IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mrs. Justice Nazmun Ara Sultana

Mr. Justice Syed Mahmud Hossain

Mr. Justice Hasan Foez Siddique

CRIMINAL REVIEW PETITION NO.42 OF 2016.
(From the judgment and order dated 06.01.2016 passed by the Appellate Division in Criminal Appeal No.143 of 2014.)

Motiur Rahman Nizami: Petitioner.

=Versus=

The Chief Prosecutor, International Crimes Tribunal, Dhaka Bangladesh: Respondent.

For the Petitioner: Mr. Khondaker Mahbub Hossain, Senior Advocate,(with Mr. Mohammad Nazrul Islam, Senior Advocate, Mr. S.M.Shahjahan, Advocate), instructed by Mr.Zainul Abedin, Advocate-on-Record.

For the Respondent: Mr. Mahbubey Alam, Attorney General, instructed by Mrs. Mahmuda Parveen, Advocate-on-Record.

Date of hearing: 5th, May, 2016.

Date of Judgment: 5th, May, 2016.

J U D G M E N T

Surendra Kumar Sinha, CJ: This petition has been filed by convict Motiur Rahman Nizami from a judgment of this court disposed of in its appellate forum maintaining his conviction and sentence on five counts, namely, charge Nos.2, 6, 7, 8 & 16.

Though this Court maintained the conviction of the petitioner in respect of five counts, Mr. Kh.

Mahbub Hossain, learned Counsel appearing for the petitioner seeks review in respect of three counts, namely, charge Nos.2, 6 and 16. So, we will confine to consider in this petition in respect of on those three counts. The occurrence in respect of charge No.2 had been committed at village Bousgari, Rupashi and Demra under Sathia Police Station, Pabna. The petitioner had incited the inhabitants at Bousgari Rupashi Primary School compound at about 11 a.m. and as a sequel of that incitement, on 14th May, 1971, at about 6/6.30 a.m. he along with Pakistani force and other Razakars gheraoed Bousgari, Rupashi and Demra villages, picked up 450 civilians and they were then shot to death. He was charged with the commission of murder, rape and other crimes against humanity. The tribunal on consideration the evidence of P.Ws.9, 11, 17 and 18 sentenced him to death. This Court maintained this conviction.

Mr. Kh. Mahbub Hossain, learned Counsel has filed a written argument in support of the review

petition and submitted that the tribunal as well as this Court has arrived at incorrect assumption of the petitioner's involvement with Pakistani army. His second contention is that this Court has committed error of law in maintaining the conviction of the petitioner on improbable facts. Thirdly, it is contended that P.Ws.11 and 17 are motivated witnesses and therefore, this Court has committed error of law in maintaining the conviction of the petitioner relying upon these two witnesses.

As regards the first point canvassed by the learned Counsel, this Court on a thorough discussion of the evidence on record held as under:

> "The above mentioned documentary evidence tell sufficiently that Al-Badr Bahini was formed mainly with the members of Islami Chhatra Shanagha. It should be mentioned here that in the case of Ali Ahsan Muhamad Mujahid and Kader Mollah this Division held earlier that Al-Badr Bahini was formed

mainly with the members of Islami Chhatra Shangha. However, the above mentioned documentary evidence tell also that appellant Motiur Rahman Nizami, as the president of All Pakistan Islami Chhatra Shangha, had an active role in the formation of Al-Badr Bahini and he himself became the leader/commander of Al-Badr Bahini.

From the above mentioned old documentary evidence it is evident that during the Liberation War of Bangladesh the appellant Motiur Rahman Nizami not only sided with the Pak army but also incited the members of Al-Badr Bahini and Islami Chhatra Shangha to co-operate with the Pak army. The exhibit-2/22 the article written by the accused appellant proves also that accused Motiur Rahman Nizami was highly satisfied with the formation of the Al-Badr Bahini and he praised highly this Al-Badr Bahini and also

praised for success of Al-Badr Bahini in protecting the existence of Pakistan. The above referred old documentary evidence prove sufficiently the role of accused appellant Motiur Rahman Nizami during the Liberation War of Bangladesh. He not only opposed the Liberation of Bangladesh and co-operated with the Pak army but also encouraged and provoked the members of Al-Badr Bahini and Islami Chhatra Shangha to co-operate with the Pakistani invading force. These documentary evidence coupled with the admitted fact that the appellant Motiur Rahman Nizami was the president of East Pakistan Islami Chhatra Shanagha for three years and thereafter he became the president of All Pakistan Islami Chhatra Shangha in the year 1969 and remained as such till September, 1971, and the proven fact that Al-Badr Bahini was formed with the

> members of Islami Chhatra Shangha, in our opinion, prove sufficiently that appellant Motiur Rahman Nizami was the leader/commander of Al-Badr Bahini and he collaborated with the Pak army and played an active role against the liberation movement of this Country and also instigated, encouraged and provoked the members of Al-Badr Bahini and Islami Chhatra Shangha to collaborate with the Pakistani Army."

As regards the other points which relate to the findings of fact on sifting the evidence as a Court of appeal, and those are not legal grounds for review. Even then, I will make a succinct opinion on those three points later on.

In respect of charge No.6, the petitioner was also sentenced to death and this Court affirmed the conviction and sentence. It was related to an occurrence committed on 27th November, 1971 at about 3.30 a.m. The petitioner with the help of Razakars

and Pakistani army raided the house of Dr. Abdul Awal of Dhulaura and neighboring houses of village Dhulaura on the plea of searching freedom fighters, caught a good number of unarmed people numbering about 30 and killed them indiscriminately in the Dhulaura School field at about 6.30 a.m. This Court relied upon the evidence of P.Ws.6, 8 & 17.

Mr. Kh. Mahbub Hossain, learned Counsel argued that this Court has committed error of law in believing P.W.6's identification of the petitioner in the incident which was not at all believeable story and that it has also committed further error in relying upon improbable facts which are narrated by P.Ws.6 and 8. The determination of these points raised in support of this charge also depends upon re-assessment of evidence and in fact, the learned Counsel has argued on facts by referring to relevant portion of the testimonies of the witnesses, which is not a legal ground for review over which I will discuss later on.

Charge No.16 is relating to committing genocide by killing professional intellectuals on 14th December, 1971, on the eve of the independence of the country. It was the positive case of the prosecution that when the petitioner and his force realized that the liberation of the country was nearing, they committed atrocities by selective elimination of professionals and intellectuals so that even if the independence was achieved, they (leaders) would not be able to run the country.

While maintaining the conviction and sentence, this Court relied upon the evidence of P.Ws.1, 13, 23 and the documentary evidence exhibits 6/17, 6/36, 6/74, 6/92, 8/1, 12/1-12/11, 28, 28/1, 28/2, 28/3, 30, 31, 33, 35 and 42. The defence has also relied upon the evidence on D.W.4 and documentary evidence exhibits-BT, BV, S, T, U, W, Z, AS, BK and BM.

Mr. Kh. Mahbub Hossain after placing the oral and documentary evidence submitted that this Court has committed error of law in believing P.Ws.13 and

23, who made inconsistent statements to the investigation officer, P.W.26. He further submits that this Court has committed further error of law in relying upon exhibit 2/22, inasmuch as, there is nothing in that exhibit that the petitioner was involved with Al-Badar activities. He further argued that this Court erred in law in assuming that the petitioner passed order for killing martyr Dr. Abdul Alim and that though it has also relied upon some books it has misread them. Finally, he argued that even if it is assumed that the petitioner had collaborated with the Pakistani army, his acts attract abetement of the offences, and therefore, leaving the principal offenders, the sentence of death awarded to the petitioner is an error of law.

On the other hand, learned Attorney General argued that the learned Counsel for the petitioner has made arguments on facts which were argued in course of the hearing of the appeal. In this connection, he has drawn our attention to some

portion of the judgment of this Court and submits that this Court has already decided those points on sifting the evidence and there is no scope to reopen those points. He further submits that the learned Counsel has failed to point out any error apparent on the face of the judgment of this Court, and therefore, the grounds on which review petition has been filed are not entertainable and thus, this petition is liable to be dismissed. In support of his contention he has relied upon some decisions.

As observed above, though the learned Counsel has argued on the question of findings of fact arrived at by this Court, considering the sentence of death, I feel it proper to recapitulate some findings of this Court. In respect of charge No.2, this Court has extensively assessed the evidence of the witnesses examined by the prosecution and arrived at the conclusion that-

> "Both these witnesses (P.Ws 11 and 18) have deposed to the effect that the Pak army

committed that incident of mass-killing by firing indiscriminately at the instruction of this accused appellant Motiur Rahman Nizami. From the side of the defence though some alleged contradictions in the evidence of these witnesses have been pointed out but we do not think that these alleged contradictions are fatal at all to make their evidence unbelievable.....”

“But we are unable to accept these arguments also of the learned Advocate. P.W.11 Md. Shamsul Hoque is an Advocate and P.W.18 Md. Zahirul Hoque is a Head Master of a School and both of them are freedom fighters and took active part in the War of Liberation of Bangladesh. They deposed before the tribunal on oath explaining how they were in that area at the time of that incident and narrated how they saw the appellant Motiur Rahman Nizami along with the Pak army while

they were committing atrocities in those three villages.....”

“It should be pointed out here that these 3 witnesses – the P.W.9, P.W.11 and P.W.18 saw the occurrence of 14.05.1971 in 3 villages from different places and not from the same place and as such it was not unnatural at all that all these 3 witnesses might not see all the perpetrators of those atrocities. So, we find no reason to disbelieve these two witnesses.”

In respect of charge No.6, this Court held that-

“P.W.6 was attempted to be killed by the Pak army and their accomplices, but he luckily survived with cut throat injury and was immediately, after the departure of Pak army and their accomplices, taken to hospital. So it is not unnatural at all that he could not know the exact number of the victims of that occurrence. So we do not

think that the above statements of this P.W.6 are fatal at all for the prosecution."

"This P.W.6, undisputedly, is a crippled freedom fighter, he was not only tortured by the Pakistani army but his throat was also cut by Pakistani army and luckily he survived. Now he is known as "গলাকাটা শাহজাহান". We do not find any cogent reason to disbelieve this P.W.6....."

"In this particular case all the above mentioned three prosecution witnesses, namely P.W.6, P.W.8 and P.W.17 are freedom fighters and they have narrated the incident of Dhulaura in detail. We have found all these 3 witnesses trustworthy and their evidence convincing."

In respect of chare No.16, this Court while meeting the point raised as regards the petitioner's involvement noticed exhibits-35 and BT and observed:

"But we do not find this argument of the learned Advocate of much weight. Some others also might have any involvement in the conspiracy of killing of intellectuals, but that does not exonerate the appellant from his criminal liability in killing the intellectuals which has been proved before the tribunal by sufficient evidence....."

"In this case it has been proved beyond all reasonable doubt by sufficient evidence that Al-Badr Bahini was formed with the members of Islami Chhattra Shangha of which this appellant was the president for a long period of five years. The evidence adduced by the prosecution and the facts and circumstances revealed thereform have proved sufficiently that this appellant also had effective control over the members of Al-Badr Bahini. The fact that the Al-Badr Bahini was raised and controlled by the Pak

army does not disprove the fact that this appellant also, being president of Islami Chhatra Shanghha, became a leader of Al-Badr Bahini. It appears from the decisions referred to above that more than one person can be superior and can hold effective control on the same subordinates and more than one superior may be liable for the crime committed by the subordinates."

"In this case sufficient evidence and facts and circumstances have come before the tribunal which have proved sufficiently that this appellant was a leader of Al-Badr Bahini and he had control on the members of Al-Badr Bahini and he had complicity also in the killing of intellectuals by the Al-Badr Bahini. In the circumstances the alleged non-implication of this appellant in the alleged earlier cases does not relieve him of the liability in intellectuals killing

which has been proved in this case by sufficient evidence. The failure of the prosecution to produce any ID Card of any Al-Badr with the signature of the appellant is not fatal at all for the prosecution - specially in consideration of the fact that those ID Cards were issued long 42 years before."

On the question of sentence this court held that-

"All these crimes were extremely cruel and horrendous in nature. Not only the near and dear ones of the victims of these crimes were shocked but also the whole society was terribly shocked by the commission of these crimes. The whole society has been waiting for the proper punishment of the perpetrators of these crimes for a long period. The commission of these crimes – even the slightest complicity in these most cruel, gruesome and barbarous crimes

warrants death sentence only. There is no mitigating circumstances to reduce the death sentences, rather there are aggravating circumstances. In this case the appellant has been found to have committed series of crimes of extremely cruel and inhuman nature during the period of Liberation War, and he has been awarded 5 separate sentences for 5 different crimes in this instant case. The commission of series of crimes of most cruel and inhuman nature by an accused may be considered as aggravating circumstances for awarding him the maximum sentence."

It is now established by catena of decisions that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error apparent on the face of the record. A finding reached by a court cannot be revisited on the reassessment of the evidence, inasmuch as, an error has to be established

on the face of the judgment but where there may conceivably arise two opinions, this can hardly be said to be an error apparent on the face of the record.

This Court held in a case that-

> "a review of a judgment is serious step and the court is reluctant to resort to it unless it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different Counsel, of old and overruled argument, a second trip over ineffectually covered ground or minor mistake of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of Counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the court which decided nor awareness of the

precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for Counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. Nothing which we did not hear then has been heard now, except a couple of rulings on points earlier put forward. The merits of the controversy have already been examined by the court and, in view of the ordinary scope of power of review the re-examination sought cannot proceed beyond the controversy already disposed of. There is no scope in any case in which substantially the same ground traversed again either entirely or in part." (63 DLR (AD)62).

This Court also held that-

"A review cannot be equated with an appeal. It does not confer a right in any way to a litigant. It is now settled point of law that a

review of an earlier order is not permissible unless the court is satisfied that material error manifest on the face of the order undermines its soundness or results in miscarriage of justice. A review of judgment in a case is a serious step and the court is reluctant to invoke its power – it is only where a glaring omission or patent mistake or grave error has crept in by judicial fallibility. Despite there being no provision in the Act of 1973 for review from the judgment of this Division on appeal, securing ends of justice a review is maintainable in exercise of the inherent powers from the judgment of this Division subject to the condition that where the error is so apparent and patent that review is necessary to avoid miscarriage of justice and not otherwise, and the execution of a sentence shall be suspended till the disposal

of the review petition if the same is filed within the period as above."(66 DLR(AD)289)

Similar views have been expressed by the Supreme Courts of Pakistan and India. In a recent case, the Supreme Court of India disposed of series of review petitions including that of accused Yakub Abdul Razak Menon, who was sentenced to death in a laconic order without at all narrating the facts, not even reproducing the arguments in support of the review as under.

> "We have carefully gone through the review petitions and connected papers. We find no merit in the review petition and the same are accordingly dismissed". (Zaibunisa Anwar Kazi V. State of Maharashtra, (2014) 14 SCC 242).

We would like to observe here that the petitioner has not taken any exception as regards his conviction and sentence with respect to charge Nos. 7 and 8, on which charges, he was also found guilty for

his direct participation in the killing of Sohrab of Brishalikh and also instigating to kill Bodi, Rumi, Jewel and Azad at old M.P. Hostel, Nakhalpara. Therefore, the petitioner's involvement and complicity in the perpetration of offences of crimes against humanity and genocide have been impliedly admitted by the accused. More so, in view of the submission of the learned Counsel to commute the sentence, the petitioner cannot dispute his involvement in those offences.

We find no merit in this petition. It is, accordingly, dismissed.

CJ.

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The 5th May, 2016
Md. Mahbub Hossain.

APPROVED FOR REPORTING