IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(CRIMINAL APPELLATE JURISDICTION)

Present

Mr. Justice Jahangir Hossain

And

Mr. Justice Md. Jahangir Hossain

Death Reference No. 49 of 2011

The State

-Versus-

Mohammad Ali

.....Condemned-Prisoner

With

Criminal Appeal No. 5763 of 2011

Mohammad Ali

-Versus-

The State

With

Jail Appeal No. 245 of 2011

Mohammad Ali

-Versus-

The State

Mr. Zahirul Haque Zahir, D.A.G with

Mr. Md. Atiqul Haque [Salim], A.A.G

.....for the State

Mr. Fazlul Haque Khan Farid with

Mr. Khondker Gulzar Hossain and

Mr. Hossain Saiful Rahman, Advocates.

.....for the appellant

Heard on: 03.04.2016, 04.04.2016, 10.04.2016, 02.05.2016, 03.05.2016, 04.05.2016, 08.05.2016 and 09.05.2016

Judgment on: 16.05.2016 and 17.05.2016

Jahangir Hossain, J

This Death Reference No. 49 of 2011 is an outcome of judgment and order of conviction and sentence dated 31.07.2011 referred by the learned Judge of Nari-O-Shishu Nirjatan Daman Tribunal No. 1, Dhaka to the High Court Division for confirmation under section 374 of the Court of Criminal Procedure [hereinafter referred to as Cr.P.C].

Challenging the said judgment and order of conviction and sentence, condemned prisoner Mohammad Ali thereafter preferred Criminal Appeal No. 5763 of 2011 and Jail Appeal No. 245 of 2011 respectively. Death Reference along with the aforesaid Criminal Appeal and Jail Appeal have been heard together and all are disposed of by this common judgment.

The allegation as narrated in the FIR, in brief, is that one Md. Salam Khan filed an ejahar against 10[ten] accused persons including the condemned prisoner with Khilkhet Police Station alleging, inter alia that his sister Khorshida Begum got married around 08/09 years ago to condemned prisoner who used to beat her up for dowry. On 11.04.2006 his sister came to their house at 10:00 am informing that the accused persons were demanding dowry of Tk-50,000/- [fifty thousand] from her. After a while she was sent back to her father-in-law's house with her brother Selim without dowry as their elder brother was not at home and gave her hope that in the afternoon their elder brother would give the money as dowry after coming back from outside. At 04:00 pm on the same day, they received information through his nephew Rafique that accused persons killed victim Khorshida Begum by

beating indiscriminately for not meeting dowry. The informant, his friend Kaiser along with others rushed to the place of occurrence and saw the dead body of his sister lying with marks of violence at different limbs of her body at the court yard of the house. It has been further stated in the FIR that all the accused persons went into hiding.

Upon receipt of the said ejahar a case being Khilkhet Police Station Case No. 03 dated 11.04.2006 was started against the 10[ten] accused persons under sections 11(Ka)/30 of the Nari-O-Shishu Nirjatan Damon Ain, 2000. Thereafter, police rushed to the scene and recovered the dead body of the victim and held inquest report at 21:00 hours, seized blood stained apparels of the victim, prepared sketch map with index and sent the dead body to Dhaka Medical College Hospital for autopsy.

During investigation of the case, the investigating officer recorded statements of the witnesses after examining them under section 161 of the Cr.P.C and collected post-mortem examination report along with chemical examination report. One sub-inspector Nashir Uddin, after conclusion of investigation, submitted police report being charge sheet No. 51 dated 16.07.2006 against three accused persons including the condemned prisoner while seven other accused persons were left out of the charge sheet. On the basis of narazi petition the case was further investigated by Detective Branch. One A.B.M Siddique, sub-inspector of Detective Branch, finally rendered charge sheet being No. 102 dated 30.12.2006 against same set of accused persons as submitted earlier under sections 11(Ka)/30 of the Nari-O-Shishu Nirjatan Damon Ain, 2000 leaving out seven other accused persons from

the allegation as having no prima face case against them.

In the second charge sheet, the investigation officer depicted elaborate descriptions of how, why and by whom the occurrence was taken place at the relevant time. The learned Trial Judge, after hearing the parties, framed the charge against three persons including the condemned prisoner under sections 11(Ka)/30 of the said Ain and the same was read over to them who pleaded not guilty of the offence and demanded to be innocent in the trial.

In the trial, the prosecution examined as many as 12[twelve] witnesses to prove its case while defence examined none. Defence case as it transpires from the trend of cross-examination that the accused persons did not kill the victim and they have been falsely implicated in the case. After closure of the evidence

the accused persons were examined by the trial court under section 342 of the Cr.P.C placing the incriminating evidence to their notices, this time they also claimed their innocence.

Having concluded the trial and upon assessment of the evidence, exhibits, material exhibits and other connected documents on record, the learned Judge of the aforesaid Tribunal found the accused Mohammad Ali guilty of the charge leveled under section 11(Ka) of the Nari-O-Shishu Nirjatan Damon Ain, 2000 [as amended in 2003] sentencing him to death with a fine of Tk-5000/-.

We have heard the arguments of learned Advocate of both the parties at length, perused the impugned judgment, testimony of the prosecution witnesses, postmortem examination report, chemical

examination report, exhibits, material exhibits and other connected documents on record.

On careful scrutiny of the evidence and documents it has revealed that among the 12 [twelve] witnesses, pw-01 Md. Salam Khan @ Salam is the brother of the deceased who lodged the FIR with the police station being informant and by supporting FIR story he disclosed in his deposition that on 11.04.2006 his sister victim Khorshida Begum came to their house informing that she had been facing humiliation for Tk-50,000/- [fifty thousand] as dowry. Thereafter, she was sent back to her husband's house with pw-04, another brother of the victim. Around 03:00 pm on the day they were informed through nephew Rafique about the killing of the victim by the accused persons. Getting such news, he along with his friend and others reached the scene and found two nephews [sons of

the victim] weeping beside the dead body of their mother-victim. Replying to a query nephews told them that the accused persons killed their mother by beating indiscriminately. The ejaher of this witness is marked as exhibit-01 and his signature as exhibit- 01/01. In course of cross-examination it is evident that the victim was given marriage around 09/10 years ago and no case was filed against the accused persons earlier for demand of dowry.

Though the sons of the victim told this witness that their mother was killed by accused persons including the condemned prisoner but the motive of the killing was not narrated by them to this witness. Before killing incident took place, pw-04 came to know from his sister Khorshida that she was beaten by accused persons for demanding dowry. This version of information heard by pw-02, another brother of the

victim, from pw-04 but who were the persons demanding dowry, did not state particularly in his deposition rather he deposed that his sister got married to accused Mohammad Ali 08/09 years ago and both were blessed by two sons aged about 07 and 05 years respectively. And the victim was sent back to her father-in-law's house with pw-04 at 11:00 am on the day giving a hope of understanding to provide the dowry by their elder brother when he comes back home. When they reached the house of the accused persons, then Ahmed Ali told pw-04 for taking her back by showing dire consequence of the victim. But pw-04 left his sister keeping her in the house of the accused persons.

At 03:30 pm nephew-Rafique over cell-phone informed him [pw-02] about the killing of the victim by the accused persons. They rushed to the spot on

hearing such news and saw dead body of the victim and two children sitting beside her dead body. Sons of the victim witnessed that their grand-mother laid the victim on floor holding her hair and pressing her nose and mouth. Accused Mohammad Ali beat the victim with lath and gave a leg blow on her while accused Ahmed Ali hit her lower part of the belly. He [pw-02] became witness as inquest report was held in his presence by police. In cross-examination he said they did not make any written complaint to the union parishad office earlier but an oral arbitration was held in 2005 to save the accused persons.

When the victim came back to her father's house at 09:00 am on 11.04.2006 pw-04 was at home. He came to learn from his sister that for dowry of Tk-50,000/- [fifty thousand] accused persons used to beat her up and her mother-in-law directed her to

bring Tk-50,000/- [fifty thousand] as dowry from her father's house. His elder brother Abdus Salam also heard the same thing. His sister previously took money for her husband from time to time. He took his sister to her father-in-law's house around 11:00 am. They went to the place of occurrence-house having heard the killing of their sister at 03:00/03:30 am and saw the dead body of their sister lying at the courtyard and her two sons were crying beside the dead body. Both sons knew who are the killers? In cross-examination he denied the defence suggestions that victim did not go to their house with a view to meet the dowry of Tk-50,000/- [fifty thousand] demanded by the accused persons and sent back her to her father-in-law's house at 11:00 am after giving her a hope to meet the same later on. This witness admitted on cross-examination that prior to the present occurrence,

they did not lodge any case or G.D entry against her husband or inmates of the house.

From the evidence of pw-05, maternal aunt of the victim, it is found that the accused persons used to beat her niece- victim for not meeting dowry of Tk-50,000/-[fifty thousand]. On the day of occurrence victim was sent to her father's house after beating for dowry. This witness further deposed that she came to her nephew's house two days before the occurrence took place. As the elder brother of the victim was not at home pw-04 took her back to her father-in-law's house at 11:00 am with a hope to meet the demand of dowry after her elder brother coming back home from outside. At about 03:00 pm she heard that the accused persons killed the victim by beating for dowry.

They reached her [victim] father-in-law's house and saw the victim's dead body lying with blood

stained wounds on her body. In course of cross-examination this witness said Khorshida [victim] got married around nine years' prior to her death. She denied the defence suggestions that she did not tell the police about victim's coming to her nephew's house on the date of occurrence at 11:00 am and Selim [pw-04] did not take her back to her father-in-law's house.

Pw-07 has been tendered by the prosecution and defence also declined to cross-examine him.

Pw-08 is a neighbor, who rushed to the place of occurrence on hearing clamor and saw the dead body, mother of Rahim and Karim and many other persons were there who told that the victim died of having insecticide. At this stage this witness had been declared hostile. In cross-examination by the prosecution she replied that due to taking insecticide

the victim died, intimated by Ahmed Ali, Mohammad Ali and another woman and saw falling froth/scum from the mouth of the victim. She also denied the prosecution suggestion that the accused Mohammad Ali and others killed the victim for the reason of dowry.

From the said evidence of pws-01, 02, 04, 05 and 08 it has emerged that they are not eye witnesses of the occurrence as to the killing of the victim but pws-01, 02, 04 and 05 heard from victim that the accused persons used to beat her up for not meeting dowry before the killing incident took place at the scene. As the victim died there is no scope to get any evidence from her mouth about the dowry as allegedly claimed by the accused persons.

Now the allegation of demand of dowry as allegedly made by the accused persons has to be assessed and evaluated on the basis of circumstantial

evidence and the ocular evidence, if any. It is also circumstance that an altercation between the victim and her mother-in-law was often held and that was why other members of the family were being separated. In such a situation, it is to be seen and considered by the evidence of two child witnesses who are also sons of the victim as well as condemned prisoner.

The evidence of both the child witnesses is very important in respect of committing offences of demanding dowry and murder of the victim by the accused persons. At the time of occurrence, the age of two children allegedly was seven and five years respectively. It is true that evidence of a child witness can only be relied upon if he or she is capable of understanding and replying to the question intelligently as laid down in sections 118 and 134 of the Evidence Act, 1872 as advanced by learned Deputy Attorney

General Mr. Zahir having referred to the decisions in the case of Abdul Quddus–Vs- the State, reported in 43 DLR [AD], 234 and in the case of Furkan @ Farhad and others –Vs- State, reported in 47 DLR [AD], 149.

It is also true and fact that dowry is a social curse in this entire sub-continent which destroys conjugal and social life and the evil cuts across all religious communities. But at the same time such allegation of demanding dowry by the husband is being misused bringing false allegation against him and his family members. In the present case in hand, it finds that the informant, brother of the deceased, brought the allegation of demanding dowry not only against the accused persons but also against all the family members of the condemned prisoner. Therefore, it

makes the prosecution case shaky in respect of demanding dowry.

Now let us see the evidence of child witness pw-03 who deposed that his uncle, uncle [fufa] and grand-mother pressed on her body by legs and his father beat her up and grand-mother also pressed her nose and mouth with hands. He tried to save her [victim] but his fufa kicked him up. His father expressed no need of his mother [victim] anymore and said further to kill her. All of them left the house after killing his mother. His maternal uncle came to the scene in the afternoon. Pw-06, another son of the victim, after examining capability of his understanding by the trial judge, said that his father gave a blow on his mother with lathi. Having pulled her hair, she was grounded after pressing her mouth. His uncle Mohammad Ali put pressure on her lower portion of

the belly with legs. He was requesting his grand-mother to save her life. His fufa [Sobhan] kicked both of them [two children]. Thereafter, his father and uncle were seen standing while his fufa and grand-mother left the scene. In course of cross-examination this witness admitted that his father i.e condemned prisoner took his mother to the hospital.

It appears from the evidence of both the child witnesses that they saw the occurrence with their own eyes being present there at the relevant time. It is also evident that they after incident were kept in the custody of the informant party for a long time and they were growing up under care of the informant party who produced them to the trial court for rendering their evidence. Even then they did not disclose that their father assaulted their mother-victim for not meeting dowry rather they said their mother was beaten by

accused persons including their father under an altercation.

Mr. A.K.M Fazlul Haque Khan Farid, learned Advocate by referring to the decision, reported in 4 BLC, 43 contends that there is a possibility of coaching the child witness by his relatives in whose care and custody he was left and as such it is not safe to rely on his evidence. This contention of the learned Advocate cannot be brushed aside instantly but in our criminal justice delivery system it is practiced and recognized that prosecution witnesses always are being kept in the custody of the informant party and they are reminded what they saw or heard narrating to the investigating officer because long time after they give evidence in court. It is pertinent to note that child or old witness, they render their evidence on oath. It is only the trial judge who can first have scope to

examine the veracity and credibility of a child or old witness and then evaluate his evidence. How far his evidence is justified to be true and trustworthy, court is empowered to verify the same. On the face of such witness trial court can presume whether he is telling truth or not or giving evidence being tutored or under threat. Besides, such assessment of the trial court is not final here. There is more than one higher authority to give eyes on it. In this case trial court made questions to the child witness on his intelligence and understanding before examining him as prescribed in section 118 of the Evidence Act, 1872.

If the evidence adduced by these two child witnesses is considered to be true and trustworthy as ocular witnesses, then the allegation of demanding dowry brought by the prosecution is being found doubtful. More so, it appears from exhibit-1, the FIR

of the case, that the informant made accusation upon entire family members [ten persons] of the condemned prisoner under sections 11(ka)/30 of the Nari-O-Shishu Nirjatan Daman Ain. Inclusion of such accusation against more accused stands some falsification blending in the true facts by the prosecution. Two different law enforcing agencies after investigation submitted two reports on the selfsame allegation against same set of accused persons, not against ten persons.

Referring to a foreign decision [Criminal A.pr (S.C) 444, 2007] learned defence lawyer Mr. Khan pointed out that demand of dowry cannot be proved, if the death of the victim-wife took place more than 07[seven] years after their wedlock. Such contention of the learned Advocate to accept entirely is difficult on the reason that demand of dowry is an offence, it can

be demanded at any time during conjugal life. There is no time limit to make such demand. It may even occur at the time of marriage or after marriage subsists, but at the same time demand of dowry, particularly in this case, after a long time of their wedlock having two children [sons] is also difficult to be acceptable and believable because both the child witnesses were seemed to be quite silent in this regard. Money transactions might have happened in their conjugal life due to poverty, relationship or any other reasons between the accused persons and the informant party. It does not mean that money transaction once occurs between the parties concerned, will be an offence of demanding dowry. Having considered the aforesaid evidence together with circumstantial evidence it is our considered view that the prosecution has not been able to prove the allegation of demand of dowry, at least

against the condemned prisoner. Because there is no direct or specific evidence that the condemned prisoner demanded money as dowry from the victim in their conjugal life.

Let us see the evidence adduced by the prosecution witnesses whether the victim was killed after having been assaulted by the condemned prisoner in his custody. It appears from evidence that pws- 01, 02, 04 and 05 rushed to the place of occurrence in the afternoon on that very day upon getting information from Rafique, although he was not examined as witness, and found the victim dead lying at the courtyard of the house of the accused persons. The aforesaid witnesses did not directly see the victim assaulted by the condemned prisoner but they found injuries on the body of the victim. Exhibit-02, inquest report held by pw-09 also contains marks of violence

on the forehead of the victim. Pws-03 and 06, child witnesses, who saw the accused persons including condemned prisoner beating their mother at the scene at the relevant time. Pw-09, Police Officer, seized blood stained apparels of the victim, marked as exhibit-03 [seizure list] and material Exhibit-I series. From the said entire evidence and circumstances, it is proved that the victim was beaten at the place of occurrence by the accused persons including the condemned prisoner.

Now the question is whether the victim succumbed to her injuries inflicted by the condemned prisoner alone or any other persons also involved in the beating of the victim. It is found from the impugned judgment of the trial court that two other co-accused persons have been acquitted as the allegation against them has not been proved. In the post-mortem

examination report, marked as exhibit-06, it appears that two injuries have been found on the body of the victim which runs as follows:

"[1] One swelling on right forehead [1½"X 1"]

[2] Bruise (½"X½") on left mid arm

at lateral aspect.''

And the doctors opined that the mentioned injuries in the post-mortem examination report are not sufficient to cause death of the victim. But it indicates that the victim was assaulted prior to her death. Such evidence of pw-10 and post mortem examination report corroborates the evidence of the aforesaid witnesses with regard to the beating of the victim. Although doctor further made comment that no definite opinion as to the cause of manner of death could be given considering the post mortem findings and chemical examination report, marked as exhibit-7.

It has also emerged from evidence on record that in the beating of the victim no sharp or deadly weapon was used by the accused persons but it is found in evidence that quarrel was always held between accused Razia and victim Khorshida Begum. And accused Razia often instigated her son- condemned prisoner to humiliate his wife. In the entire evidence of prosecution witnesses including pws-03 and 06 there was no pre-plan, preparation or premeditation, taken by the condemned prisoner for the killing of the victim before incident occurred at the scene. Even if, circumstances does not show any sign of pre-arrangement, taken by the condemned-prisoner for killing his wife [victim] in any way. Therefore, it can be presumed that intention to kill the victim was absent in this case. It finds support from the case of Monohor Jowarder-Vs-State,

reported in 57 DLR [AD] 494, where it was held that,

> ***"In the absence of any conspiracy, pre-plan or premeditation on the part of the accused-appellants inflicting injury on the thigh of the victim by using fala resulting in the death of the victim six days after the occurrence, is not a murder as the accused Monohor did not intend to cause death by inflicting the said injury but the same could be an offence of culpable homicide not amounting to murder."***

Ordinarily an accused has no obligation to account for the cause of death of the victim for which he has been indicted. But when murder having taken place while the accused was living with his wife in the same house, he is under an obligation to explain how she died. In the absence of any reasonable explanation by the husband as to how his wife had met death within his vicinity, the only conclusion would be that it is none but the husband to be responsible for the cause of death of his wife. And that is why we do

agree with the contention of the learned Deputy Attorney General Mr. Zahir having referred to the decision in the case of Gouranga Kumar Shaha-Vs-State, reported in 2 BLC [AD], 126

But in the present case it is found in evidence of ocular witnesses, particularly pw-06 who stated that condemned prisoner made an attempt to take the victim to the hospital after quarrel which also occurred often between the victim and her mother-in-law. Evidence on record shows that her mother-in-law accused Razia Khatun always used to instigate condemned-prisoner and also often made altercation with the victim. For which the victim and her husband along with their children got separated but accused Razia did not stop abusing and humiliating the victim.

It is also noticed by second police report submitted by pw-11 that on the day of occurrence at

about 10:00 am there was a quarrel occurred between accused Razia and the victim and they used filthy language to each other. Then the accused Ahmed Ali came to the scene and beat the victim after having been instigated by his mother-Razia. Thereafter, victim went to her brother's house and came back with a hope to solve the claim through her elder brother. Around 03:30 pm accused Razia having reminded about dowry started using abusive words with the victim. Thereafter, accused Razia instigated condemned prisoner to beat the victim. In the absence of others, victim felt sick as she took insecticide and on the way to hospital she died.

From sketch map along with index held by pw-12 which has been marked as exhibits-04 and 05, it shows that there are 12 dwelling huts inside the homestead of the accused persons. FIR named

8[eight] accused persons were residing separately while accused Ahmed Ali and Razia residing jointly [according to the evidence of P.ws 3 and 6]. Place of occurrence shown in the sketch Map as 'Ka' between the 'Kha' and 'Gha' huts. 'Kha' has been shown as the hut of accused Ahmed Ali measuring fourteen cubit length and 'Gha' shown as the hut of Labu Miah. 'Dhah' has been shown as the hut of condemned prisoner in the northern place, is far from the place of occurrence. In such a situation, it is very clear that the occurrence took place not at or around the hut of the condemned prisoner. Therefore, it can be safely held that the victim was not assaulted in the absolute custody of the condemned prisoner when the occurrence took place but his liability as husband has not gone away for the reason as stated above. He did neither restrain his mother nor his brother from beating the

victim rather he was instigated by them to take part in the same event.

Mr. Zahirul Haque Zahir, learned Deputy Attorney General pointed out by referring to the decisions, reported in 56 DLR [AD] 81 and 14 DLR [HC] 248 that it was the husband who ought to have restrained or protected co-perpetrators rather he embraced hands of the co-perpetrators in the beating of the victim. We, therefore, find substance in the contention of the learned DAG Mr. Zahir. But that very act and conduct were done upon an altercation and instigation in which the condemned prisoner had also participation with guilty knowledge. In this regard we find support from the case of Nibir Chandra Chowdhury –Vs- State, reported in 53 DLR [AD] 113 where it was held that,

> ***"Section 304 of the Penal Code, which consist of two parts, does not create any offence, but provides for punishment of culpable homicide not amounting to murder. The first part applies to a***

case where there is guilty intention and the second part applies where there is no such intention, but there is guilty knowledge."

In the case in hand, we find in evidence that the condemned prisoner as husband of the victim failed to resist his mother and brother rather he took part by their instigation in the beating of the victim with guilty knowledge.

Pw-08 is a neighbor of the condemned prisoner who was although declared hostile but in her deposition she claimed that the victim died by taking insecticide which she heard from the persons present at the spot after occurrence. In cross-examination by the prosecution she said, such information she received from Ahmed Ali, Mohammad Ali and another female member. The above evidence of pw-08 has not been supported by chemical examination report as the post-mortem examination's doctors sent the viscera of the

victim for chemical examination in which no poison was found.

Mr. Fazlul Haque Khan Farid, learned defence lawyer contends by referring to the decisions of 25 DLR 398 and 5 BLC 451 that non-examination of vital witnesses particularly some of the neighbors creates doubt about the prosecution case. In this case it is found that Rafique, nephew of the informant, being first informer notified the informant party regarding killing of the victim and Kaiser, [friend of pw- 01] accompanied Pw-01 to the scene, were not examined by prosecution, although their statements were recorded by pw-12 under section 161 of the Cr.P.C. It is not material substance by giving more similar evidence to focus on the evidence already adduced because the said witnesses are holding similar status like pws- 01,

02, 04 and 05 as they did not see the occurrence on their own eyes.

Sometimes the people of our society express unhappiness that the case has been presented causing the death of victim for dowry. But the courts in many cases struck down such allegation and acquit the perpetrators or convert the same into Penal Code giving lesser punishment there under accordingly. It should be borne in mind that when an allegation is brought under any special law like Nari-O-Shishu Nirjatan Daman Ain and adduce evidence to prove the allegation, then the entire evidence along with circumstantial evidence has to be assessed and evaluated very carefully because there is a possibility of its misuse, so that an innocent person should not face unnecessary harassment by getting punishment. And a

judge should have been guided by law giving up all sorts of emotion from his mind.

If the **mens rea** is absent in causing death of the victim it would amount to culpable homicide not amounting to murder and the accused person is to be liable to be punished under section 304 Part-II of the Penal Code depending on the facts and circumstances proved in a criminal case [Sate-Vs-Shah Alam, reported in 56 DLR 232].

Having considered all the facts and circumstances, testimonies of the witnesses, and cited decisions and contentions of both the parties, we are constrained to hold that the prosecution has been able to prove the allegation against the condemned prisoner beyond reasonable doubt under section 304 Part-II of the Penal Code only, instead of section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000.

In the present case the trial was held by the Nari-O-Shishu Nirjatan Daman Tribunal as the allegation of murder took place for demand of dowry under section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000. If the demand of dowry is not proved by evidence then the murder charge can be brought into light and the case comes under section 302 or 304 of the Penal Code. In such a situation the case for proving murder charge should be returned to the magistrate or the court of sessions. But it appears from FIR of the case that the occurrence took place on 11.04.2006 and the trial of the case was concluded on 31.07.2011 more than 5[five] years after the incident which counts passing away of around 10[ten] years in total. We have also gone through the decisions of 67 DLR [AD] 172, 51 DLR [AD] 18, 11 BLC [HCD] 81, 56 DLR [HCD] 285 and 5 BLC

[HCD] 230 from which it finds that almost in all those cases the Apex Court and the High Court Divisions showed discouragements in many ways not to send the cases to the courts below for fresh trial. Considering all aspects and facts and circumstances of the case we are of the view that there will be no output if the present case is sent back either to the magistrate court or the court of sessions for fresh trial from its beginning.

Since the cause of death for dowry against the condemned prisoner has not been proved under section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000, sentence of death passed by the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal, Dhaka is altered into one of section 304 Part-II of the Penal Code.

Accordingly the condemned prisoner is sentenced to suffer rigorous imprisonment for 10[ten] years with a fine of Tk-10,000/- [ten thousand], in default, to suffer rigorous imprisonment for 01[one] year more. Out of this awarded sentence, the quantum of sentence he has already served out and period of custody before impugned judgment shall also be deducted on the application of the provision of section 35A of the Cr.P.C.

In the result, the Death Reference is hereby rejected. The Criminal Appeal No. 5763 of 2011 along with Jail Appeal No. 245 of 2011 is also dismissed with the aforesaid modification in the sentence. The condemned prisoner Mohammad Ali be shifted from condemned cell to normal cell meant for similar convict at once.

At the end we intend to express our sincere appreciation to Mr. Zahirul Haque Zahir, learned Deputy Attorney General along with Mr. Md. Atiqul Haque [Selim], learned Assistant Attorney General and Mr. Fazlul Haque Khan Farid, the learned defence lawyer, for their lucid expression of law and also invaluable assistance to this Court.

Let a copy of this judgment and order along with lower court records be sent to the Nari-O-Shishu Nirjatan Daman Tribunal No.1, Dhaka for information and necessary action at once.

Md. Jahangir Hossain, J

I agree

Liton/B.O