

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Obaidul Hassan, *Chief Justice*
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Md. Abu Zafor Siddique
Mr. Justice Jahangir Hossain

CRIMINAL APPEAL NO.72 OF 2019

(From the judgment and order dated 11.10.2017 passed by the High Court Division in Death Reference No.38 of 2011 with Criminal Appeal No.3787 of 2011 and Jail Appeal No.147 of 2011).

Chaitonya Sarkar**Appellant**

-Versus-

The State and another**Respondents**

For the appellant : Mr. Shaikh Azmol Hayat, Advocate with Mr. Hamidur Rahman, Advocate, instructed by Mr. Md. Nurul Islam Chowdhury, Advocate-on-Record.

For the respondent No.1 : Mr. Md. Sarwar Hossain, Deputy Attorney General with Mr. Mohammad Saiful Alam, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record.

For the respondent No.2 : Not represented.

Date of hearing and judgment : The 03rd day of January, 2024

JUDGMENT

Obaidul Hassan, C.J. This Criminal Appeal by leave granting order dated 15.07.2019 in Civil Petition for Leave to Appeal No.148 of 2018 is directed against the judgment and order of conviction and sentence passed by the High Court Division on 11.10.2017 in Death Reference No.38 of 2011 heard analogously with Criminal Appeal No.3787 of 2011 and Jail Appeal No.147 of 2011 arising out of Motlab South Police Station Case No.03 dated 02.10.2007 corresponding to

G.R. No.90 of 2007 and Nari-O-Shishu Nirjatan Daman Case No.01 of 2008 dismissing the appeal converting the conviction of the appellant awarded under Section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (for short Nari-O-Shishu Ain) to one under Section 302 of the Penal Code, 1860 and thereby commuting the sentence of the appellant from death penalty to imprisonment for life.

The prosecution case, in short, is that one Kartick Baidya lodged an *ejahar* with the Motlob South Police Station being Motlob South Police Station Case No.03 dated 02.10.2007 under Sections 11(Ka)/30 of Nari-O-Shishu Ain alleging, *inter alia*, that Sanchita Rani, daughter of the informant was married to the accused Chaitonya Sarker. After marriage they were living together as husband and wife, but from the very beginning of their conjugal life the accused-appellant had been demanding dowry amounting Tk.1,00,000.00 from the victim Sanchita Rani and used to assault her. On 02.10.2017 at about 09:00 a.m. one Kanailal, the father of the accused told the informant over mobile phone that due to physical illness the victim was got admitted into the Motlab Hospital. Thereafter, the informant along with his wife came to the house of the accused-appellant on the same day at 1.00 p.m. and found the dead body of the victim therein. On query to the inmates of the house they told that the victim committed suicide.

The Investigating Officer, after completing investigation, submitted Charge Sheet being No.88 dated 11.11.2007 under Section 11(Ka)/30 of Nari-O-Shishu Ain against the convict-appellant and others. The case was eventually transferred to the Nari-O-Shishu Nirjatan Daman Tribunal No.2, Chandpur (for short Tribunal) for trial and charge was framed against the convict-appellant and others under the aforesaid provisions of law. To substantiate the case, the prosecution examined as many as seven witnesses. Upon closure of the evidence of the prosecution witnesses, the convict-appellant along with others were examined under Section 342 of the Code of Criminal Procedure to which they pleaded innocence. They informed the Court that they would not adduce any evidence in support of their plea.

The defence case, as it reveals from the trend of cross-examination is that the convict-appellant along with others were innocent and the victim committed suicide, but they had been falsely implicated in this case.

Tribunal after considering the evidences and materials on record vide judgment and order dated 19.06.2011 found the convict-appellant guilty and sentenced him to death penalty under Section 11(Ka) of Nari-O-Shishu Ain and acquitted the rest of the accused persons. Death sentence proceeding has been submitted to the High Court Division by way of Reference by the Tribunal and the

Reference has been noted as Death Reference No.38 of 2011. The convict-appellant also preferred Criminal Appeal No.3787 of 2011 and Jail Appeal No.147 of 2011 before the High Court Division.

The High Court Division vide judgment and order of conviction and sentence dated 11.10.2017 rejected the Death Reference and dismissed the Criminal Appeal and Jail Appeal. However, the High Court Division converted the conviction of the appellant from Section 11(Kha) of Nari-O-Shishu Ain to one under Section 302 of the Penal Code, 1860 and the death sentence was commuted to imprisonment for life.

Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence dated 11.10.2017 passed by the High Court Division, the convict-appellant filed the Criminal Petition for Leave to Appeal No.148 of 2018 before this Division and leave was granted on 15.07.2019 and hence the instant Criminal Appeal.

Mr. Shaikh Azmol Hayat with Mr. Hamidur Rahman, learned Advocates appearing for the convict-appellant took us through the First Information Report(FIR), the Inquest Report, the Post Mortem Report, the Charge Sheet, testimonies of the witnesses, the judgments and orders passed by the Tribunal and the High Court Division, connected materials on record submits that the High Court Division to consider the judgment and order of conviction and sentence is bad

in law as well as in facts and, as such, the impugned judgment and order of conviction and sentence is liable to be set aside. The learned Counsel for the appellant contend next that the High Court Division came to a finding that demanding of dowry resulting the murder of the victim is not proved and, thus, set aside the sentence under Section 11(Ka) of Nari-O-Shishu Ain and under the said circumstances, the High Court Division should have sent back the record for fresh trial to the appropriate Court having jurisdiction upon framing charge under proper legal provisions, but the High Court Division wrongly and illegally convicted the appellant under Section 302 of the Penal Code and sentenced him imprisonment for life. The learned Counsel argue further that there is no eye witness of the occurrence and the alleged conviction and sentence is based on circumstantial evidence along with post mortem report which cannot be treated as conclusive evidence to prove the guilt of the appellant, but the High Court Division failed to consider that the judgment and order of conviction and sentence is based on surmise and conjecture and not on legal evidence and, as such, the impugned judgment and order of conviction and sentence is liable to be scraped.

In opposition Mr. Md. Sarwar Hossain, learned Deputy Attorney General with Mr. Mohammad Saiful Alam, Assistant Attorney General appearing for the respondent No.1 put forth their submissions supporting the judgment and order of conviction and

sentence passed by the High Court Division and the Tribunal and prayed for dismissal of the appeal.

Now, to ascertain whether the prosecution has been able to prove the charge against the convict-appellant let us examine and analyze the depositions of the witnesses adduced by the prosecution.

P.W.1, Kartik Baidya, the informant and father of the victim Sanchita stated in his deposition that the victim was married to the accused-appellant three months earlier of the date of occurrence. At the time of marriage ceremony he gifted gold ornaments weighing five *bhories* to the victim and gave cash money amounting Tk.55,000.00 to the accused and also spent Tk.2.5-3.00 lac in the marriage. On 02.10.2007 in the morning the father of the accused-appellant told the informant that his daughter was admitted to hospital due to serious illness. Soon after the informant started for the house of the accused, but on the way he came to know that the victim was killed by the accused persons. The accused persons had been demanding dowry amounting Tk.1,00,000.00 from the victim on several occasions, but on her failure to pay the dowry the accused persons killed the victim. On arrival of the informant at the house of the accused-appellant at about 2:00 p.m. he found the dead body of the victim at the door of the house. Subsequently, the police came to the spot and preparing inquest report, took his signature on the report and took the dead body to the police station. The informant

filed *ejahar* with the police station. This witness identified the FIR and his signature thereon as Exhibits-1 and 1/1 respectively and also identified the inquest report and his signature thereon as Exhibits-2 and 2/1 respectively.

During cross-examination he stated that within three months of marriage the victim came to his house twice to visit them. He did not assault the victim when she came to his house last time. He knew Kanailal the son of his neighbour Hiralal. He did not state in the FIR about getting the victim with Kanai at 9 O'clock in the night. He denied the defence suggestion to the effect that everyone knew about the love affair of the victim with Kanailal. He further denied the suggestion that the accused-appellant declined to take the victim with him in her in-law's house last time the victim visited the house of the informant. He further denied the suggestion that the victim solemnized her marriage with Kanailal at Kalibari. He further denied the defence suggestion that the victim committed suicide and the accused was implicated in the case falsely. This witness stated in his cross-examination that he found the tongue of the victim coming out of her mouth.

P.W.2, Kanika Rani, the mother of the victim stated in his deposition that the accused persons killed his daughter for dowry amounting Tk.1,00000.00. The father-in-law of the victim informed them that the victim was sent to the hospital for physical illness.

Subsequently, on going to the house of the accused-appellant found the dead body of the victim. The accused killed the victim by strangulation with *saree*.

During cross-examination she stated that accused Chaitanya and the victim went to visit their house 4/5 days before the occurrence. She further stated that the victim had no relation with Kanailal, the son of Hiralal. She denied the defence-suggestion that her daughter had illicit relation with Kanailal and she saw the victim with Kanailal and informed the said fact to her husband, who assaulted the victim for the said reason. She further denied the suggestion that the victim committed suicide and the accused was implicated in the case falsely.

P.W.3, Md. Monir Hossain stated in his deposition that the police made inquest of the dead body and prepared inquest report and he put his signature thereon. This witness identified his signature in the inquest report as Exhibit-2/2. The police seized some *alamats* in his presence and prepared seizure list and he put his signature thereon. This witness identified the seizure list and his signature therein as Exhibits-3 and 3/1 respectively.

During cross-examination he stated that he did not read the seizure list and post mortem report before putting his signatures therein.

P.W.4, Abdul Matin Farazi deposed that he put his signatures in the seizure list and the inquest report. This witness identified his signature in the inquest report and the seizure list as Exhibits-2/3 and 3/2 respectively.

During cross-examination he stated that he did not know anything about the occurrence.

P.W.5, Dr. Azharul Islam, stated in his deposition that on 03.10.2007 while he was posted as Medical Officer at Chandpur Sadar Hospital held autopsy upon the cadaver of victim Sanchita Rani and gave the following opinion:

“Death in my opinion was due to asphyxia, shock and internal hemorrhage resulting from strangulation which was ante mortem and homicidal in nature.”

This witness identified the post mortem report and his signature therein as Exhibits-4 and 4/1 respectively.

During cross-examination he stated that internal hemorrhage may cause without injury. The injuries were caused 24-36 hours back. He denied the defense-suggestion that he prepared the post mortem report being influenced by the prosecution.

P.W.6, Doyal Baidya stated in his deposition that on 02.10.2007 at about 09:00 a.m. hearing about the illness of the victim went to the house of the accused-appellant and found the dead body inside. He came to know that the accused persons murdered the victim for the demand of dowry. He found the victim's *saree* wrapped around her

throat. The accused persons fled away leaving the dead body unattended.

During cross-examination he stated that the father of the victim first knew about illness of victim over phone. He stated further that the victim had no love affair with Kanailal. He denied the defense-suggestion that he did not go to the place of occurrence and the victim had love affair with Kanailal. He further denied the suggestion that he deposed falsely.

P.W.7, Md. Shajahan Miah, Sub-Inspector of Police and the Investigating Officer stated in his deposition that during investigation he visited the place of occurrence and recorded the statements of witnesses under Section 161 of the Code of Criminal Procedure and prepared the sketch map and index and also prepared the inquest report of the cadaver of victim. He sent the dead body of the victim to the morgue for autopsy. He identified the sketch map, index and his signatures therein as Exhibits-5, 5/1, 6, 6/1 respectively. He also identified his signature in the inquest report as Exhibits-2/4. He also seized some *alamats* including a *saree* and prepared the seizure list. This witness identified the said seizure list and his signature therein as Exhibits-7, 7/1 respectively. He identified the *alamats* as material Exhibits I-III. After investigation he submitted charge sheet against the accused persons.

During cross-examination he stated that he untied the knot of *saree* on the throat of the dead body of victim and found no sign of hanging. He denied the defense-suggestion that it was a case of suicide or that he submitted a false report implicating the accused persons in this case.

These are the witnesses adduced by the prosecution. Out of seven witnesses P.W.1 is the informant and father of the victim Sanchita Rani, P.W.2 is the mother of the victim, P.Ws.3 & 4 are the witnesses of inquest report, P.W.5 is the doctor performing autopsy of the dead body while P.W.7 is the Investigating Officer and P.W.6 is the local witness.

It is undisputed that the dead body of the victim Sanchita Rani was found in the house of the convict-appellant. P.W.1 stated in his deposition that he found the dead body of the victim in the house of the convict-appellant. P.W.1 identified his signature in the inquest report as Exhibit-2/1. P.W.2 stated in her deposition that he saw the dead body of the victim in the house of the convict-appellant. P.W.3 is one of the witnesses to the inquest report and he identified his signature in the inquest report as Exhibit-2/2. P.W.4 also identified his signature in the inquest report as Exhibit-2/3. P.W.6 deposed that he saw the victim's dead body in the house of the convict-appellant. P.W.7 is the Investigating Officer, who prepared the inquest report of

the victim and he identified the inquest report and his signature therein as Exhibits-2 and 2/4 respectively.

Now let us examine the post mortem report of the dead body of victim. P.W.5 is the Doctor, who conducted autopsy upon the cadaver of the victim and he identified the post mortem report and his signature therein as Exhibits-4 and 4/1 respectively. P.W.5 gave the following opinion in the post mortem report:

“Death in my opinion was due to asphyxia, shock and internal hemorrhage resulting from strangulation which was ante mortem and homicidal in nature.”

At this juncture, it is congenial to know the difference between a death due to hanging and strangulation. The differences between hanging and strangulation is well described in world-acclaimed book titled ‘Modi’s Medical Jurisprudence and Toxicology’, 23rd edition at page 583-584 which is extracted under-

“The differences between hanging and strangulation are given below in tabulated form:

Hanging		Strangulation	
1	Mostly suicidal.	1	Mostly homicidal.
2	Face—Usually pale and petechiae rare.	2	Face—Congested, livid and marked with petechiae.
3	Saliva— Dribbling out of the mouth down on the chin and chest.	3	Saliva— No such dribbling.
4	Neck—Stretched and	4	Neck—Not so.

- elongated in fresh bodies.
- 5 External signs of asphyxia, usually not well marked.
- 6 Bleeding from the nose, mouth and ears very rare.
7. Ligature mark — Oblique, non-continuous placed up in the neck between the chin and the larynx, the base of the groove or furrow hard, yellow and parchment-like.
- 8 Abrasions and ecchymoses round about the edges of the of the ligature mark, rare.
- 9 Subcutaneous tissues under the mark— White, hard and glistening.
- 10 Injury to the muscles of the neck— Rare.
- 11 Carotid arteries,
- 5 External signs of asphyxia, very well marked (minimal if death due to vasovagal and carotid sinus effect).
- 6 Bleeding from the nose and ears may be found.
- 7 Ligature mark — Horizontal or transverse continuous, round the neck, low down in the neck below the thyroid, the base of the groove or furrow being soft and reddish.
- 8 Abrasions and ecchymoses round about the edges of the ligature mark, common.
- 9 Subcutaneous tissues under the mark— Ecchymosed.
- 10 Injury to the muscles of the neck — Common.
- 11 Carotid arteries,

internal coats ruptured in violent cases of a long drop.	internal coats ordinarily ruptured.
12 Fracture of the larynx and trachea—Very rare and that too in judicial hanging.	12 Fracture of the larynx and trachea — Often found also hyoid bone.
13 Fracture-dislocation of the cervical vertebrae — Common in judicial hanging.	13 Fracture-dislocation of the cervical vertebrae — Rare.
14 Scratches, abrasions and bruises on the face, neck and other parts of the body— Usually not present.	14 Scratches, abrasions fingernail marks and bruises on the face, neck and other parts of the body — Usually present.
15 No evidence of sexual assault.	15 Sometimes evidence of sexual assault.
16 Emphysematous bullae on the surface of the lungs — Not present.	16 Emphysematous bullae on the surface of the lungs — May be present.

In view of the above it is transparent that in case of hanging ligature mark is seen oblique, non-continuous placed up in the neck between the chin and the larynx while in case of strangulation the ligature mark is seen horizontal or transverse. In the inquest report (Exhibit-2) P.W.7, S.I. Md. Shahjahan Mia stated that while untying

the knot of *saree* he found a horizontal ligature mark on the neck of the victim from which it is clear that the death was caused by strangulation.

The inquest report states that a long blood stain was found on the upper part of the left thigh of the victim which bears the testimony of homicidal strangulation. Since in homicidal strangulation bleeding from the nose and ears may be found.

Again, in case of strangulation the tongue of the victim usually comes out of the mouth, but P.W.1 stated in his cross-examination that he saw the tongue of the victim out of her mouth which is a sign of homicidal strangulation. Furthermore, in hanging saliva is found dribbling out of the mouth of the victim down on the chin and chest while in case of strangulation no saliva was found dribbling. In the case in hand, the inquest report did not mention about the dribbling of saliva out of the mouth of victim for which it can be termed as the case of homicidal death by strangulation.

In the Post Mortem Report the following injuries were found:

“One ecchymosis over the mid abdomen size 6”x 4”. One swelling over the both parietal region in the head size 3”x2”. One almost circular ligature mark high up of the neck.”

Such injuries clearly indicate the case of strangulation inasmuch as in case of strangulation scratches, abrasions fingernail marks and bruises on the face, neck and other parts of the body remain usually present.

In view of the discussion made above, we are led to the conclusion that the victim was killed by strangulation by the convict-appellant. It is evident from the record of the case that on the relevant date and time of occurrence the victim was under the custody of her husband, the convict-appellant and as such he cannot escape his liability of killing the victim.

It is evident from the record that the P.Ws.1-7 corroborated each other supporting the prosecution case. All P.Ws. had been cross-examined by the defence elaborately but nothing could be elicited to shake their credibility in any manner whatsoever. The Tribunal on correct appreciation of the evidences on record convicted the convict-appellant and the High Court Division also lawfully upheld the conviction of the appellant and as such we do not find any perversion in the impugned judgment and order of the High Court Division.

However, on going through the impugned judgment and order of the High Court Division it appears that the High Court Division altered the conviction of the convict-appellant one under Section 11(Ka) of Nari-O-Shishu Ain to the one under Section 302 of the Penal Code on the observation that the prosecution had not been able to prove the allegation against the convict-appellant of demanding dowry from the victim. We endorse the aforesaid observation of the High Court Division as well and as such the said observation does

call for interference by this Division since there is no satisfactory evidence available on the record against the convict-appellant about demanding of dowry from the victim.

Now a pertinent question arises whether the High Court Division has the jurisdiction to convert the conviction of an accused under Section 11(Ka) of Nari-O-Shishu Ain to one under Section 302 of the Penal Code. The said issue has already been fairly settled by this Division in the case of *State vs. Nurul Amin Baitha* reported in 75 DLR(AD)187. The relevant portion of the case is extracted below:

“17. In order to convict a person under minor offence, though charged under major offence, the ingredients constituting the offence under the minor offence should be common as that of the ingredients constituting major offence and to convict him, some of the ingredients of the major offence could be absent. Since the offence under Sections 11(Ka)/30 of the Ain is a graver offence wherein the charge as to killing of the wife has been framed along with charge of demanding dowry than that of the case under Section 302/34 where the charge of killing of any person is usually be brought against accused, we are of the view that the alternation of charge from 11(Ka) of the Ain to Section 302 of the Penal Code will not cause prejudice to the accused.

18. The interest of justice should be the ultimate goal in the use of this power. In *Thakur Shah V. Emperor* AIR 1943 PC 192; the Privy Council said, “The alteration or addition is always, of course, subject to the limitation that

no course should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made or is not given full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred." The purpose behind providing Courts with the right to alter charges is to avoid a miscarriage of justice.

19. Joint trial of different offences under different enactments does not vitiate proceedings in the absence of prejudice to the accused, particularly when the special enactment authorizes the Court to try different offences jointly where a charge is framed for one offence, but offence committed is found to be some other than the one charged, provided, the same facts can sustain a charge for the latter offence, the accused can be convicted for such an offence. Even if the facts proved are slightly different from those alleged in the charge, a conviction based on the facts proved would be legal.

20. The Appellate Court's jurisdiction is co-extensive with that of the trial Court in the matter of assessment, appraisal and appreciation of the evidence and also to determine the disputed issues.

21. The High Court Division has a wide appellate jurisdiction over all Courts and Tribunals in Bangladesh inasmuch as it may, in its discretion, from any judgment and order of conviction and sentence passed by any Court of Sessions and Tribunal. When the Tribunal is empowered to try a case as Tribunal as well as Court of Sessions, we are of the view that it could not be without jurisdiction in view of the facts and circumstances of the

particular case to conform the judgment and order of conviction under Section 11(Ka) converting or altering charge to one under Section 302 of the Penal Code. The technicalities must not be allowed to stand in the way of importing justice. It is observed that depending on the facts and circumstances of a particular case in the larger interest of justice the Court may overlook a mere irregularity or a trivial breach in the observance of any procedural law for doing real and substantial justice to the parties and the Court may pass any appropriate order which will serve the interest of justice best. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. It is intended to achieve the ends of justice and normally, not to shut the doors of justice for the parties at the very threshold.

22. Accordingly, we find substances in the submission of the learned Attorney General that the finding of this Division that High Court Division is not authorized to convert the conviction under Sections 11(Ka)/30 of the Ain into one under Sections 302/34 of the Penal Code is not correct view, hence such observation is liable to be reviewed.

23. Our final conclusion is that the High Court Division as an Appellate Court has the jurisdiction to convert the conviction under Section 11(Ka)/30 of the Ain to one under Sections 302/34 of the Penal Code as appeal is the continuation of an original case. An Appellate Court has the same power as that of the trial Court i.e. the Tribunal and therefore, as an Appellate Court the High Court

Division in the present case is competent to convert the conviction to secure the ends of justice. Undoubtedly such an Act of the High Court Division shall in no way prejudice the accused and State; otherwise order of remand shall entail unnecessary time, money and energy due to fruitless or useless prosecution and defence. Similarly, the Tribunal which is created under the Ain shall be deemed to be the Court of Sessions of original jurisdiction and, is entitled to alter/amend the charge framed under Section 11(Ka) of the Ain to one under Section 302 of the Penal Code and to dispose of the case finally in accordance with law if the accused is not otherwise prejudiced."

(underlines supplied by us)

The settled proposition of law as evident from the above is that the High Court Division as an appellate Court is entitled to alter or amend the charge framed against the accused under Section 11(Ka) of Nari-O-Shishu Ain to one under Section 302 of the Penal Code and to dispose of the case finally in accordance with law since the appellate Court has the same power as that of the trial Court and the case is not required to be sent to the Court of competent jurisdiction for holding trial afresh. In the case in hand, although the High Court Division upheld the conviction of the convict-appellant passed by the Tribunal but altered the sentence under 11(Ka) of Nari-O-Shishu Ain to one under Section 302 of the Penal Code, 1860 and in doing so the High Court Division did not commit any illegality. Since the offence under

Section 11(Ka) of Nari-O-Shishu Ain wherein the charge as to killing of the wife along with charge of demanding dowry framed against the convict-appellant is a graver offence than that of the charge under Section 302 of the Penal Code for committing murder of the victim and, as such, we are of the view that the alteration of charge against the convict-appellant from Section 11(Ka) of Nari-O-Shishu Ain to Section 302 of the Penal Code will not cause prejudice to him.

In the result, the instant Criminal Appeal preferred by the convict-appellant is **dismissed** without any order as to costs.

The conviction and sentence of life imprisonment awarded to the appellant by the High Court Division is maintained. However, the convict-appellant will get the benefit of Section 35A of the Code of Criminal Procedure in calculation of his sentence and other remissions as admissible under the Jail Code.

C.J.

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