Bench:

Mr. Justice Bhishmadev Chakrabortty
and
Mr. Justice K.M. Rasheduzzaman Raja

Death Reference No. 128 of 2019

The State .... petitioner
-Versus-

Md. Jony ....condemned-prisoner
with
Jail Appeal No. 281 of 2019

Md. Jony .... appellant

-Versus-

The State .... respondent

Mr. Syed Ejaz Kabir, Deputy Attorney General with Mr. Ashraful Alam, Ms. Mahbuba Tasnim Akhi and Mr. Md. Abdul Motaleb, Assistant Attorney Generals
.... for the state

Ms. Shahana Syed, Advocate
.... appointed as State Defence Lawyer for the condemned-prisoner

Judgment on 09.11.2026

Bhishmadev Chakrabortty, J:

Learned Judge of Nari-o-Shishu Nirjatan Daman Tribunal, Kustia (the Tribunal) on trial in Nari-o-Shishu Case 160 of 2018 found accused Md. Jony guilty of offence under section 11(Ka) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (the Ain, 2000) and sentenced him thereunder to death

with fine of Taka 100,000/- and made this reference to this Division for its confirmation. Against the aforesaid judgment and order of conviction of sentence the condemned-prisoner filed a Jail Appeal 281 of 2019. Since the reference and the jail appeal have arisen out of the selfsame judgment and order of conviction of sentence, these have been heard together and the being disposed of by this judgment.

The prosecution case, in brief, is that PW1, Asma Khatun alias Asma lodged a first information report which Kumarkhali police station at about 11:30 hours on 28.06.2018 alleging, *inter alia,* that her daughter Mst. Jonaki Khatun (the victim) was married off to accused Md. Joni one year ago. After soleamazing the marriage, the accused demanded Taka 1,10,000/- to the victim to purchase a motor cycle. The accused started torturing her daughter for the said amount. In several occasions she send money to the accused. Her elder daughter Jaba informed her in the morning on 16.05.2018 that the accused had been torturing the victim for dowry. Jaba was crying at about 8:30 pm on 16.05.2018 and told her that the accused in meantime killed the victim for dowry. They then rushed to the occurrence house and found her daughter Jonaki

laying in the verandah of the house. They came to learn from her elder daughter Jaba that at about 5:30 pm on 16.05.2018 victim's maternal grandmother accused Farida Khatun and others brought down the dead body of the victim which was hanging with the bamboo bar of the house. The dead body was taken to the police station and an UD Case 14/18 dated 16.05.2018 was started. The police came, held inquest of the dead body and sent it to the morgue for holding autopsy. They subsequently came to learn that her daughter was throttled to death, thereafter her body was suspended with the bamboo bar of the house. On the aforesaid allegation the Kumarkhali Police Station Case 23 dated 28.06.2018 corresponding to GR Case No. 136 of 2018 under section 11(Ka) of the Ain, 2000 was started against sole accused.

PW 7 SM Rajib Raihan alias Md. Rajib Raihan, a Sub-Inspector of police was entrusted investigation of the case. During investigation, he prepared sketch map with index, recorded the statements of witnesses under section 161 the Code of Criminal Procedure (the Code), collected the autopsy report and inquest report. Arrested the accused and forwarded him to the learned Magistrate for recording his confession

under section 164 of the Code. The IO on investigation finding *prima facie* case against the accused submitted a charge sheet against him on 31.07.2018 under section 11(Ka) of the Ain.

The record of the case was then transmitted to the Tribunal for holding trial which was recorded as Nari-o-Shishu Case No. 160 of 2018. Learned Judge of the Tribunal at first took cognizance of offence against the accused under section 11(Ka) of the Ain and subsequently framed charge against him on 07.11.2018 under the selfsame section of the Ain. The charge so framed was read over to the accused then present in the dock, to which he claimed to be innocent and prayed for trial.

During trial, the prosecution examined in all 7 witnesses; of them PW 1 mother of the victim Asma Khatun alias Asma stated that his victim daughter was married off to the accused. She failed to remember the date of occurrence. She stated that her daughter committed suicide by hanging 7 months ago. She heard that her daughter was killed. Police held inquest of the dead body and take steps for holding its autopsy. She proved the FIR exhibit-1. In cross-examination by the defence she stated that at the time of occurrence she

had been residing in Oman. After hearing the news of death of his daughter, she returned this country, heard about the occurrence from other men and then lodged the FIR. The FIR was not read over to her.

PW 2 Mst. Jaba Khatun alias Jaba, elder sister of the victim stated that hearing the news of death of her sister she rushed to the house of occurrence and found the dead body lying on the verandah of the house. She heard that her sister committed suicide by hanging. In cross-examination by the defence she stated that she went to the house of occurrence at night. Accused Jony was not at home at the material time. They called Jony over telephone and Jony returned home from Ruppur. She put her signature in the police station on some blank papers. She did not know whether it was UD case.

PW 3 Md. Abu Bakkar, a neighbour stated that he knew the informant, victim Jonaki and accused Jony. He heard that a girl had died. He rushed to the occurrence house and found men appeared there were crying. He found the dead body of the victim lying. In cross-examination by the defence he stated that when he reached the house of occurrence accused Jony

was not present there. He went to the house receiving a phone call.

PW 4 Shamim Reza stated that he did not know the informant but he knew accused Jony. He heard that the wife of accused Jony committed suicide. He was not cross-examined by the defence.

PW 5 Md. Rumon Rahman, a doctor who was posted to Kushtia General Hospital at the material time, held autopsy on the dead boy of the victim. In the evidence he stated that held autopsy of the dead body and prepared a report. He proved the autopsy report exhibit-2 and identified his signature thereon. He opined that the death was due to asphyxia as a result of throttling and suffocation which was antemortem and homicidal in nature. In cross-examination by the defence he stated that there was stitches in the first injury they found in the body of the victim. But he did not know who stitched it. It was done 5 days before victim's death. The second injury was on the front part of trachea and they found clotted blood there. They found no finger print in the second injury. Throttle and suffocation may be a cause of asphyxia. Asphyxia may be caused in case of suicide. The second injury was caused

recently. The victim did not die due to the cause of first injury but he died as a result of second injury. He denied the defence suggestion that no injury was caused due to throttling. He denied the defence suggestion that the victim committed suicide.

PW 6 Muhammad Masuduzaman, a Judicial Magistrate posed to the judicial Magistracy of Kushtia at the material time recorded the confession of the accused under section 164 of the Code. He stated that he allowed the accused 3 hours' time for reflection and then the accused made confession to him voluntarily and at his free will. He also found the confession as true. He proved the confession exhibit-3. In cross-examination by the defence he stated that in the record it has been written that the accused was arrested on 27.06.2018. He denied the defence suggestion that he found mark of injuries on the body of the accused. He further denied that the confession was extracted on coercion and durace. He stated that the confession was made voluntarily. He put questions to make him understand that he was not bound to make confession.

PW 7 SM Rajib Raihan alias Md. Rajib Raihan, the Investigating Officer (IO) stated that he visited the place of occurrence prepared sketch map and index, recorded the statements of witnesses under section 161 of the Code. He arrested the accused and took steps to record his confession. In the investigation he found *prima facie* case against the accused and submitted a charge sheet against him under section 11(Ka) of the Ain. He proved the sketch map and index exhibits-4 and 5. In cross-examination by the defence, he stated that he arrested the accused at about 12:35 hours on 28.06.2018 from beside his house. On that very day at about 15:05 hours he forwarded him to the Court. He denied the defence suggestion of torturing the accused and taking him to the Kumarkhali hospital and extracting the confession from him.

On conclusion of examination of the prosecution witnesses, learned Judge examined the accused under section 342 of the Code, to which he reiterated his innocence and prayed for justice. However, learned Judge of the Tribunal on assigning the evidence and other materials on record found him guilty of offence under section 11(Ka) of the Ain and

sentenced him thereunder to death, giving rise to this reference and the jail appeal.

Mr. Syed Ejaz Kabir, learned Deputy Attorney General taking us through the materials on record submits that in fact the accused and the informant party compromised the matter which can be found in the record. Consequently, the prosecution witnesses did not depose in support the prosecution case including the informant. Even they were not declared hostile but the condemned-prisoner made a confession and PW 6 Md. Masuduzzaman, a judicial Magistrate recorded it under section 164 of the Code. The aforesaid confession is found to be true and made voluntarily which disclosed the offence committed by the condemned-prisoner. Such confession which is apparently found true and made voluntarily can be the sole basis of conviction of its maker, the condemned-prisoner. Although as per the evidence of the prosecution witnesses demand of dowry has not been proved but offence of killing the victim has been proved by the evidence of doctor PW 5 and the autopsy report exhibit-2. So the Court can pass appropriate sentence to the condemned-

prisoner under the relevant provision of law, Mr. Kabir concludes.

Ms. Shahana Syed, learned Advocate appointed as a State Defence Lawyer takes us through the confession made by the condemned-prisoner and submits that even the confession made by the convict is taken as true and made voluntarily, it do not disclose offence of murder punishable under section 302 of the penal Code. At best it may come under section 304 part II of the Penal Code because the offence was committed by the condemned-prisoner at the instigation of the deceased on sudden provocation. He prays for converting the conviction of the condemned-prisoner under section 304 part II and the sentence which he has already served may be treated as his sentence, Ms. Syed concludes.

We have considered the submissions of the learned Deputy Attorney General and the learned Advocate appointed as a State Defence Lawyer, gone through the evidence and other materials on record.

It appears that although in the FIR, PW 1 mother of the victim had brought allegation against the condemned-prisoner of demanding dowry and killing the victim for its nonpayment

but in evidence she he did not at all support the said prosecution case. None of the public witnesses including PWs 1-4 brought any allegation that the condemned-prisoner demanded dowry from the victim or to their family members. But all of them stated that their heard that the victim committed suicide by hanging. Therefore, offence if any committed by the condemned-prisoner do not come within the meaning of section 11(Ka) of the Ain.

But the fact remains that the victim died in the house of the condemned-prisoner. He had to explain the death of his wife. The explanation he offered by putting suggestion to the prosecution witnesses that the victim committed suicide by hanging is found not satisfactory and believable as per autopsy report and evidence of doctor. The autopsy report is exhibit-2. The doctor PW 5 Md. Rumon Rahman in the autopsy found (1) a stitched wound at dorsum of left foot which is almost 5 days old measuring about 1″ x 2′ mm x 2 mm. (2) A brusing in the middle of neck over cricoid cartilage size 3 cm x 2 cm. He found trachea, intact and congested. On dissection he found trachea, both lungs, liver, spleen and kidnyes were congested and passed opinion that the cause of the death was due to

asphyxia as a result of throttling and suffocation which was antemortem and homicidal in nature. The autopsy report exhibit-2 has been corroborated by the evidence of PW 5, the doctor. PW 5 was cross-examined by the defence at length but nothing has come out adverse as to the cause of death of the victim. It has come out in evidence that injury 1, i.e., stitched wound was 5 days old but it was not the cause of death of the victim. So we can safely conclude that the victim was throttled to death which was antemortem and homicidal in nature.

Now we have to be examined who committed the offence. Although, the public witness of the prosecution stated in evidence that the condemned-prisoner was not at home at the time of occurrence but the confession made by the condemned-prisoner shows a different story. For brevity of discussion the confession is quoted- ‘‘খুব ছোট বেলায় আমার বাবা মা আমাকে ছেড়ে চলে যায়। আমি এতিম এর মত মানুষ হয়েছি। আমি নানা বাড়ীতে থাকি। গত ৮ মাস আগে জোনাকির সঙ্গে আমার বিয়ে হয়। আমি জোনাকিকে নিয়ে নানা বাড়ীতে থাকতাম। আমার নানাবাড়ী কুমারখালীর গটিয়া। জোনাকি বিয়ের পর থেকেই আমাকে খুব নির্যাতন করত। আমি গ্রামে গ্রামে ঘুরে ভাঙ্গারী ব্যবসা করতাম। গত ১৬/০৫/২০১৮ ইং তারিখ বুধবার অর্থ্যাৎ রমজানের দুই দিন আগে অনুমান সকাল ৮:৩০ ঘটিকার সময়ে আমি ঘুম থেকে উঠে আমার বউ জোনাকির নিকটে ভাত চাইলে

সে আমাকে ধমক দিযে বলে ‘ভাত তুই নিজে বেড়ে খা।’ পরে আমি নিজেই ভাত বেড়ে খেয়ে পানি চাইলে জোনাকি আমাকে রুটি বানানোর বেলুন দিয়ে আমার চোয়ালে বারি মারে। আমার সাথে জোনাকির খুব ঝগড়া হয়। এক পর্যায়ে সে আমার ঠোটে বেলুন দিয়ে আঘাত করে। আমার ঠোট দিয়ে রক্ত পড়তে থাকলে আমি নিজেকে আর নিয়ন্ত্রণ করতে পারিনি। জোনাকির উপর আমার ভীষণ রাগ হয়। আমি জোনাকির উপর ক্ষুব্ধ হয়ে তার গালে চড় মারি এবং রাগের মাথায় তার গলা দুই হাত দিয়ে চেপে ধরি। গলা চেপে ধরার কিছুক্ষণ এর মধ্যেই জোনাকি মারা যায়। জোনাকি মারা যাওয়ার পর ঘরে থাকা ওড়না দিয়ে জোনাকির লাশ ঘরের সিলিং এর সাথে ঝুলিয়ে রাখি, যাতে মানুষ ভাবে সে আত্মহত্যা করেছে। এই আমার জবানবন্দী।’’ *(emphasis supplied)* PW 6 Md. Masuduzzaman, a judicial Magistrate recorded the confession of the condemned-prisoner exhibit-3. On perusal of the aforequoted confession, we find that it was recorded in compliance with provisions of law of sections 164 and 364 of the Code. The condemned-prisoner was given enough time for reflection. Learned Magistrate explained him the questions of column 5 and the consequence of making confession and wrote the answers of question put in column 6 and then he recorded the confession. He also made a memorandum at the bottom of the confession, although in a wrong place. In a question put by the Magistrate to the accused about his

tendering lip, the accused replied that his wife at the time of occurrence struck on his mouth with rolling pin.

It has been well settled by our apex Court in numerous cases that, if a confession is found to be true and made voluntarily it may be used against its maker to pass conviction. In this case the confession made by the condemned-prisoner having been made true and voluntarily, it can safely be used against him to pass conviction. But the question comes under what penal provision of law, the condemned-prisoner is to be found guilty and be convicted. In the confession he stated that in the morning at about 8:30 pm on 16.05.2018 he wanted rice to his wife (the victim) while she told him to take rice by himself in the language "ভাত তুই নিজে বেড়ে খা।" The condemned-prisoner himself took rice and have it. After having it he wanted a glass of water to the victim while the victim struck on the *Jaw* of the condemned-prisoner with a rolling pin. They started altercation and at one stage she struck the condemned-prisoner's lip with rolling pin. Blood was coming out form his lip and then the condemned-prisoner attacked the victim, slapped her and pressed her throat with hands and consequently she died.

In the narration of the confession, we do not find that the killing was preplanned or premeditated. The condemned-prisoner attacked the victim on sudden provocation at the heat of passion. This is not a murder but culpable homicide not amounting to murder as defined in section 299 of the Penal Code. The offence committed by the condemned-prisoner comes within exception 4 of section 300 of the Penal Code which is as under:

> *Exception 4.- culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner*.

In this case, we find that there was no premeditation on the part of the condemned-prisoner to kill the victim. While the condemned-prisoner after taking rice as directed by the victim wanted a glass of water to her, she struck on his *Jaw* and secondly on his lip with rolling pin causing bleeding injury which is reflected in the comment made by the learned Magistrate in column 8 of the confession. The condemned-prisoner did not take any undue advantage upon the victim or

acted in a cruel or unusual manner. At the rude and unusual attacking behavior of the victim, he grew angry upon her, slapped her and pressed her throat with hands causing her death. But thereafter he suspended the dead body on the ceiling of the house to screen the offence. This sort of act of the condemned-prisoner of suspending the dead body to screen the offence definitely comes within the meaning of section 201 of the Penal Code. But no charge to that effect was framed. The maximum sentence of that section is imprisonment for 7 (seven) years which this condemned-prisoner had already served. In the present case, we find that the offence committed by the condemned-prisoner comes under section 304 of the Penal Code. Section 304 of the Penal Code consists of two parts. This section does not create any offence but provides punishment for culpable homicide not amounting to murder. The first part applies to the cases where there is guilty intention and the second part applies where there is no intention but there is guilty knowledge. In the instant case, we find that the condemned-prisoner had no guilty intention but he had guilty knowledge that for pressing the throat of the victim she might have died.

In view of the aforesaid premises, we find that the offence committed by the condemned-prisoner falls under section 304 part II of the Penal Code. In the case of Md. Sukkur Ali vs. the State, 73 DLR (AD) 91 it has been held- "*Death caused not on premeditated act nor with intention to kill but on a sudden fight when the deceased caught hold of the neck of convict by his collar, the petitioner also caught hold of the neck/throat of the deceased is course of altercation and quarrels. The convict did not had the intension to kill the victim. The death was caused because of not only sudden provocation but also as a measure of defence or saving himself on event of being attacked or in course of free fight. There is nothing in the record that previously the condemned-prisoner took steps to kill the victim."* The principle laid in the aforesaid case squarely applies in the case in hand. Therefore, we find that Justice would be met, if the conviction and sentence passed against the condemned-prisoner under section 11(Ka) of the Ain is converted to one under section 304 part II of the Penal Code and sentence him thereunder to the period he has already served in jail (more than 8 years).

In the result the reference is rejected. The jail appeal is allowed-in-part. The conviction of the condemned-prisoner passed under section 11(Ka) of the Ain is altered to part II of section 304 of the Penal Code and he is sentenced thereunder to the period he has already served. The concerned authority is directed to release the condemned-prisoner Md. Jony son of Bakul and Mst. Saleha Khatun of village Paschhim Abdulpur (Hati Abdulpur), police station Mirpur, District-Kushtia at liberty forthwith, if not wanted in any other case(s).

Communicate this judgment and send down the records of the Tribunal.

K.M. Rasheduzzaman Raja, J.

I agree

Rajib