

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mr. Justice Syed Mahmud Hossain

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider

Mr. Justice Mohammad Bazlur Rahman

CRIMINAL REVIEW PETITION NO.58 OF 2016.

(From the judgment and order dated 08.03.2016 passed by the Appellate Division in Criminal Appeal No.144 of 2014)

Mir Quasem Ali:

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 Alaam, Attorney General, Bangladesh, (with Mr. Murad Reza, Additional Attorney General, Mr. Momtaz Uddin Fakir, Additional Attorney General, Mr. Biswajit Debnath, Deputy Attorney General, Mr. Md. Ekramul Haque, Deputy Attorney General, Mr. Kh. Diliruzzaman, Deputy Attorney General, Mr. Masud Hasan Chowdhury, Deputy Attorney General, and Mr. Bashir Ahmed, Assistant Attorney General), instructed by Mrs. Mahmuda Parveen, Advocate-on-Record.

Date of hearing: 24th and 28th August, 2016.

Date of Judgment: 30th August, 2016.

J U D G M E N T

Surendra Kumar Sinha, CJ.: Petitioner Mir Quasem

Ali was convicted by the International Crimes

Tribunal No.2 on ten counts under section 3(2) of the

International Crimes Tribunal Act, 1973 and sentenced to death in respect of count Nos. 11 and 12, and 20 years and 14 years respectively in respect of two counts, and 7 years on six other counts. He preferred an appeal in this court. This court maintained the conviction in respect of seven counts. He has been acquitted in respect of three counts including count No. 12 sentencing him to death by majority. Against the said judgment of this court this review petition has been filed by the petitioner.

Though the review petition has been filed against the conviction and sentence maintained by this court in respect of count Nos. 2, 3, 7, 9, 10, 11 and 14, learned counsel argues that he is not inclined to press this leave petition on all counts except charge No. 11. He, however, submits that this does not mean that he is accepting the findings and conviction of the petitioner in respect of charge Nos. 2, 3, 7, 9, 10 and 14. According to him since this court has maintained the sentence of death in

respect of charge No.11, no fruitful purpose will be served to consume court's time by making arguments in respect of all counts if his conviction and sentence is maintained in respect of charge No.11. So, he has confined his argument in respect of charge No.11. This charge is relating to the killing of a young freedom fighter Jashim in Dalim Hotel, Chittagong town. Prosecution in support of this charge has relied upon the evidence of Syed Md. Imran (P.W.1), Md. Sanaulah Chowdhury (P.W.2), Nasir Uddin Chowdhury (P.W.3), Jahangir Chowdhury (P.W.16), Hasina Khatun (P.W.17), S. M. Jamal Uddin (P.W.18), S. M. Sanowar Uddin (P.W.19), Lutfar Rahman Faruq (P.W.20) and Nurul Islam (P.W.24).

Learned counsel has taken through the glimpses of the evidence of those witnesses and submits that these witnesses have utterly failed to prove the complicity of the petitioner in the killing of Jashim. In a review petition there is little scope to make any submission on merit even then we have

allowed the learned counsel to make elaborate submissions. He has also placed a written argument in support of his argument. We have perused the written argument as well.

His second bone of contention is that even if it is assumed that the petitioner was commander of Al-Badar force and operated his activities at Dalim Hotel, this court has committed error of law in portraying him as principal offender. In this regard the learned counsel has drawn our attention to the charge and submits that the tribunal has framed charge against him as an abettor but this court has found him guilty as the principal offender of the charge and thereby this court has committed fundamental error in maintaining his sentence. Learned counsel at one stage vented anger in the manner this court found the petitioner as principal offender of the charge. His last contention is that assuming that the petitioner was involved in the offence of crime against humanity, in no case his

sentence is acceptable one in view of the fact that there is no direct evidence of his involvement in the killing of Jashim, and considering the petitioner's status, his contribution towards the nation by setting up business conglomerate his sentence may be commuted.

Learned counsel has also argued on some trifling points touching on the merit of the case and drawn our attention to the grounds taken in his written argument as under:

(i) There is not a single evidence on record to show that the convict abducted, confined and tortured or killed victim Jashim and other 5 unknown victims and as such the conviction in Charge No.11 is merely based on conjecture and surmises resulting in serious miscarriage of justice. In fact the Appellate Division has realised this and this is why the court erroneously took recourse to 'common knowledge' lowering down

the standard of proof to find the Appellant guilty for Charge-11 as at page 168 of the judgment it erroneously held that 'when there is direct evidence to connect the accused with a particular incident even though the common knowledge pointing fingers towards the accused, the tribunal is given liberty to accept secondary source, such as reports, articles, books, video interviews treating them as corroborating evidence without attempting to collect primary sources of evidence because the lapse of time impacts on the quality of evidence.' The Appellate Division failed to refer to any such report, articles, books, video interview etc to support its finding of conviction in Charge-11.

- (ii) The Appellate Division failed to consider that all the P.Ws. of Charge 11 are hearsay witnesses. There is no eye witness

who could support Charge 11. Moreover except P.W.17 the other P.Ws did not disclose during investigation to the Investigation Officer about the incident of Charge-11, making their testimonies unreliable.

- (iii) The Appellate Division erroneously relied upon the hearsay testimony of P.W.17 as this Court failed to consider that she did not say most of the incriminating part of her testimony regarding charge 11 in her earlier statement made on 27.03.2013 to the Investigation Officer (IO) during investigation (Para-34(q), Page-38, Part-I) and hence these are merely subsequent embellishment on the part of P.W.17 and calls for no consideration against the Petitioner. The Appellate Division should have considered that though P.W.17 claimed to have heard about the alleged incident

from Advocate Shafiul Alam, the said person in his book titled 'সেই সে সময় আনন্দে বেদনায়' (Material Exhibit-VI Series) never incriminated the Appellant in any way whatsoever in the atrocities allegedly taken place in Dalim Hotel. (Part-II, Page-769-775).

- (iv) The Appellate Division also did not at all consider that P.W.17's testimony cannot be believed since she admitted that just after the liberation she used to be editor of a local weekly namely 'সাপ্তাহিক স্বীকৃতি' and admitted that though she wrote about different aspects of our liberation war including 'killing spot', she did not mention anything about Dalim Hotel or the alleged incidents of charge 11 regarding her cousin Jashim. (Part-II, page 559, Line 24-27; Page-560, Line 10-11). She also admitted that she never filed any

complaint about the alleged incident of charge-11 or against the appellant (Part-II, Page-560, line 22-23). It is therefore clear that her allegations against the convict are subsequent embellishment. She is a tutored witness as she could only say the name of the convict and admitted that she could not say the name of any other members of Rajakars or Peace Committee (Part-II, Page-560, Line 19-22).

- (v) The Appellate Division did not at all consider that it is clear from the evidence of P.W.17 that Jashim has one living brother, Dr. Rajib Humayun, who is Professor of Dhaka University and the Investigation Officer (P.W.24) admitted that though he quizzed the said brother of Jashim during investigation he did not make him a P.W. (Part-II, Page-560, Line

3-4; Page-584, Line 13-16). It is important to note that victim Jashim's brother Dr. Rajib Humayun's refusal to testify in the case against the petitioner speaks a volume. If the convict was in any way involved with Dalim Hotel or killing of Jashim, then Dr. Rajib Humayun, who is a highly educated person and a teacher of Dhaka University, would have surely testified in this case to find justice for his deceased brother. This Hon'ble Court should have drawn adverse inference against the prosecution for non-examination of victim Jashim's brother Dr. Rajib Humayun who was competent and most relevant witness for this charge.

- (vi) The Appellate Division erroneously relied upon the hearsay testimony of P.W.1 holding that he was the Appellant's school mate. The Appellate Division failed to

consider that it was apparently a false claim from P.W.1 and this could be the sole reason to disbelieve him. He did not say a single sentence about killing of Jashim at Dalim Hotel in his earlier statement made to the IO indicating that these are subsequent embellishment of P.W.1 and hence cannot be relied upon. His testimony is contradictory with that of P.W.2. Though P.W.1 claimed that P.W.2 was the only person used to know Jashim from before, P.W.2's testimony shows that it was not correct.

(vii) Appellate Division also erroneously relied upon the testimony of P.W.2 for his claim to have seen Jashim at Dalim Hotel. But the Appellate Division failed to consider that P.W.2 did not say this to IO during investigation. Moreover he admitted not knowing Jashim from before. The Appellate

Division should have considered that P.W.2's identification of the Appellant is not believable. He claimed that Advocate Shafiul Alam identified the convict-Appellant to him when Jashim was allegedly thrown to his room. (Part-II, Page-509, Line 20-21). But according to P.W.17 Advocate Shafiul Alam was blind-folded at the time when Jashim was allegedly thrown to his room and he could open his eyes after some time. (Part-II, Page 559, Line 6-9). It is therefore apparent that Advocate Shafiul Alam was not in a position to see as to who had thrown Jashim into the room and hence it was not at all possible for him to identify the Appellant to P.W.2. This proves that P.W.2's identification of the Appellant is concocted and not at all believable. The Appellate Division should have also

considered that P.W.2's claim that Advocate Shafiul Alam identified the Convict/Appellant to him as 'Bangalee Khan' is a bogus story since Advocate Shafiul Alam in his book 'সেই সে সময় আনন্দে বেদনায়' (Material Exhibit No.VI Series) did not bring any allegation against the Appellant. (Part-II, Page-769-775).

(viii) Appellate Division also erroneously relied upon the hearsay testimony of P.W.3 as the Hon'ble court failed to consider that he did not say anything about killing of Jashim to the IO during investigation. There was no justification for him to identify the Appellant in 1971.

(ix) Appellate Division also erroneously relied upon the testimony of P.W.16 and held that the defence 'could not elicit anything which could discredit (his) testimony in any manner'. It is submitted that the

Hon'ble court failed to consider that if the Appellant was really commander of AB camp in Dalim Hotel and center of all the atrocities alleged to have been committed therein as alleged by the prosecution, it is not practicable for him to carry victim Jashim to his room as alleged by W.P.16 (Part-II, Page-554, Line 32-33) and this is also not supported by the book written by Advocate Shafiul Alam (Prosecution Material Exhibit - VI, Part-II, Page 769-775). It is submitted that the Appellate Division should have considered the material inconsistencies in the statements of P.W.16. It is admitted that Eid-ul-Fiter was observed on 21st November 1971 and P.W.16 claimed to be detained in Dalim hotel after 2 days of Eid-Ul-Fiter i.e. on 23rd November 1971 (Part-II, Page-554, Line 14-17). P.W.16 claimed to have seen Jashim

being killed on the next day i.e. on 24th November 1971 (Page 554, last two lines) though it is the prosecution case that Jashim was killed on 28th November 1971.

(x) The Appellate Division also erroneously relied upon the testimony of P.Ws.18, 19 & 20 for charge-11 since the Hon'ble Court failed to consider that they did not say anything about Charge-11. At page 179 of the Appeal Judgment the Appellate Division incorrectly held that P.Ws '18, 19 and 20 heard from Swapan the story of torture of Jashim'.

(xi) The Appellate Division erroneously relied upon the book written by Advocate Shafiul Alam as Material Exhibit No.VI-Series 'সেই সে সময় আনন্দে বেদনায়' chapter 'দুঃস্বপ্নের নরকে : হোটেল ডালিম' to support finding of guilt in Charge-II. The Hon'ble Court failed to consider that the writer Advocate Shafiul Alam did not

claim in the said book that the Appellant was in any way involved with any of the alleged atrocities in Dalim Hotel. The Appellate Division should have considered that if this book is believed then there is no case against the Appellant and hence he should have been acquitted.

- (xii) The Appellate Division relied upon the Defence Material Exhibit No.B, the research oriented book 'প্রামাণ্য দলিল মুক্তিযুদ্ধে চট্টগ্রাম' to find that there were many torture camps in Chittagong in 1971. This book was written by renowned freedom fighter Gazi Saleh Uddin, who is also teacher of Chittagong University and member of Ghatok Dalal Nirmul Committee. But the Hon'ble Court failed to consider that in the said book at Page 201 under heading 'সন্দ্বীপ পটুজোলা, বধ্যভূমি ও শহীদদের তালিকা' it is written that the date and place of Jashim's death

was not known (Part-III, Page-988). As such it is evident on record that the prosecution's claim of Jashim's death at Dalim Hotel is not supported by this research oriented book authenticity of which is confirmed by the Appellate Division.

(xiii) All the P.Ws of Charge-11 referred to 'Bhatwala Swapan' as the source of information about the death of Jashim. He is the central character of Charge-11 and therefore is the most relevant witness for this charge. But IO (P.W.-24) admitted that he could not find whereabouts of 'Bhatwala Swapan', even from alleged victims of Dalim Hotel. (Part-II, Page 583, Line 8-9). The Appellate Division failed to consider the inherent weakness in the evidence of Charge-II as none of the P.Ws. of this charge could say

anything about Swapam and they never tried to find about this person after the liberation war. This goes against the reasonable human behavior and only indicates that none of them had any personal knowledge about this person. P.W.17 who is the main witness of charge-11 also admitted that she never tried to find whereabouts of Swapam (Part-II Page-560, Line 6-7). As such this Hon'ble Court should have drawn adverse inference against the prosecution for non-examination of competent witnesses and hence the conviction and sentence in charge-11 is liable to be set aside. It is held that "Eye witness not examined could be presumed to have not supported the prosecution Case" - 1964 P Cr LJ Page-96).

We have given our anxious thought to the points canvassed by the learned counsel. In fact the points

argued by the learned counsel are reiteration of the points in verbatim raised at the time of hearing of the appeal. This court upon a thorough assessment of the evidence of both the prosecution as well as defence held that 'the accused was a powerful central leader of Islami Chatra Sangha and leader of Al-Badar force which formed the killing squad. He is also a central leader of Jamat-e-Islami, one of the powerful political party in the country which maintains a cadre force'.

This court noticed the uncontroverted statements of P.Ws.2, 3, 16, 17 and 20 regarding the role of the petitioner during the relevant time and held that these uncontroverted evidence sufficiently proved beyond doubt that the accused raised Al-Badar force in Chittagong; that the Dalim Hotel was taken control by the Al-Badar force and used as torture center of Al-Badar force; that the accused played the role of commander of the force; that all decisions, planning, strategy, raid, arrest, mode of torture and

concealment of dead bodies after the killing were taken at Dalim Hotel by the accused alone; that Jashim was a young freedom fighter, who was captured and detained in Dalim Hotel; that Jashim along with 4/5 other innocent persons was tortured to death on the roof top of Dalim Hotel and his dead body was thrown into Karnafuli river; that P.Ws. 2 and 16 saw the accused at the time of throwing the paralyzed body of Jashim into their room; that P.Ws. 1, 3, 18, 19, and 20 heard from Swapan about the story of torture of Jashim and 4/5 others and concealment of their dead bodies; that P.W.17 corroborated them in material particulars; that there are incriminating uncontroverted evidence on record pointing fingers at Mir Kashem Ali that he was not only the commander but also theoretical leader of Al-Badar force, which perpetrated all atrocities, crimes against humanity in Dalim Hotel and that the killing of Jashim Uddin along with 4/5 others was perpetrated on direct participation of the petitioner.

Learned counsel has not made any submission regarding the findings arrived at on the question of uncontroverted evidence of the above witnesses. In the absence of denial of positive statements made on oath by the witnesses, the court was left with no option but to accept them as admitted facts by the defence. This court meticulously mentioned the uncontroverted incriminating statements of P.Ws. 2, 3, 16, 17 and 20 in the impugned judgment. These uncontroverted statements proved beyond doubt about the petitioner's direct control of the force, the atrocities committed by this force at Dalim Hotel and his direct participation in the killing of Jashim.

As regards the framing charge of abetment of the offence by the prosecution against the petitioner, this court observed that at the time of framing charge his attention was also drawn to section 4(2) of the Act of 1973 and therefore he could not now take any exception. This court observed that there was error on the part of the prosecution

to frame charge against him for abetment of the offence but this error will not materially affect in finding him guilty as principal offender if the evidence disclose that the petitioner has directly participated in the killing, inasmuch as, the prosecution witnesses deposed in his presence; that his counsel has cross-examined them thoroughly and that he had full knowledge that the witnesses deposed against him as a principal offender. He was not taken by surprise and that's too, he had not taken any exception of the statements made by the witnesses. This court observed that the petitioner directly participated in the torture; that there are uncontroverted evidence regarding his role in respect of this charge; that he acted in the capacity as superior commander and had command position and control over Al-Badar force and that he had directly participated in the killing of Jashim. There is, therefore, no doubt that he was the principal offender. It further held that the question of

preventing crime by him does not arise in view of the fact that there are direct evidence that he himself has participated in the killing of the victim.

This court further held that the court's prime concern was to see as to whether the accused had a fair trial; whether he knew what he was being tried for; whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. If an accused is defended by his counsel, it may, in a given case, be proper to conclude that 'the accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted no further particulars, provided it is always borne in mind that no serious defect in the mode of conducting the trial can be justified.' The Court is required to see whether there was any failure of justice. We were satisfied on sifting the evidence particularly the cross-examination of the witnesses and the statements

of the defence witnesses that there had occasioned no failure of justice in finding the petitioner guilty as the principal offender.

This court also disbelieved the plea of alibi taken by the accused and accepted the views taken by the tribunal in this regard. This court held that in the issue of daily Azadi dated 04.12.1971, there were reports that the petitioner being in charge of Islami Chatra Sangha, Chittagong Chapter and being local commander of Al-Badar Bahini was in Chittagong during the relevant time. On the question of culpability of the petitioner, this court observed that the butchers suddenly attacked the innocent citizens, university teachers and intellectuals in the dead of night - the night following 25th March, 1971. The brutality and butchery were so serious that shocked the world's conscience. After a bit of recovery from the trauma of brutality, the people of this country resisted the occupation army and started fighting to liberate the country. It is at this stage that the local

collaborators sided with the butchers and formed paramilitary forces. The petitioner was one of the organizers of Al-Badar force at Chittagong, and this force was raised with the aim and object of killing the pro-liberation forces and minority community. The force was known as 'killing squad.' The accused not only organized the force at Chittagong but also he had commanded the force and directly participated in the perpetration of most barbarous acts unknown to human civilization. He does not deserve any leniency on the question of sentence on consideration of the nature and gravity of the offence. It was observed that the tribunal awarded the sentence of death in respect of charge No.11, which according to us, was 'proportionate to the gravity of the crime.'

We have already held that a review is available if there is error apparent on the face of the record. There cannot be a ground for review if of two or more views are argued on a point, it cannot be a ground

for review. A review is not a rehearing of the matter afresh. It is only a clerical mistake or mistake apparent on the face of the record that can be corrected but does not include the correction of any erroneous view of law taken by the court. The basic philosophy inherent in it is the universal acceptance of human fallibility but the points raised by the learned counsel are beyond the principles on which a review can be allowed. This court has given guidelines in Abdul Quader Mullah's case in which cases a court can interfere with a matter in respect of offences of this nature. We cannot take any different view.

On the question of sentence this court held that there was no mitigating ground to commute the sentence of death in respect of the charge. This court affirmed the findings of the tribunal observing that the tribunal rightly held that 'accused Mir Quashem Ali has incurred criminal liability which may legitimately be taken into account as an aggravating

factor for the purpose of determination in the degree of culpability and awarding sentence."

As regards the submission on the question of the commutation of the sentence on taking into consideration the petitioner's contribution towards the economic development of the country by establishing business conglomerate and employing thousands of citizens in his business establishments which is not a legal ground to commute the sentence. It is within the jurisdiction of the executive. The court is only concerned with the culpability of the petitioner and the law governing on the sentencing principles. Crimes against humanity are taken as serious types of offence. The word 'humanity' signifies humanness-mankind collectively. The term 'crimes against humanity' has come to mean anything atrocious committed on a large scale. These crimes are committed against civilian population during war. These offences by nature are heinous. If any person commits crimes against humanity and if the court

finds that the offender directly participated in such crimes the court is left with little discretion in awarding the minimum sentence particularly in respect of serious crimes. This court has considered this aspect of the matter and on consideration of the culpability of the petitioner disagreed with the opinion of the tribunal regarding the petitioner's culpability and found him guilty as the principal offender. Therefore, there is no scope to commute the sentence.

This court has already settled the question of contradictory statements of a witness and held that the contradiction as available in general law will not be applicable in trials under the Act of 1973. Contradictions can be taken only to the subject matter of the statement of a witness made in his examination-in-chief only and not otherwise.

As observed above, the tribunal found the petitioner guilty in respect of charge Nos.2, 3, 4, 6, 7, 9, 10, 11, 12 and 14 and sentenced him

accordingly. This court maintained the conviction and sentence of the petitioner in respect of charge Nos.2, 3, 7, 9, 10, 11 and 14, but through oversight it has not mentioned in the operating part of the judgment in respect of his conviction in respect of charge No.14, although in the body of the judgment this court found that the prosecution has been able to prove the said charge and that the tribunal was justified in finding him guilty. Inadvertently this court did not make any order in the operating part in this regard. The operating part of judgment is accordingly modified.

This petition is dismissed with the above correction.

CJ.

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The 30th August, 2016
Md. Mahbub Hossain.

Approved For Reporting.