

Present:

Mr. Justice S.M. Emdadul Hoque
and
Mr. Justice K M Zahid Sarwar

Death Reference No.109 of 2017 with
Criminal Appeal No.9002 of 2017 with
Jail Appeal No.349 of 2017 with
Jail Appeal No.350 of 2017 with
Jail Appeal No.351 of 2017 with
Jail Appeal No.352 of 2017.

The State

..... Petitioner

-Versus-

Razon Khan and others

.....Condemned- Prisoners

Mr. Harunur Rashid, D.A.G with

Mr. Zahid Ahammad (Hero), A.AG with

Mr. Abu Naser (Swapon), A.A.G

..... for the State.

Mr. Md. Shahidul Islam with

Mr. Md. Wahiduzzaman Sohel, Advocates

(In criminal appeal No.9002 of 2017, Jail Appeal
No. 351 of 2017 and Jail Appeal No.352 of
2017).

..... for the appellant.

Mr. Md. Hafizur Rahman Khan, for the

state defence lawyer (In Jail appeal Nos.349
of 2017 and Jail Appeal No.350 of 201.

Heard on: 08.10.2023,09.10.2023
and Judgment on: 17.10.2023.

S.M. Emdadul Hoque, J:

This death reference has been made by the learned
Additional Sessions Judge, 8th Court, Dhaka under Section

374 of the Code, 1898, for the purpose of confirming the death sentence of the condemned-prisoners. The sentences were awarded under sections 302/201/394/411/34 of the Penal Code in Sessions Case No.39 of 2009, which were arising out of Dohar Police Station Case No.16 dated 14.09.2008 and corresponding to G.R. Case No.200 of 2008.

The prosecution case, in short, is that, on 13.09.2008 the mother of the informant, after having ifter with other family members, walking on the road in front of her house but after 6:30 P.M, she was disappeared, as a result, the informant and his other family members continued to search for the victim in the houses of their relatives, as well as, neighbours. They even announced the missing news of the victim by the mike of the mosque of the village. They continued to search for the victim throughout the entire night within the vicinity. One stage of searching, on 14.09.2017 at approximately 7.30 A.M, a man informed the informant from Dohar Ghata that he saw a dead body and after receiving the said information, the informant along with others, reached there and found the dead body of his

mother at the slope of the brick road, adjacent to the house of one Abdur Rahim, near Dohar Ghata Hut, within the village of Dohar Ghata, approximately 4/5 kilometers from the house of the informant. Hence, the case.

Being aggrieved by and dissatisfied with the impugned judgment and order of conviction of the trial Court the condemned-prisoners Razon Khan and Sumon Bayaty preferred Criminal Appeal No. 9002 of 2017, Razon Khan also filed Jail Appeal No.352 of 2017, Sumon Bayaty filed Jail Appeal No.351 of 2017, condemned-prisoners Shahnaj Begum filed Jail Appeal No.350 of 2017 and Fozal @ Fayzol Haque preferred Jail Appeal No.349 of 2017. Since all the Jail Appeals and Criminal Appeals are being arising out of the same judgment and order of conviction and sentence, they all were heard analogous and disposed of in this single judgment.

The case was investigated by the Sub-Inspector, Mizanur Rahman, who prepared the inquest report of the deceased and subsequently dispatched the dead body to

the morgue for an autopsy. After completing all the formalities of the investigation, he found a *prima-facie* case against the condemned-prisoners and accordingly submitted the charge-sheet, being No.190, dated 17.12.2018, under Sections 394/302/ 201/411/34 of the Penal Code.

The case record was eventually sent to the learned Sessions Judge, Dhaka, where it was registered as Sessions Case No.39 of 2009. Subsequently the case was transferred to the learned Additional Sessions Judge, 8th Court, Dhaka, who framed charges against the condemned-prisoners under Sections 394/302/201/411/34 of the Penal Code on 04.03.2009. The charges were read over to them, who pleaded not guilty and claimed to be tried.

At the time of trial the prosecution examined, as many as, 14 witnesses and they all were duly cross-examined by the defence.

After the closing of the prosecution witnesses, the accused-persons were examined in accordance with section 342 of the Code of Criminal Procedure, 1898, which was

read over to them to which they reiterated their innocence again.

The defence case, as inferred from the pattern of the cross-examination of the prosecution witnesses and the examination conducted under section 342 of the Code of Criminal Procedure, 1898, is a complete denial of the prosecution's case. Further, the defence case is that they are innocent and have been wrongfully implicated in this case. The statements, recorded under section 164 of the Code of Criminal Procedure, 1898, of the condemned prisoners, were neither true nor given voluntarily as they were obtained through coercion and torture.

The trial, Court after consideration of the evidence on record, found that the condemned-prisoners were guilty of the charges brought against them and convicted them accordingly and made this reference under Section 374 of The Code of Criminal Procedure, 1898 and all the records subsequently sent to this court for the confirmation of the death sentence.

Mr. Zahid Ahammad (Hero), the learned Assistant Attorney General, presented the impugned judgment, the Ejahar, the charge-sheet, the charges brought against the accused persons, the depositions of the witnesses, the examination of the accused persons conducted under section 342, the inquest report, the seizure-list, the post mortem report along with all the relevant papers and documents available on the record.

Thereafter, the two condemned-prisoners namely, Razon Khan and Shumon Bayati preferred Criminal Appeal No.9002 of 2017 through the learned Advocate Mr. Md. Wahiduzzaman Sohel. However, during the time of hearing of this death reference and appeal, the learned Advocate Mr. Md. Shahidul Islam appearing on behalf of the Razon Khan and Mr. Md. Wahiduzzaman Sohel appearing on behalf of the condemned-prisoner Shumon Bayati, made their argument, in the instant case that there were no eyewitnesses to the occurrence. Mr. Md. Shahidul Islam, further submits that Razon Khan was convicted, in the instant case, without any foundation or supporting evidence

on record. He further asserts that the confessional statement of Razon Khan was neither truthful nor given voluntary and which stands in contradictions to the other confessional statements made by the three other accused persons. He further submits that in the instant case the accused was not examined under Section 342 of the Code of Criminal Procedure in accordance with the direction of law and again another argument was made by Mr. Md. Wahiduzzaman Sohel on behalf of appellant Shumon Bayati and also by Mr. Md. Hafizur Rahman Khan, the learned Advocate, which indicates that all learned Advocates made the same argument that in the instant case, there was no eyewitness to the occurrence and the conviction was based solely on the basis of the confessional statements made by the accused persons. Mr. Md. Wahiduzzaman Sohel further submits that the confessional statement of Shumon Bayati is purely exculpatory. Additionally, Mr. Md. Hafizur Rahman Khan also contends that the confessional statement of Shahnaj Begum is also a purely exculpatory one. He argues that a conviction cannot be imposed on the basis of

exculpatory confession, particularly, since the incriminating evidence was not presented before the condemned prisoners during their examination under Section 342 and thereby the entire trial should be vitiated. In support of this argument, the learned Advocate, Mr. Md. Shahidul Islam, cited the decisions reported in 66 DLR (AD)-199. He further mentioned that in the case reported in 63 DLR (AD)-105; our Apex Court upheld the decision of the High Court Division for sending back the case on remand due to the trial Court, in the said case, did not examine the accused under Section 342 of the Code of Criminal Procedure, 1898. However, in the subsequent cases, specially in the case of 66 DLR (AD)-272, 23 BLC (AD)-150 and 16 SCOB (AD)-22 our Apex Court, in a majority opinion, after considering the facts and circumstance of the aforesaid cases, decided that the trial has been vitiated and accordingly setting-aside the impugned judgment. The learned Advocate therefore prayed for allowing the appeal and rejecting the death reference.

Mr. Md. Hafizur Rahman Khan, specifically submits that since the condemned prisoners were not examined under Section 342 in a proper way and incrimination evidences were not presented before condemned prisoners during their examination under section 342, in such a case, the trial should be vitiated.

Mr. Harunur Rashid, the learned Deputy Attorney General appearing on behalf of the state has presented his arguments, following the procedure of examination under section 342 of The Code of Criminal Procedure. He further submits that the 342 examination is nothing but the judge only put his signature in a prescribed form and made only three questions to the condemned prisoners, in such a case, the learned Deputy Attorney General submits that since, in the instant case, there was no eyewitness to the occurrence of the case and involvement of the accused was solely based on the confessional statements of the condemned prisoners, and the materials were seized from the house of the condemned prisoner Shahnaj Begum and which were produced by condemned prisoner Fozal @ Fayzol Haque, in

such a case, the learned Deputy Attorney General prayed that the concerned judge be asked to explain that why he imposed capital sentence without properly examining the condemned prisoners in accordance with the provisions of section 342 of the Code of Criminal Procedure, 1898. Furthermore, he submits that only viable course of action is to remand the case for a proper examination under section 342 and instruct the trial Court to proceed from that stage. Thereafter, we have issued a show cause notice upon the concerned judge, Mr. Md. Ahasan Tarique, the then Additional District and Sessions Judge, 8th Court, Dhaka on 10.10.2023, with a direction to reply why he imposed capital Sentence against the 04 (four) condemned prisoners without examining them properly under Section 342 of the Code of Criminal Procedure, 1898 and in reply, the learned Judge now Special judge, Pabna replying to the effect which is as follows:

মহোদয়,

যথাবিহিত সম্মান প্রদর্শন পূর্বক নিবেদন এই যে, আমি নিম্নস্বাক্ষরকারী অতিরিক্ত জেলা জজ, ৮ম আদালত, ঢাকা-এ কর্মরত

থাকাকালে দায়রা মামলা নং-৩৯/২০০৯ (জেলা ঢাকার দোহার থানার মামলা নং-১৬, তারিখ ১৪/০৯/২০০৮ খ্রি. এবং জি.আর মামলা নং-২০০/২০০৮)-এ সাক্ষ্য প্রমাণাদির উপর ভিত্তি করিয়া আসামী ১। রাজন খান, পিতা- হাকিম খান ২। শাহনাজ বেগম, স্বামী- মৃত আলফু খালাসী ৩। সুমন বয়ানী, পিতা- মৃত মজিদ বয়ানী এবং ৪। ফজল @ ফয়জল হক, পিতা- মৃত আলী আকবর শেখ আলী হোসেন শিকদার-দেরকে মৃত্যুদন্ড প্রদান করিয়াছি। বর্ণিত মামলার ডেথ রেফারেন্স (নং ১০৯/২০১৭) শুনানীকালে মাননীয় বিচারপতিবৃন্দ কর্তৃক ফৌজদারী কার্যবিধির ৩৪২ ধারা মতে আসামী পরীক্ষা সংক্রান্ত বিষয়ে আমার নিকট থেকে লিখিত জবাব জানিতে চাওয়া হইয়াছে।

সদ্য পদোন্নতিপ্রাপ্ত হইয়া আমি সেসময় উল্লিখিত আদালতে যোগদান করিয়াছিলাম এবং বর্ণিত মামলাটি আমার প্রদত্ত প্রথম মৃত্যুদন্ড প্রদানকারী মামলা। বর্ণিত মামলায় অনভিজ্ঞতা ও অপরিপক্বতার কারনে ফৌজদারী কার্যবিধির ৩৪২ ধারা মতে আসামীদের যথাযথ পন্থায় পরীক্ষা করা হয়নি, যাহা পরবর্তীতে বিভিন্ন প্রশিক্ষণে আমি অনুধাবন করিয়াছি। ইহা আমার অনিচ্ছাকৃত ত্রুটি। তজ্জন্য আমি নিঃশর্ত ক্ষমাপ্রার্থী। ভবিষ্যতে এতদবিষয়ে সতর্ক থাকার অঙ্গিকার করিতেছি।

অতএব, মহোদয়বৃন্দের নিকট সবিনয় প্রার্থনা, আমার অত্র লিখিত জবাব গ্রহন করত: আমাকে এতদসংক্রান্ত দায় হইতে অব্যাহতি প্রদান করিতে মহোদয়বৃন্দের সদয় মর্জি হয়।

আপনাদের অনুগত

(মোঃ আহসান তারেক)
বিশেষ জজ (সিনিয়র জেলা
জজ) পাবনা।

We have considered the reply of the learned Judge. Though as an Additional District Judge he stated that he was not properly aware of the procedure of section 342 and thus could not able to examine the condemned prisoners in a proper way and thus prayed for unconditional apology.

Since we have only considered that non-examination of the accused under Section 342 not only prejudice the defence but has also vitiated the trial and it is also a mandatory provision. In the light of the decisions reported in 63 DLR (AD)-105, it is our considered view, in the instant case, since the Additional District Judge, now designated as Special Judge, Pabna, without properly examining the condemned prisoners, imposed capital sentence and furthermore, the incriminating evidence consists of the accuseds' confessional statements and the materials seized; however, the seizure-list was not brought under the notice to the condemned prisoners during the examination conducted under section 342, has significantly prejudiced their position in this case. As the learned Advocate Mr. Md. Shahidul Islam, Mr. Md. Wahiduzzaman Sohel and Mr. Md.

Hafizur Rahman Khan submit that the confessional statements all are neither truthful nor given voluntary and Mr. Md. Wahiduzzaman Sohel, the learned Advocate submits that confessional statement of Shumon Bayati is purely exculpatory in nature and Mr. Md. Hafizur Rahman Khan, the learned Advocate also submits that the confessional statement of Shahnaj Begum is also exculpatory in nature and the same should be considered by the trial Court at the time of pronouncement of the judgment and furthermore we found that the trial Court did not examine the accused persons under Section 342 of the Code of Criminal Procedure, 1898 properly, as such, it is better to send back the case on remand to proceed from the stage of 342 examination and the trial Judge should consider the provision of section 342 of The Code of Criminal Procedure, 1898 properly, as well as, the subsequent provisions in the time of disposal of the case.

We have gone through the 342 examination earlier and quoted the same that the judge put only three questions in the prescribed form, without presenting any

incriminating evidence against the accused persons. Furthermore, there was no eyewitness in the instant case and the judgment relied solely on the confessional statements. In response, the learned Deputy Attorney General contended that the case should be remanded, citing the decisions from the case of *Sohel @ Sanaullah @ Sohel Sanaullah Vs. State reported in 63 DLR (AD)-105*. In the said case, a Division Bench of this Court, after consideration of the 342 examination found that the examination of the condemned-prisoners had not been conducted in a proper way under Section 342 of The Code of Criminal Procedure, 1898, wherein, our Apex Court took view that:

“So, in the circumstance the sending back the case on remand for fresh trial from the stage of the examination of the accused under section 342 of the Code of Criminal Procedure for the purpose of bring these incriminating evidence including the confessional statement to the attention of this accused-appellant Sohel cannot be taken as giving of undue privilege to the prosecution to fill up any lacuna. Rather, this remand of the case to the trial Court is for

removing a procedural defect only which was caused for non-application of the mind of the trial judge. If such type of procedural defect is not allowed to be cured and the accused is acquitted for such procedural defect that will cause great injustice to the informant side who brought the matter before the Court of law for justice.”

And the Court also took view that:

“However, from the above discussion it is evident that the impugned judgment of the High Court Division does not suffer from any illegality or doing impropriety. In the given facts and circumstance of this case the impugned judgment and order of the High Court Division sending back the case on remand for fresh trial from the stage of examination of the accused under section 342 of the Code of Criminal Procedure has been proper and justified.”

We have also considered the other decisions reported in 73 DLR (AD)-83, 16 SCOB (AD)-22, 23 BLC (AD)-150, 2 BLC (AD)-27, 28 DLR (SC)-35 and 74 DLR (AD)-212, while also considering all the decisions referred by the learned Advocates and learned Deputy Attorney General, as well as

reviewing the provisions of section 342 of the Code of Criminal Procedure, 1898.

However, since the learned Judge begged for unconditional apology and thus is exempted from the show cause but should be cautious for the future. Considering the facts and circumstance of the case, the impugned judgment and order of conviction and sentence should not be sustained.

In the result, the death reference is rejected. The criminal appeal No.9002 of 2017 is allowed and Jail Appeal No.352 of 2017 filed by Razon Khan and Jail Appeal No.351 of 2017 filed by Shumon Bayati are hereby disposed of and the Jail Appeal No.350 filed by Shahnaj Begum and Jail Appeal No.349 of 2017 filed by Fozal @ Fayzol Haque are hereby allowed. The impugned judgment and order of conviction and sentence dated 07.08.2017 passed by the learned Additional Sessions Judge, 8th Court, Dhaka is hereby set-aside.

The Sessions Case No.39 of 2009 is hereby sent back on remand to the learned District and Sessions Judge, Dhaka for a fresh trial commencing from the stage of 342 examination. The learned District and Sessions Judge, Dhaka is at liberty to dispose of the same either by himself or by any of the competent Court having jurisdiction.

The concerned Judge is directed to dispose of the case as early as possible preferably within 02 (two) months from the date of receipt of this judgment.

The Jail authority is directed to shift the condemned prisoners from the condemn cell to the cell meant for the prisoner alike.

Send down the lower Court records at once.

K M Zahid Sarwar, J:

I agree.

B.O Obayedur