examined 12 witnesses and tendered two to prove the charge leveled

against the accused person. Two tendered witnesses were not cross examined by the defence. Besides the defense did not cross examine PW8 Dr. Sosimol Sinha who performed Post Mortem examination of the deadbody of victim Jahera, PW10 Abdul Quiyum who carried the dead body of above victim for post-mortem examination, PW11 Dulal Chandra Das who recorded this case and PW13 Abdul Quiyum who witnessed the preparation of the inquest report. The defense did not adduce any evidence oral or documentary in support of the defense case.

The Learned Deputy Attorney General has reiterated that the prosecution has succeeded to prove the charge leveled against the convict appellant by circumstantial evidence as well.

Now let us examine how far the prosecution has succeeded to prove the complicity of the condemned appellant in the commission of rape and murder of victim Jahera Khatun by legal evidence.

It is well settled that in order to prove a criminal offence the prosecution has to prove the place of occurrence, date and time of the occurrence and the manner of the occurrence and more importantly connect the accused person with the commission of the offence by legal evidence and beyond reasonable doubt.

PW1 Md. Rowshan Ali is the brother of victim Jahera Khatun who has stated that he saw the dead body of his sister victim Jahera Khatun was lying in the Kalachara Reserve Forest on 28.10.199 with visible marks of injuries on the head, face and other areas of her body. The defense did not cross examine PW1 Md. Rowshan Ali as to above mentioned part of his evidence. PW13 Abdul Quiyum @ Kahir Miah has given evidence in support of the inquest report of the dead body of above victim. PW12 Soliyman Ahmed and PW13 Abdul Quiyum @ Kahir Miah have given mutually corroborated evidence as to the recovery of the dead body of victim Jahera

Khatun with above marks of injuries. The evidence of above two PWs as to marks of injuries on the person of victim Jahera Khatun was not cross examined by the defense.

PW8 Dr. Sosimol Sinha performed post-mortem examination of the dead body of the above victim Jahera Khatun and he found following injuries:

- (1) Body as a whole is swollen and emits foul smell, soaked in Kerosin Oil.
- (2) Facial region is swollen and stained with extravasated blood and left side of facial region is grossly congested.
- (3) One L/W on the right maxillary area, measuring  $1\frac{4}{3}$ " X  $1\frac{1}{2}$ " X  $1\frac{1}{2}$ " bone depth.
- (4) One incised wound on the upper part of occipital region, measuring  $2\frac{3}{4}$ " X  $1\frac{1}{2}$ " X bone depth in oblique direction.
- (5) Neck was grossly swollen and one leguiteremark (post mortem) around the neck prominat anteriorly  $\frac{1}{4}$ " broad, which is deficient posteriorly.
- (6) Multiple abression and echymosis of different sizes and shape on anterior and left lateral aspect of lower chest field and abdomen.
- (7) Difuse echymosis on the left side of facial region, on dissection soft tissues and muscles are grosly congested.
- (8) Vagina was grossly lacerated and congested.

In his opinion death was due to combined effect of haemorrhage, shock and asphyxia resulting from injuries mentioned on head, neck and throat which were antemortem and homicidal in nature. Vaginal injury mentioned was due to forceful sexual intercourse and antemortem in nature.

The defense did not cross examine PW8 as to his findings of above mentioned injuries on the person of victim Jahera Khatun and his opinion as to cause of death.

In view of above mutually corroborated evidence of PW1 Md. Rowshan Ali, PW13 Abdul Quiyum @ Kahir Miah, PW12 Soleman Ahmed @ Kahir Mia and PW8 Dr. Sosimal Sinha we hold that the prosecution has succeeded to prove beyond reasonable doubt that victim Jahera Khatun was brutally murdered by causing grievous injuries on head, face and other parts of body and before above murder she was also subjected to forcible rape.

As mentioned above in this case there is no eye witness who saw the above occurrence of rape and murder of victim Jahera Khatun.

None of five accused persons has made any confession as to the complicity of all or any accused person in the commission of above offence.

In the FIR it was stated that the informant received information as to the missing of victim Jahera Khatun from her children namely Kasim Ali and Amina Khatun. But none of them has been examined at trial as prosecution witnesses.

In his evidence as Pw1 informant Md. Rowshan Ali stated that Mukter Ali Miah and Syed Miah informed him that the dead body of victim Jahera Khatun was lying in the Kalachara Reserve Forest. But above Mukter Ali Miah and Syed Miah were not examined as prosecution witnesses in this case.

PW2 Abdul Gani, PW3 Abul Hossain, PW5 Abdul Matin, PW6 Sukur Ali and PW7 Siddiq Miah have given evidence as prosecution witnesses. But none of them has been endorsed as such by PW1 Md. Rowshan Ali. In his evidence as PW1 Md. Rowshan Ali did not say that he heard anything about the occurrence of rape and murder of his sister victim Jahera from above prosecution witnesses.

All above PWs have given mutually conflicting evidence as to the place of occurrence and could not say specifically from whom he learnt about the complicity of the accused persons in the commission of above rape and murder.

In the FIR the place of occurrence has been stated to be Kalachara Reserve Forest (Bagmara). In the body of the FIR it has been stated that the dead body was found on the hill of Kalachara Reserve Forest. Pw2 Abdul Gani stated that the occurrence took place in the Kalachara Reserve forest but he did not visit the occurrence place nor he knows who raped and murdered the victim. PW3 Abul Hossain also stated in his cross examination that he did not know at what place and how victim Jahera Khatun was murdered. PW6 Sukur Ali stated that he heard that Jahera Khatun was raped and murdered in the Bagmara hill. PW7 Siddiq Miah stated that the place of occurrence was hill. In cross examination he stated that the accused person performed chowkidari duty in the above hill.

The Kalachara Reserve Forest comprises a huge area of land and it is a Government Forest which is managed, secured and controlled by the department of Forest of the Government of Bangladesh. It has been alleged that all five accused persons are guards of the Forest Department and they were on duty in the above reserve forest when the occurrence took place. But in support of above claim the prosecution could not produce any oral evidence of any competent witness or any official document.

In his cross examination PW12 Solaiman Ahmed who is the Investigating Officer of this case stated that he did not examine any person from the Forest office of above reserve forest. No duty roster of the guards of above forest was produced at trial to show that five accused persons were forest guards and they were on duty at the time of the alleged occurrence.

As such, the prosecution has miserably failed to prove that five accused persons were forest guards and they were on duty in the above Reserve Forest at the time of the commission of the offence by legal evidence.

We are shocked to notice from the impugned judgment and order of conviction and sentence that the learned Judge of the Trial Court below held without any legal evidence that all five accused persons were forest guards and at the relevant time they were on duty in the above forest as such the accused persons are responsible for commission of rape and murder of victim Jahera collectively.

If it was not possible for a criminal to enter into the reserve forest bypassing the surveillance and security of the forest guards then how victim Jahera Khatun a woman of 45 years age could enter into the occurrence place?

The learned Judge of the Trial Court held all five persons collectively responsible for commission of rape and murder of victim Jahera Khatun but surprisingly convicted and sentenced only the convict appellant and acquitted the other four accused persons.

It is crystal clear that the learned Judge of the trial court does not have the basic knowledge as to what constitutes circumstantial evidence and despite miserable failure of the prosecution to adduce an iota of evidence showing the complicity or involvement of condemned Appellant Etua Mura in the commission of rape and murder of Jahera Khatun most illegally convicted and sentenced him with death which is a tragedy of the dispensation of justice.

As far as the condemn Appellant is concerned this is a case of no evidence, but the learned Judge of the Trial Court has most illegally convicted and sentenced him under Section 302 of the Penal code as mentioned above which is liable to be set aside.

In above view of the materials on record we are unable to find any substance in this reference and the same is liable to be rejected. On the contrary we find substance in both the Criminal Appeal and Jail Appeal which deserve to be allowed.

In the result, the Death Reference is rejected and both the appeals being Criminal Appeal No.4494 of 2017 and Jail Appeal No.139 of 2017 are allowed.

The impugned judgment and order of conviction and sentence dated 27.03.2017 passed by the learned Judge of Nari-O-Shishu Nirjatan Daman Tribunal, Moulvibazar, in Nari-O-Shishu Nirjatan Daman Case No.82 of 2003 arising out of G.R. No.645 of 1999(Komol) and Komolgonj Police Station Case No.20 dated 28.10.1999 under Section 6(4) of Nari-O-shishu Nirjatan (Bishesh Bidhan) Ain, 1995 convicting the appellant and sentencing him thereunder to death is hereby set aside. Convict-accused-Appellant Etua Mura is acquitted of the charge leveled against him under Section 302 of the Penal Code, 1860. Let appellant Etua Mura be set at liberty at once if not wanted in connection with any other case.

Let the lower court's record along with a copy of this judgment be transmitted down at once.

**Fahmida Quader,J:**

I agree.

MD. MASUDUR RAHMAN  
BENCH OFFICER