In the Supreme Court of Bangladesh

High Court Division

(Criminal Appellate Jurisdictions)

Present:

Mr. Justice Jahangir Hossain

And

Mr. Justice Md. Jahangir Hossain

Death Reference No. 55 of 2010

The State

-Vs-

Bipul Chandra Ray

.....Condemned-Prisoner

with

Criminal Appeal No. 3264 of 2011

(Arising out of Jail Appeal No. 305 of 2010)

Sree Bipul Chandra Ray

-Vs-

The State

Mr. Abdullah Al-Mamun with

Mr. Mehadi Hasan [Milon], Advs.

.....for the convict-appellant

And

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

Mr. Md. Atiqul Haque [Selim] and

Mr. Md. Nizamul Haque Nizam, A.A.Gs

.....for the State

Heard on

13.08.2017, 20.08.2017, 04.10.2017, 08.10.2017, 09.10.2017, 10.10.2017

Judgment on

15.10.2017 and 16.10.2017

Jahangir Hossain, J

This Death Reference No. 55 of 2010 is the outcome of judgment and order of conviction and sentence dated 21.09.2010 referred to the High Court Division by the learned Additional Sessions Judge, Bogra for confirmation of death sentence to condemned prisoner Bipul Chandra Ray under section 374 of the Code of Criminal Procedure [briefly Cr.P.C].

Challenging the said judgment and order of conviction and sentence, condemned prisoner Bipul Chandra Roy filed a petition of appeal being numbered as Criminal Appeal No. 3264 of 2011 and also filed Jail Appeal No. 305 of 2010. Death Reference and both the Criminal Appeal and Jail Appeal have been heard together and are disposed of by this common judgment.

The prosecution case is briefly described as under:

The informant, full brother of the deceased, lodged an FIR against the condemned prisoner on 01.08.2001 alleging

inter alia that his sister Swapna Rani got married to condemned prisoner around 16[sixteen] years ago. Thereafter, the condemned prisoner used to humiliate his sister by several ways. On 01.08.2001 at about 08:00 am one Anando Chandra of Vimjani village informed him that his sister died. On getting such news he along with his nearest relatives went to the house of the condemned prisoner and found the dead body of his sister lying in a hut. Thereafter, the informant came to know from the locals that surrounding people found his sister dead in the jute field of one Manoranjan around hundred yards far from the house of condemned prisoner at about 11:00 pm on 31.07.2001. The informant also saw marks of violence in the neck, shoulder and nose of the victim. Having reached the place of occurrence they also found broken wrist buckles. He believed that his brother-in-law along with others killed his sister by strangulation.

Having received the FIR police started Sherpur Police Station Case No. 01 dated 01.08.2001 against condemned prisoner and 3/4 unknown persons under sections 302/34 of

the Penal Code and police after completion of investigation submitted police report against condemned prisoner and two others under the aforesaid sections.

During investigation of the case, the condemned prisoner made a confessional statement before the magistrate under section 164 of the Cr.P.C. The charge was framed and read over and also explained to the accused persons who pleaded not guilty and claimed to be innocent at the trial. The learned Additional Sessions Judge, Bogra after taking evidence, found the condemned prisoner guilty of the offence under section 302 of the Penal Code and sentenced him to death with a fine of Tk. 30,000/-[thirty thousand] while the two other accused persons were found not guilty and acquitted accordingly.

It appears from evidence on record that in this case the prosecution examined as many as 09[nine] witnesses.

Pw-01 Sree Pranesh Chandra Sarker is the informant of the case and brother of the deceased. Having supported the FIR history he testified that he along with his relatives went

to the house of the condemned prisoner after getting information that his sister died and found marks of violence in the neck, shoulder and nose of the victim lying in the hut of the condemned prisoner. Some broken wrist buckles of the victim and blood stains were found on the earth of the jute field and he came to know that his sister was killed by his brother-in-law. The FIR lodged by him has been marked as exhibit-01. In course of cross-examination defence suggested that the victim might have been killed because of her extra marital relationship with other.

Sree Sanjit Kumar Sarker, cousin of the deceased as pw.02 deposed that the occurrence took place on 31 July at 11:00 pm. On getting information he along with others reached the house of the condemned prisoner and saw marks of violence around the neck, shoulder and blood on nose. Locals said dead body was found in the jute field of Manoranjan. Instantly they came to know that victim was killed by her husband who was confined by the locals and subsequently he [witness] was told by police that the victim

was killed by her husband with the help of others and inquest report was prepared by police where he signed, marked as exhibit-02.

Pw-03 Md. Shafiqul testified that he recorded the confessional statement of the condemned prisoner on 02.08.2001, marked as exhibit-03 where he has given certificate that the confessional statement is voluntary and true and he put several signatures on it.

Sree Premchand Sarkar as Pw-04 testified that he is an uncle of the deceased. He rushed to the house of the condemned prisoner on 01.08.2001 at about 10:00/11:00 am and saw the dead body of the victim covering with shawl. He was told by locals present there that the victim was killed by her husband along with his cohorts by strangulation. At the time of occurrence the victim was pregnant of 06/07 months.

Pw-05 Bojon Kumar Sarkar is also a cousin of the victim. He rushed to the place of occurrence after getting information and saw the dead body of the victim. From the mouth of the locals he got to know that condemned prisoner

killed Swapna Rani when she was pregnant and he saw the marks of violence around the neck of the victim. He also signed the inquest report held by police.

Pw-06 Atul Chandra, who is an uncle of the victim, deposed that on getting news he along with his relatives went to the house of condemned prisoner and saw the condemned prisoner sitting beside the dead body. On query he [condemned prisoner] disclosed that he along with his friends killed the victim and police took him to the police station along with dead body after arrest.

Pw-07 Kallayni, sister-in-law of the deceased and wife of the informant pw-01, deposed that they rushed to the house of the condemned prisoner who admitted that he along with his friends killed Swapna Rani and they also found marks of violence around the neck of the dead body.

Pw-08 Md. Monjurul Hoque Bhuiyan, Sup-Inspector of Police, held the inquest report, sketch map with index of the occurrence and also partly investigated the case while pw-09 Md. Mozaffar Hossain after completion of investigation

submitted police report being No. 88 dated 24.06.2002 against the condemned prisoner and two others under sections 302/34 of the Penal Code. In course of cross-examination defence claimed that the condemned prisoner is innocent. He did not kill his wife rather she was killed by others due to extra-marital relationship.

It appears from the above evidence of the prosecution witnesses that there is no ocular evidence with regard to the killing of the victim. Even then, none of the inmates of the condemned prisoner was examined in support of the prosecution case. Pws. 01, 02, 04, 05, 06 and 07 all are the relatives of the victim. It is quite natural that they were supposed to reach the place of occurrence on hearing the news of the death of the victim as they are close relatives of the victim, when the inmates of the house or the neighbors may not come forward to depose or tell the truth in a wife killing case.

Therefore, the prosecution is necessarily relying on circumstantial evidence or the evidence of the nearest relative

of the victim. It finds support from the case of the State-Vs-Md. Shafiqul Islam alias Rafique and another, reported in 43 DLR [AD] 92, where it was opined that,

> ***"-In a wife killing case, from its very nature, there could be no eye witness of the occurrence, apart from inmates of the house who may refuse to tell the truth. The neighbours may not also come forward to depose. The prosecution is, therefore, necessarily to rely on circumstantial evidence. In a case of this nature, like any other case of circumstantial evidence, one normally starts looking for the motive and the opportunity to commit the crime....."***

The said witnesses found the dead body with marks of violence around the neck, shoulder and nose of the victim lying in the house of the condemned prisoner following day morning of the occurrence. They also visited the place of occurrence as allegedly taken place in the jute field of one Manoranjan where the victim was killed at around 11:00 pm

on 31 July, 2001. And they also found broken wrist buckles of the victim and sign of some legs of human being on the earth.

It reveals from the evidence of pws.08 and 09 that they having visited the place of occurrence found the sign of killing of the victim in the jute field of Manoranjan. The place of occurrence shown by pw-08, investigating officer, in the sketch map, marked as exhibit-05 is around 100 yards far from the house of the condemned prisoner. So, the question of dispute of the place of occurrence as claimed by the defence, has no basis as per evidence of the said witness and the same has also been supported by the confession of the condemned prisoner admitting that he along with his accomplices gave pressure holding some parts of the body of the victim and killed her subsequently in the jute field of Manoranjon. Pw-01 in his evidence also deposed that he came to know from Bipul [condemned prisoner] admitting himself that he killed the victim when he [witness] reached the house of Bipul.

In course of cross-examination he also replied that in the dreadful night of the occurrence Bipul came back home by 07:00 pm and he found sign of legs on the earth and also abnormal scenario of the grasses in the jute field. Pw-02 also suspected that Bipul killed the victim on making conversation with the locals who put him under fastening when they reached there. On query the condemned prisoner admitted in presence of pw-06 that he along with his cohorts killed his wife which has also been supported by pw-07. Here it is found that the condemned prisoner made extra judicial confession before the said two witnesses following day of the occurrence.

Mr. Abdullah Al-Mamun, learned Advocate contends that the doctor, who examined the dead body of the victim and aunt of the accused, who used to live in the house of the condemned prisoner and Manoranjan, owner of the jute field were not examined by the prosecution and thus the prosecution case became doubtful. It is to be borne in mind that this is a wife killing case as alleged by the prosecution.

The question is whether the wife [victim], at the relevant time, was living with her husband within his periphery or the vicinity. It is earlier discussed that the dead body was found in the jute field of one Manoranjan around 100 yards far from the house of the condemned prisoner and the surrounding people brought the dead body in the compound of the house of condemned prisoner. And subsequently the witnesses having reached the house of the condemned prisoner found the dead body there under. So, there is no scope in such a situation to say that the victim was not within the periphery of the condemned prisoner. Even then, in course of cross-examination there has been no single evidence that the victim was not killed in the vicinity of the condemned prisoner. Only mere suggestion that on arrival of the condemned prisoner after 11:00 pm to his house is not enough to disprove the claim of the prosecution that the victim was not in the house of the condemned prisoner. Such suggestion has also been denied by the prosecution.

It is not unusual that an aunt of the condemned prisoner has not come forward to provide evidence as she is a nearest one of the condemned prisoner. Manoranjan, owner of the jute field is not an eye witness of the occurrence. His evidence is not so prudent to facilitate the prosecution case stronger as no one denied that the victim was not killed in the jute field of said Manoranjan. The important question is before us that the doctor of the autopsy report was not examined by the prosecution, although the autopsy report has been exhibited by the trial court itself. It appears from documents on record that the trial court made several attempts by issuing non-bail able warrants against the doctor of the autopsy report for providing evidence in its support but he did not turn up to depose in court. As per law the postmortem examination report is a piece of corroborative evidence. In this case, it is found that there is no disagreement with the alleged allegation that the victim was not killed and found with marks of violence on her person, which has also been supported by the inquest report, marked

as exhibit-02 which was prepared by pw-08. So, in the absence of examination of doctor with regard to the autopsy report the prosecution is not to be recognized that it failed to prove the case, if other evidence is enough to be trustworthy. When the prosecution has been able to prove that the victim was killed within the vicinity of the condemned prisoner, he as husband has to explain how his wife [victim] met the death.

It has revealed that the condemned prisoner failed to explain, depending himself in course of cross-examination, how his wife was killed. Although he made an attempt to say that he used to come to his house after 11:00 pm every day from his workplace. Such plea, he has taken up as his defence, is not enough to provide that he has sufficiently explained the cause of death of his wife. Since his wife was living with him, obviously, his knowledge is very much important in the instant case. Section 106 of the Evidence Act, 1872 states that when any fact is especially within the

knowledge of any person, the burden of proving that fact lies upon him.

In the present case the condemned prisoner took an alibi that he was outside of the house at the relevant time as disclosed in his given suggestion. If it is so, the entire onus is upon him to prove his alibi. It is not enough to say, he is innocent claimed at the time of examination under section 342 of the Cr.P.C. He had even scope to explain at the time of examination as to how his wife was killed but in respect of killing he was totally silent. Our Apex Court held in the case of State –Vs- Md. Sadequl Islam Tusar and others, reported in 63 DLR (AD)134 which is run as follows,

> ***"As a husband the accused was to explain as to how the victim met her death but the minimum that the prosecution must prove is that the husband was present in the house at the time of occurrence……."***

It is previously discussed on perusal of the evidence that at the relevant time the condemned prisoner was living

with her wife [victim] in his house and as per his confession he came to his house from his work place at about 10:30 pm and took the victim to the jute land in the name of toileting and subsequently killed the victim holding her different parts of the body.

The burden of proving the alibi lies upon the defence but the burden of proving the case against the accused is absolutely on the prosecution. In this case it finds that all the prosecution witnesses corroborating each other told that they found the victim dead with the marks of violence on her person lying in the vicinity of the condemned prisoner who admitted in their presence that he along with his associates killed the victim in jute land of Manoranjan. So, there is no scope to skip the burden of liability regarding the killing of the victim by the condemned prisoner in the instant case.

It reveals from documents on record that the condemned prisoner was arrested by police following day of the occurrence and he made a confession before the judicial magistrate on 02.08.2001. In his confession he stated that

he got married to the victim and found her unable to give birth after around eight or nine months of their marriage though he found her pregnancy subsequently. On query she declined to say anything about her pregnancy. In such a situation, he suspected that she had extra marital relationship with someone and as a result, she declined to disclose the fact. Subsequently, he told her to abort her pregnancy and he consulted with his cohorts namely Shudon and Ullash and then took her to the place of occurrence and gave her pressure holding her body until her death. He started getting alarmed while surrounding people coming towards his house. He along with locals brought the dead body of the victim from the jute land. In support of confessional statement pw-03 provided evidence stating that he recorded the confessional statement made by the condemned prisoner on 02.08.2001 which has been marked as exhibit-03. Before recording his confession he maintained all formalities following relevant provisions of law. In course of cross-examination he replied

that he had given three hours time to the condemned prisoner for his reflection.

On a careful scrutiny of the confessional statement made by the condemned prisoner it is found that he made the confession immediately after his arrest. He did not claim that his confession was made under duress or he was tortured to make confession. Although, learned defence counsel claimed that the confession made by the condemned prisoner was not true and voluntary and some part of the statement is appeared to be exculpatory in nature and two cohorts of the condemned prisoner have been relieved from the charge leveled against them.

From the plain reading of the confession it appears that the condemned prisoner became so ferocious when he could see that his wife became pregnant after coming back from India as stated by him in his confession. He became more ferocious when the victim declined to abuse her pregnancy and eventually consulted with his accomplices, by which it is found that a motive was grown up in the mind of the

condemned prisoner to kill his wife as advanced by the learned Assistant Attorney General and subsequently succeeded by killing the victim.

Having perused the confessional statement it finds that the condemned prisoner made the confession before the magistrate [pw-03] implicating himself and others in the killing of the victim. So the entire judicial confession of the condemned prisoner becomes inculpatory in nature. Since there is no claim of torture or humiliation even after it was made, from the side of the defence, the confessional statement absolutely is found true and voluntary and if the confession is found to be true and voluntarily can form the basis of conviction against the maker of the same.

It finds support from the decision in the case of Islam Uddin –Vs- State, reported in 13 BLC [AD] 81 which is run as follows,

"It is now the settled principle of law that judicial confession if it is found to be true and voluntary can form the sole basis of conviction as

against the maker of the same. The High Court Division has rightly found the judicial confession of the condemned prisoner true and voluntary and considering the same, the extra judicial confession and, circumstances of the case, found the condemned prisoner guilty and accordingly imposed the sentence of death upon him."

In the present case the condemned prisoner not only made confessional statement before the judicial magistrate on 02.08.2001 but also made extra judicial confession before the witnesses particularly pws-06 and 07 one day before his confession. By which it proves that whatever he admitted before the witnesses following day of the alleged occurrence and subsequently, he elaborately stated the same thing in his judicial confession before the magistrate one day after his arrest. So, there is no scope to disbelieve that the said judicial statement was not made voluntarily and not true. It appears from confessional statement that before regarding confession pw-03 alerted him saying that it might be used

against him as evidence if he confesses. And further told him that he was not a police officer but a magistrate and the accused is not bound to confess. Having understood the questions he made the judicial confession willingly.

From the trend of cross-examination of this witness it has revealed that there was no sign of enmity between the recording magistrate along with investigating officer and the confessing accused. And the defence also failed to discard the evidence that any authority or interested quarter came forward to compel him to make such confession. So the arguments made by the learned Advocate seem to be unworthy in nature. There may be some minor irregularities in recording the confessional statement of the accused but such irregularities are not being considered as major mistake. In the confession there has been found nothing that the recording magistrate failed to give the memorandum as to his confession and the recording magistrate has been thoroughly cross-examined by the defence as to the genuineness of the confession and memorandum issued by him. It is not

necessary that the memorandum as to the confession is to be issued separately. It is enough, if the same is inserted in the prescribed form but there must be signature of the recording officer which is present as disclosed by him in his evidence. So the judicial confession as to the circumstances under which it was taken by the magistrate is true and the confession was duly taken.

Mr. Zahirul Haque Zahir, learned Deputy Attorney General citing some decisions contends that although the doctor of the autopsy report was not examined but the same can be considered as corroborative evidence according to section 509A of the Cr.P.C. For the sake of argument the post-mortem examination report even if not taken into consideration does not weaken the prosecution case for lack of corroboration. It also finds support from the case of State –Vs- Ful Mia, reported in 5 BLC (AD)41 which is runs as follows,

".....The post-mortem report was filed under section 509A of the Code of Criminal

Procedure as the Doctor was not available. Section 509A Cr.P.C contemplates certain procedure but those were not complied with and for that the post-mortem report could be left out of consideration. As the factum of murder has been proved by four eye witnesses the post-mortem report as corroborative evidence is not absolutely essential.....”

Since, the prosecution witnesses provided evidence as to the killing of the victim and the condemned prisoner himself admitted that he killed his wife because of the reasons cited earlier and inquest report marked as exhibit-02 supported the said prosecution evidence and judicial confession of the condemned prisoner. It is to be noted here that the inquest report was prepared by pw-08 just immediately after the occurrence. There is no scope on the part of the maker to be biased by the prosecution soon after the occurrence. Although only on the basis of confessional statement conviction can be imposed upon the maker as per section 30 of the

Evidence Act. But it finds support from other circumstantial evidence as stated earlier in the present case. The alibi taken by the condemned prisoner as per section 106 of the Evidence Act has failed to establish his absence in the occurrence area.

Having considered the above evidence, discussions, findings and facts and circumstances of the case, we are constrained to hold that the prosecution has established the case against the condemned prisoner beyond shadow of doubt under section 302 of the Penal Code. It is also evident that the condemned prisoner killed her wife when she was pregnant of 5/6 months in a pre-planned manner. Therefore, it can be said that it is a case of heinous offence committed by the condemned prisoner. But at the same time it appears from connected documents on record that the condemned prisoner was arrested on 01.08.2001 and he remained in normal jail until pronouncement of the judgment dated 21.09.2010 passed by the trial court. And he has been in condemned cell since 21.09.2010 which indicates that he has

suffered around 16[sixteen] years' sentence in normal jail as well as condemned cell. A pang of long suffering facilitated to consider the death penalty to be commuted. More so, it appears from record that at the time of examination of the condemned prisoner under section 342 of the Cr.P.C his age was shown as 22 years.

To consider the lesser punishment from death sentence to life imprisonment mitigating evidence or circumstances must be stronger than that of aggravating evidence produced by the prosecution. In this case we find the following circumstances outweigh the aggravating circumstances.

[1] Condemned prisoner never obtained bail after his arrest dated 01.08.2001. He was in normal jail custody till pronouncement of the judgment dated 21.09.2010.

[2] He is in condemned cell till the delivery of the judgment dated 21.09.2010 suffering from pangs of life.

[3] At the relevant time his age was only 22 years.

Therefore, we do find extraneous grounds to commute the sentence but we do not find any reason to interfere that the conviction recorded against him under section 302 of the Penal Code.

In the above facts and circumstances of the case, we are of the view that ends of justice will be met if condemned prisoner Bipul Chandra Ray is sentenced to one of imprisonment for life instead of awarding him sentence to death with a fine of Tk. 1000/-.

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 provision of section 35A of the Cr.P.C.

In the result, the Death Reference No. 55 of 2010 is, hereby, rejected with the said modification in awarding sentence. The Criminal Appeal No. 3264 of 2011 arising out of Jail Appeal No. 305 of 2010 is dismissed.

Accordingly, the condemned prisoner Bipul Chandra Roy is sentenced to imprisonment for life with a fine of Tk. 1000/- as stated above and be shifted from the condemned cell to normal cell meant for similar convicts at once.

Let a copy of this judgment and order along with lower court's records be transmitted to the Additional Sessions Judge, Bogra expeditiously for necessary measures.

Md. Jahangir Hossain, J

I agree

Liton/B.O