IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha,
Chief Justice
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Hasan Foez Siddique
Mr. Justice A.H.M. Shamsuddin Choudhury

CRIMINAL REVIEW PETITION NO. 8 OF 2015
(From the judgment and order 03.11.2014 passed by the Appellate Division in Criminal Appeal No. 62 of 2013)

Muhammad Kamaruzzaman …… Petitioner

=Versus=

The Government of Bangladesh represented by the Chief Prosecutor, International Crimes Tribunal, Dhaka …… Respondent

For the Petitioner :Mr. Khandker 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 Mr. Syed Mahbubar Rahman, Advocate-on-Record

Date of hearing :The 5th April, 2015

J U D G M E N T

A.H.M. Shamsuddin Choudhury, J:

This review petition is directed against the appellate judgment and order this Division passed in Criminal Appeal No. 62 of 2015, on 3rd November of 2014.

Criminal Appeal No. 62 of 2015 was preferred by one Muhammad Kamaruzzaman invoking Section 21 of the International Crimes Tribunal Act, 1973 (henceforth cited as the Act), a special legislation that made this Division the exclusive appellate forum against judgments and orders passed by the tribunals created by the Act to try those accused of Crimes Against Humanity under the Act.

Muhammad Kamaruzzaman was duly tried by Tribunal No.2, a progeny of the Act, for Crimes Against Humanity on 7 (seven) charges. It found him guilty of 5 (five) charges and awarded various sentences, the highest being the death sentence, which was, cumulatively on charges Nos. 3 and 4. Its verdict was delivered on 9th May, 2013.

By exercising his right as conferred by Section 21 of the Act Muhammad Kamaruzzaman preferred an appeal before this Division, and a four member Bench of this Division, after exhaustive and comprehensive hearing, spreading over 17 working days, allowed the appeal in part, unanimously affirmed the guilty finding arrived at on charge No.3 by the Tribunal below, unanimously acquitted him of charge No.1, and by majority maintained the conviction and sentence in respect of charges Nos. 2 and 7. Death sentence on charge No.3 has been maintained by a majority decision.

FURNISHED GROUNDS

In seeking review of our aforementioned appellate judgment and order, the instant petitioner, Muhammad Kamaruzzaman, stated in black and white that this Division failed to determine and evaluate the elements Of Crimes Against Humanity which included an attack directed against a civilian population, which was widespread and systematic, based on one of discriminatory grounds listed in Section 3(2)(a) of the Act with nexus between such attack and the acts of the accused, within the accused's knowledge, within State policy or plan.

He further asserted that this Division failed to consider that (i) the petitioner was only 18/19 years of age in 1971, (ii) hearsay evidence has no probative value unless corroborated, (iii) contradictory statements in arriving at the finding that the petitioner was an Al-Badre Leader, (iv) the investigating officer could find no evidence as to the petitioner's involvement with Islami Chatra Sangha, and (v) that this Division committed error apparent on the face of the record by failing to consider that;

(a) hearsay evidence without any corroboration not admissible under customary international law,

(b) under the customary international law prevailing in 1971, the existence of a plan or policy was a constitutive element of Crimes Against Humanity,

(c) the Tribunal acted on conjecture and surmise,

(d) under the customary international law prevailing in 1971, the attack contemplated in a Crime Against Humanity was required to be both widespread and systematic,

(e) a Crime Against Humanity was required to be committed on the basis of one of the grounds specified in section 3(2)(a) of the International Crimes (Tribunals) Act, 1973,

(f) all the alleged offences specified in the Charge Framing Order were committed in the context of the 1971 war,

(g) defence could in fact discredit the veracity of PW-3's deposition as in (i) cross examination that PW stated that the date of occurrence of Charge No.3 was late October, 1971 although the actual date was May, 1971 (ii) that the petitioner sold stationery products which was inconsistent with the prosecution case (iii) that he was a student of Islamic History when in fact he was an intermediate-level student of science and that (iv) he had made a false statement on oath as to the drug abuse by his son,

(h) the statement made by PW-3, that the occurrence described in charge No.2 took place in October, 1971 was not correct as in fact it took place in May, 1971,

(i) the inability of the only live victim in Charge No.2 to appear before the ICT-2 on health grounds was not justified as he was listed as a prosecution witness and prosecution's application showed that he traveled to Dhaka for medical check-ups,

(j) other inhumane acts as "Crimes Against Humanity" is not act of similar gravity and seriousness to the offences or murder and rape,

(k) the other inhuman acts complained of are also required to be carried out in a systematic manner and on a large scale and that no evidence to that effect was adduced,

(l) other inhuman acts were required to be committed on one of the many discriminatory grounds listed in section 3(2)(a) of the Act though there was no evidence as to the discriminatory ground on which the victim, Principal Hannan, was humiliated,

(m) as an unlawful incentive for giving false evidence, PW2's son was appointed as an MLSS on 29th December 2011, although his son did not have required qualification,

(n) no charge was framed in relation to rape as a Crime Against Humanity and as such the finding of complicity in rape was unlawful,

(o) None of the 3 possible dates indicated by the PWs accorded with the Charge Framing Order on charge No.3,

(p) while PW 12 deposed that PW 13 was raped on the same day, PW 13 herself stated that it was 6 days after the event,

(q) PWs 12 and 13, both of whom described themselves as war widows and who had identified themselves as wives of their martyred husbands, were in fact concealing the fact they had in fact subsequently been married and had children from such marriages,

(r) the evidence of the DW-1 did not become as politically motivated merely because he did not know the petitioner,

(s) it could not be correct that the petitioner had brought the dead bodies of the massacred people back to Sherpur, as PWs 10-13 all deposed that the bodies were left at the site of the massacre and were buried there,

(t) there was no evidence to substantiate that the rape of the victims of Charge No.3 "continued for days together",

(u) it could not be true that the petitioner is guilty of rape in charge No.3 as no charge for rape as Crimes Against Humanity was framed against him,

(v) the claim that Exhibit –A (published in February, 2012), which recorded the events of the charge No.3, as made by PW 11 and 13 was motivated and could not be true and that this claim has not been substantiated and no evidence was in fact adduced to that effect and that this defence document was filed on 15.07.2012, well before the prosecution applied on 08.10.2012 to examine the PWs 11 to 13 as additional witnesses,

(w) the claim that Exhibit –B (published in February, 2011) which recorded the events of the Charge No.3 was motivated could not be believed as there was no evidence to support it.

He further asserted that fresh evidence reveals that PW 13 in an interview, recorded on 15.01.1996 published in a book titled "Mohila

Muktijodda", edited by Farida Akhter, described the events in charge No.3 did not implicate the petitioner,

PWs. 11-13 had been brought in to depose in charge No.3 as additional witnesses only after the PW 10 had failed to implicate the petitioner and also after the prosecution had failed to produce other listed witnesses of charge No.3,

One of the Shohagpur witnesses, PW.13, in her evidence claims to had known the petitioner 3 / 4 months after the war ended, when he was walking in front of her house, although according to the prosecution he was in jail at that time,

Golam Mostofa was targeted as he was a pro-liberation person, when in fact he was taking his examinations held by the occupation forces in violation of the clear instruction of the Freedom Fighters,

PWs 2 and 5 (both hearsay witnesses) had failed to prove beyond reasonable doubt the allegations in charge No.4,

It was not proved that PW-5 allegedly lodged a case against the petitioner in relation to charge No.4,

None of the PWs deposed that the victim Dara Miah was abducted on the instructions of the petitioner or that the petitioner was in any manner involved with the abduction, detention or murder of Dara Miah, and as such the charge No.7 has not been proved,

Although the brother of the victim Dara Miah, i.e. Shafikul Islam was examined by the Investigating Officer and also brought to the ICT-2 premises, the prosecution did not examine him,

PW-15's claim of seeing Dara Miah in captivity could not be true as he was in the Dak Bungalow in July-August 1971,

He further asserted that there is an error in that the majority found the petitioner guilty and maintained death sentence, relying on the evidence of PWs 11, 12 and 13, though it is crystal clear from the record that these 3 (three) witnesses were not examined by the Investigating Officer and their names were not in the list of witnesses or formal charge submitted by the Prosecution, but they were inducted after a long lapse of time after examination of 10(ten) witnesses were concluded by reopening the investigation process, which is not permitted by any provision of the Act and the Rules.

RESPECTIVE SUBMISSIONS

As the subject review petition was taken up for adjudication on 5th April 2015, Mr. Khandakar Mahbub Hussain, the learned Senior Advocate, in vindication of the petition, at the very inception of his submission first drew our attention to the record of evidence with the profferment that the statements of PWs. 11, 12 and 13, whose depositions were considered decisive in passing the capital sentence, were not figured in the formal charge, submitted on 30th October 2012, but the prosecution team reopened the investigation process illegally by recording statement of 8 (eight) potential female witnesses at a time well after when the trial had commenced. He went on to submit that out of those eight women only, three, namely PWs.

11, 12 and 13 deposed before the Tribunal implicating the petitioner, wherefor their credibility stood irretrievably dented. Although they made no mention of the petitioner's name to the investigation officer.

All of these three prosecution witnesses, whose names were not in the list, admitted that they came to know the petitioner only after the liberation war ended. They were not, as such, in a position to connect the petitioner with the alleged offence.

He continued to submit that the charge framing order, dated 4th June 2012, contained nothing to implicate the petitioner with direct participation in the alleged incident. "None", said Mr. Khandaker, "deposed that the petitioner himself perpetrated any murder or rape", yet, this Division, upon superficial scanning of evidence, arrived at the conclusion that the petitioner's participation was direct. He submitted that it is this very Division which justified its decision of commuting death sentence, handed down on charge No.4, on the ground that there is nothing in the record to reveal the petitioner's direct participation in the killing.

Mr. Khandakar brought to our notice extracts from a book, titled, " " published in February 1991 and submitted that the book had printed statements allegedly made by Korfuli Bewa, who though as the PW 13 deposed against the petitioner, said nothing against him during the alleged interview published in this book. He contended that information divulged in this book has surfaced

subsequent to the conclusion of the trial and the appeal process and as such, is admissible as fresh evidence. His submission was that this new revelation totally exonerates the petitioner of allegation as contained in charge No.3.

In the alleged interview, P.W.13, while describing the events encompassed in charge No.3, made no mention whatsoever of the petitioner, but stated instead that her husband was killed by the Paki Bahini and that on departure of the Paki Bahini, she rushed to her husband. She said nothing about incidents of raping.

Mr. Khandakar then embarked upon metaphysical introspection against capital punishment beginning with the assertion that death sentence, as a form of punishment, has during the preceding years, received global indignation, that the statutes of none of the modern UN sponsored war crime tribunals, such as International Crimes Tribunal for former Yugoslavia (ICTY), International Crimes Tribunal, Rwanda (ICTR), Special Court for Sierra Leon (SCSL), Special Tribunal for Lebanon and International Criminal Court (ICC), prescribes death sentence. According him, the prevailing worldwide trend is either to abolish death sentence in toto or to refrain from practicing it.

He reminded us that the Indian Supreme Court ordained in Bachan Singh –V- State of Punjab (2 SCC 1980, 684) that death sentence should be imposed in the rarest of the rare cases.

Mr. Mahbubey Alam, the learned Attorney General, on the other hand, came up with the jurisprudence that regulate adjudication of review petitions. In doing so he cited the ratio we expressed while disposing of the review petition, one Abdul Quader Mollah, another person convicted under the Act, filed (Abdul Quader Mollah-V-The Chief Prosecutor, International Crimes Tribunals (ICT), 66 DLR (AD) 289). By reminding us of the limitations that circumscribe a review petitioner's maneuverability, he proceeded to submit that questions revolving round the depositions of PWs. 11, 12 and 13 have been dealt with quite exhaustively when the appellate judgment was pronounced and that this aspect cannot be reopened unless error apparent on the face of the judgment is divulged.

He did, nevertheless, take us through the depositions these three witnesses placed to show that they had ample opportunity and cogent reason to connect the petitioner with the offences, the petitioner has been convicted of.

In reply to Mr. Khandaker's assertion that hearsay needs corroboration, the learned Attorney General submitted that it is not what is required by the scheme of the Act. He, nevertheless, submitted that in any event, their depositions were squarely corroborated by circumstantial evidence, adding that the whole world knows of the atrocities these outfits resorted to in 1971, stating further that the

petitioner's status as an Al-Badre leader and a leader of Islami Chatra Sangha has remained beyond qualm.

On the claimed new evidence, the learned Attorney General submitted that the book was authored at a time when BNP – Jamat alliance was in power and hence very few people would have had the nerve to implicate a Jamat leader, adding that PW 13 in her alleged interview named none, any way.

He concluded, reminding us that we are not hearing an appeal but are only adjudicating upon a review petition and are, thus not in a position, to reopen the matter all afresh.

LMITATION ON REVIEW

Having heard the parties, perused the documents and considered the jurisprudential dictates that revolve round a review petition filed by those subject to regimentation clogged by Article 47A (2) of the Constitution, we are to ensure that in the pretext of review, re-hearing of the whole matter is not initiated.

Unbroken chain of high preponderant authorities have drawn the boundary beyond which a review petitioner must not wander around, keeping in mind that a review petition cannot be equated with an appeal.

Strictly speaking, to succeed a postulant must show that this Division resorted to a fundamental error of law, which remains apparent on the face of the judgment. One of the most striking examples would be where this Division acted per incuriam or

overlooked one or more statutory provisions. As the doctrine of stare decisis does not bind this Division under Article 111 of the Constitution, a review petitioner can not invoke that doctrine.

There are authorities for the proposition that fresh evidence, which has bearing on the event under consideration, but despite best efforts, could not be obtained during the original or appellate hearing, can have effect on review hearing.

In the case of Abdul Quader Molla – V- The Chief Prosecutor, supra, we held that because of the protective provisions in Article 47A(2) of the Constitution, provisions figured in Article 105 can not be engaged by them who are accused of Crimes Against Humanity, but applying the doctrine of ex-debito justitiae, we may pass an order to correct mistakes in the judgment. We also held that inherent power of this Division may be invoked only when there does not exist any other provision and that this Division can invoke its inherent powers, not curtailed by Article 47A(2), under rule 46A of the Tribunals Procedure Rules, and, hence, it is not necessary to invoke Article 104 in this petition.

We further held that the procedures provided in Order XXVI rules 1-6 of the Appellate Division Rules, which are not inconsistent with the Act and the Rules, would guide the procedure and practice of this Division for disposal of a review petition, that is to say, a review in a criminal matter can be made on the ground of an error apparent on the face of the record.

We reiterated that a review cannot be equated with an appeal. It does not confer a right in any way to a litigant. We unequivocally expressed that it is now well settled 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 it's soundness or results in miscarriage of justice. We observed that a review of judgment is a serious step and the Courts are reluctant to invoke their power except where a glaring omission or patent mistake or grave error have crept in earlier by judicial fallibility.

Power of review is not an inherent power – it must be conferred by law either specifically or by necessary implication and that despite there being no provision in the Act or the Rules for review from the judgment of this Division on appeal, by fiction of law a review is maintainable 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.

OUR ANALYSES

Let us now examine the petitioner's plea and his learned Senior counsel's contention in the backdrop of what we have stated above.

The complaint that PWs. 11, 12 and 13 were inducted as witnesses long afterwards, is not a new one. This issue has been well considered by us in the appellate judgment. We do, nonetheless, wish to reiterate that rule 19 of the Rules of Procedure enjoins the Chief Prosecutor to hold further investigation. This provision stands on a

different footing from that in the Code of Criminal Procedure (Cr.P.C.), which stands excluded by the Act.

The allegation as to PWs. 11, 12 and 13's knowledge of the petitioner's identity is also not something new, but has been exhaustively examined at the appeal stage. This was based on a finding of fact. We do not find any error apparent on this count.

In reply to a question put under cross examination, PW 11 stated that she heard from the elders after liberation that Kamaruzzaman was a big leader who was arrested in Sherpur, while PW12 stated in Chief that on 10th day of Sraban in the English Calendar year of 1971, at 7.00 a.m., Kamaruzzaman along with Punjabis, Al-Badres, Rajakars, killed her husband at their habitat and that she heard Kamaruzzaman's name from the elders, that the Paki Bahini entered into her dwelling afterwards, struck her down with a gun and ravished her. Her evidence reveals that she was an eye witness and came to know the petitioner's name from her elders. PW.13, who also witnessed the event as a direct spectator, testified that after her husband rushed home, two Punjabis entered into the house, who were accompanied by Nosa, Boga Bura, Kamaruzzaman and that Paki solders told her husband that he was a Freedom Fighter, shot him twice. She also stated that she fled to another place and as she returned to whence she went from three days later, the Punjabis ravished her in the cowshed and Nosa, Boga Bura, Muje and

Kamaruzzaman were with the Punjabis. She also identified the petitioner in the dock.

During cross examination she said she came to know the petitioner 3 / 4 months after liberation, stating further that she heard the names of the big Al-Badre leader Kamaruzzaman, Boga Bura, Kadir doctor, Muzaffar and that Kamaruzzaman was the Al-Badre leader of her area at that time.

We do not see anything perverse in their evidence and it cannot be said that their depositions reveal that they were not in the position to identify the petitioner.

Striking similarity in their versions inter se make their deposition all the more reliable.

We can not be at one with Mr. Khandokar's claim that as we commuted the petitioner's death penalty on charge No.4 on the ground that there was no evidence on his direct participation on killing, we must do the same in respect to charge No.3 as well. Suffice it will to say that we could detect no evidence to reveal that the petitioner directly participated in killing Gulam Mostafa (charge No.4), but that does not follow that we found no evidence in respect to the petitioner's direct participation in the offences encapsulated in charge No.3. Indeed we found ample evidence to substantiate the petitioner's direct participation in the charge No.3 offences.

Mr. Khandakar's contention that hearsay evidence needs corroboration is unworthy of consideration in the light of the explicit provision in the Act making hearsay evidence admissible without further ado. We made it abundantly clear in Abdul Quader Mollah

case, supra, that international law provisions are not applicable. Anyway, as the learned Attorney General submitted, they have been sufficiently corroborated by each other's testimony as well as by circumstantial evidence.

FRESH EVIDENCE

As to the alleged fresh evidence-plea, advanced by Mr. Khandakar, the first point we noted is that the book, titled " " is of seriously doubtful credibility. Having read the book from the top to the toe, we are immutably convinced that it is a tailor made book that has been published with an ulterior motive to shield the native paramilitia forces from the accusation of Crimes Against Humanity. Nowhere in the book has the frenzied role of the collaborators against the liberation forces been depicted. The book gives conspicuous and undistorted impression as if Rajakars, Al-Badres played no part in 1971 atrocities, although truth has it that the Paki army would have been totally lost and helpless without the active help and participations of those local poodles. This book has been published by which is also an unfamiliar quantity. The authenticity of this book has never been tested nor has PW 13 been ever asked any question on the alleged interview, shown to have been published in that book.

The book was first published in February 1991, with 2nd edition in December 1994. So, all the publications took place when the party

of the petitioner's belonging was in power. Hence, conceivably, it was not easy to implicate a powerful member of that political party at an interview. What, however, is most significant to note is that none from this book interviewed Korfuly Bewa, but instead this alleged interview was in fact copied and reproduced from another obscure magazine named " " in the copy paste form. Authenticity of that alleged interview has also not ever been tested, nor has the authenticity, identity or the credibility of the said obscure " " been ever brought to surface. Moreover, while " " was first published in 1991, the alleged interview was in 1995.

On Mr. Khandakar's complaint that the petitioner could not have been Rajakar leader as leadership rested with the army, this will be enough to say that we made it distinctively clear in the appellate judgment that there were de-facto local leaderships at all areas. This finding of fact discloses no error. We can therefore put no reliance whatsoever on the so-called interview.

DEATH PENALTY

On Mr. Khandakar's philosophic submission that death penalty is in the wane globally, suffice it would to say that this submission again falls out of consideration as the Act does not only permit death sentence, but figures death sentence at the top of the list of penalties.

While it is true that many countries have abolished death sentence, the position as it stands today, is that capital punishment

prevails in as many as 55 (fifty five) countries and 7 (seven) countries retain death sentence for exceptional cases. (Source: Amnesty International and Penal Reform International)

Countries that retain capital sentence, include the largest democracy, i.e. India, and 33 component States of the United States of America. Some countries, such as Malaysia, Singapore, Saudi Arabia, Trinidad and Tobago retain mandatory death sentence for murder, while some 13 (thirteen) countries prescribe mandatory death sentence for drug trafficking, while 33 (thirty three) countries have death as an alternative sentence for the said offence. (Penal Reform International)

Although it is true that ICTR statute excludes death sentence, its tribunal stated in Prosecutor v Laurent Semanza (Case no ICTR (7-20-T) that Rwanda Organic Law indicates that even for genocide and Crimes against Humanity, the ordinary penal code sentences shall apply with certain modifications, which include heightened penalties of death and life imprisonment, respectively, for categories 1 and 2 perpetrators.

Even the United Kingdom law permits death sentence for some special kind of offences like treason and espionage.

INTERNATIONAL LAW ON CAPITAL PUNISHMENT

International Law does not prohibit death penalty.

Article 6(5) of International Convention on Civil and Political Rights (ICPR) adopted by the UN General Assembly in 1966 provides that death penalty can be imposed only for the most serious crimes.

The UN Human Rights Committee has stated, “the expression the most serious crimes must be read restrictively to mean that the death penalty should be quite an exceptional measure.

The UN Human Rights Committee has interpreted most serious crimes not to include economic offences, embezzlement by officials robbery, abduction not resulting in death, apostasy and drug-related crimes. It has also excluded political offences, expressing particular concern about very vague categories of offences relating to internal and external security, vaguely worded offences of opposition to order and national security violations and about political offences couched in terms so broad that the imposition of the death penalty may be subject to essentially subjective criteria.

The UN Commission on Human Rights, a subsidiary body of the UN Economic and Social Council (ECOSOC), replaced by the Human Rights council in 2006, interpreted most serious crimes as not including non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions stated in his 2012 report to the UN General Assembly that the death penalty should only be applied for offences of intentional killing, based on the practice of retentionist states and the jurisprudence of UN and other bodies.

In 2014, Amnesty International have found that many of the countries that carry out executions justify their action as a response to

threats – real or perceived – to state security and public safety posed by terrorism, crime or internal instability.

RAREST OF RARE

In respect to Mr. Khandakar's contention, relying on Bachan Singh case, that the Indian Supreme Court requires death penalty to be imposed in the rarest of the rare cases, the truth is that the number of rarest of the rare has not remained limited as death sentences have been awarded in plentitude of cases in India.

Section 354 of India's present Code of Criminal Procedure (Cr.P.C.), enacted in 1973, regulates the procedural aspect of judgment delivery.

Prof Salmond's globally acclaimed propoundment that a crime is an act that is deemed by law harmful not merely for the individual victim but for the society as a whole, has althrough been adhered to by the authorities, the legislators and the Judges in India.

LORD MACAULAY ON DEATH SENTENCE

Lord Macaulay stated,

> "First among the punishment provided for offences by this case stands death. No argument that has been brought to our notice has satisfied us that it would be desirable wholly to dispense with this punishment. But we are convinced that it ought to be very sparingly inflicted; and we propose to employ it only in cases

where either murder or the highest offence against the state has been committed".

It would, hence, go without saying that the legislators, who accepted intact Lord Macaulay's report, intended retribution and general deterrence to be among the sentencing rationales to be used while convicting offenders under the Penal Code, particularly in murder and high profile anti state cases.

Though Indian Parliament freshly legislated their Code of Criminal Procedure in 1973 and amended the Penal Code during the preceding years, it found no reason to totally abolish death sentence. Under the Old Code of 1898, before 1955, the normal sentence to be awarded to a person found guilty of murder was death and imprisonment for life was an exception. The Amending Act 26 of 1955 deleted sub-s.(5) of S. 367. The result was that the Court was left with a discretion to inflict the death sentence or the sentence of life imprisonment each according to the circumstances and exigencies of each case. In keeping with the current penological thought, the new Code of 1973, makes imprisonment for life a rule, and death sentence an exception in the matter of awarding punishment for murder. (Ambaram V. State of M.P., AIR 1976 SC 2196).

The capital punishment as provided by the law is to be awarded in rarest of the rare cases. (Shashi Nayar V. Union of India , AIR 1992 SC 395).

Brutality, obliviously would be an existing factor, but how the same did take place is the relevant and necessary material to be considered. (Registrar General, High Court of Karnataka V. Prakash Jadav, 2006 CrLJ 3393 (3409) (BD).

KASSAB CASE

In the sensational death penalty case of Mohammad Ajmal Amir Kasab V. State of Moharastra, Criminal Appeal No. 1899 – 1900 of 2011, popularly known as the Bombay bomb attack case, the Supreme Court of India reiterated the importance of death sentence in a case that outrages public sentiment, stating, "In Machhi Singh this Court observed that though the "community" revered and protected life because "the very humanistic edifice is constructed on the foundation of reverence for life principle" it may yet withdraw the protection and demand death penalty. The kind of cases in which protection to life may be withdrawn and there may be the demand for death penalty were then enumerated in the following paragraphs: "32. … It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of

the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

1. Manner of commission of murder 33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (i) when the house of the victim is set aflame with the end in view to roast him alive in the house. (ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death. (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland. III. Anti-social or socially abhorrent nature of the crime 35. (a) When murder of a member of a Scheduled Caste or minority community, etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to

terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance. (b) In cases of “bride burning” and what are known as “dowry deaths” or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. IV. Magnitude of crime 36. When the crime is enormous in proportion. For instance, when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed. V. Personality of victim of murder 37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-à-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.”

DELHI GANG RAPE CASE

In another sensational High Court case, known as Delhi Gang Rape Case, the High Court in Delhi, upheld the death sentence of 4 accused persons. Yugesh Khanna: J, rejected the pleas for a lesser

sentence saying the case has “shocked the collective conscience of India “, and that “Courts can not turn a blind eye to such crimes”.

Although Indian Parliament by enacting their Cr. P.C. put death sentence second in the ranking in murder cases, i.e. next to life imprisonment, they have nevertheless, retained retribution and general deterrence based on the doctrine of proportionality commensurability, intact.

What can without hesitation be summed up from these two decisions are as follows:-

(i) Reform and rehabilitation, in grave offences should be given a chance (ii) deterrence and preventive sentence is sometimes necessary (iii) retribution and general deterrence, having regard to proportionality and commensurability, as sentencing rational can not be brushed away when seriousness of the offence so deserve.

PUBLIC CONFIDENCE

The Indian Supreme Court has in a number of cases, placed emphasis on the public confidence issue, to justify death sentence, which, as stated earlier, cannot be under any rationale other than retribution and/or general (as opposed to specific deterrence), deterrence in deserving cases. Thus in Mahesh –V-State of MP (AIR 1987 SC 1346), the Supreme Court, while refusing to interfere with death sentence, expressed, “it will be a mockery of Justice to permit the accused to escape the extreme penalty of law when faced with

such evidence and such cruel acts. To give lesser punishment to the accused would be to render the justicing system of the country suspect. The common man will lose faith in Courts. In such cases, he understands and appreciates the language of deterrence more than the reformative Jargon".

Question of public confidence was explicitly portrayed also in the case of State of Karnataka-V-Krishna alias Raju (1987 1 SCC 538), where the Supreme Court enhanced a sentence of nominal fine in a road accident case, characterising the punishment as unconscionably lenient or "Mea – bite" sentence, observing that consideration of undue sympathy in such cases will lead to miscarriage of justice and undermine the confidence of the public in the efficacy of the criminal judicial system.

BRITISH VIEW ON PUBLIC CONFIDENCE

Even the British Judges apply public confidence test, as is reflected in the following passages expressed by Lord Taylor C.J.

> "The test is whether public confidence in criminal justice could be maintained if the public were aware of the circumstances of this case and the sentence which was passed" (AG's Reference No. 15 of 1992, 14 Cr. A R (S) 324).

In a similar vain, Lord Bingham observed,

> "Courts can not and should not be unmindful of the important public dimension of criminal

sentencing and the importance of maintaining public confidence in sentencing system". (Re: Howell 1999 1 Cr. A. R. (S) 335).

The Court of Appeal in the UK expressed this public confidence yardstick more than once.

VICTIMS' RIGHT

Consideration of victims' rights now stand universally recognised. It is reckoned that the Court in sentencing an offender should not confine itself to the fundamental rights of the accused only, but must also take account of the victims' predicaments and rights. In our view this concept is of particular importance in the context of the atrocities that were perpetrated during our glorious war of liberation, as literally, the entire populace, save a handful of anti liberationists, were victims of those atrocities.

PROPORTIONALITY DOCTRINE

To emphasise the doctrine of commensurability, the Indian Supreme Court in Satwant Singh-V-State of Punjab, (AIR 1960 SC 266) in disapproving a lenient sentence, expressed that the measure of punishment to be awarded upon conviction for an offence has to be commensurate with the nature and seriousness of the offence and that if the accused is unable to show that the sentence imposed upon him is not in any way excessive, the fact that a co-accused charged with

abetment of the same offence, received a lighter sentence is not a relevant circumstances.

In numerous cases the Indian Supreme Court reiterated the view that in imposing sentence the main consideration should be character and magnitude of the offence, but the Court cannot lose sight of the proportion which must be maintained between the offence and the penalty and the extenuating circumstances that may exit. The Court should also take account of the circumstances under which they were committed, degree of deliberation shown by the offender, provocation, offenders antecedents, and that while the sentence should be adequate to the offence, they should not be excessive either. (Adamji Umer Dolal-V-State of Bombay, AIR 1952 SC 14, Roghunath –V-Paria (AIR 1967 Goa 95, Sham Sundar-V-Puran AIR 1991 SC 8),

It also ordained that a Court should weigh the sentence with reference to the crime committed and the circumstances of the case and not with reference to what may happen subsequently.

So in Mangal Singh-V- State of UP, AIR 1975 SC 76, the Supreme Court deemed appropriate a death sentence passed on a convict, in the absence of extenuating circumstances, on a convict who killed a woman who was alone in the house by inflicting several brutal injuries.

Punishment rational of 'just desert', the modern form of retributive philosophy, enclaving proportionality and commensurability as its touch stone is indeed an internationally accepted concept.

Whether a given country maintains death sentence or not, it, in cases of felonious offences follow 'Just Desert' rational .

HLA Hurt argued that general justification justifying aim of punishment must be found in the prevention and control of crime and that the sentence should be proportionate to the seriousness of the offence (Hurt 1968).

Dr. Thomas expressed, "Proportionality plays some part: but the Judges select a tariff sentence where he imposes, usually in the name of general deterrence, a sentence intended to reflect the offenders culpability". (Thomas, Principle of Sentencing 1979 Page 8).

Lord Taylor C.J. expressed, "Accordingly the phrase commensurate with the seriousness of the offence must mean commensurate with the punishment and deterrence which the offence requires" (Re: Cunningham 1993 14 Cr. A. R. (S) 444).

White Paper published in the UK on its Criminal Justice Act 1991 recorded the following passages –

> "If the punishment is just and in proportion to the seriousness of the offence, then the victim, the

> victims family and friends and the public will be satisfied that the law has been upheld and there will be no desire for further relation or private revenge". (White Paper 1990, Para 2.3).

DECLINE IN DEATH SENTENCE COUNTRIES

While it is true that more countries have joined the flock to abolish capital punishment, it is equally true that as of today a total of 55 countries still retain capital punishment and the retentionist include the world's largest democracy i.e. the Republic of India and 32 out of 50 component States of the United States of America, the most powerful democracy in the World. According to Amnesty International's latest report, death sentence worldwide jumped by more than 500 in 2014 compared with the previous year and that during that year at least 2466 people were sentenced to death worldwide.

There are countries, like Malaysia, where also democratic order is now fairly trenched, death sentence is mandatory for murder. Belarus is an European country that maintains death penalty, while Tajikistan and Kajakistan, two of the former USSR component units, maintain death sentence.

According to Penal Reform International's report, 13 countries whose legislation provides for mandatory death sentence for such non-homicidal offence as drug trafficking. Some countries maintain non-mandatory death sentence for drug offences.

As expressed in Penal Reform International's report, countries advocating for retention, assert that death penalty acts as strong deterrent and that popular view is in favour of retention.

According to Penal Reform International opinion poll conducted in the United States revealed that 60 % of the population favoured retention, while the percentage was 52% in the Russian Republic. Opinion polls conducted in some other countries also revealed that majority view favoured retention of capital punishment.

Some of the countries that previously declared moratorium on capital sentence, reverted back from it. Pakistan obviously provides the most glaring example where the authorities revoked moratorium in the wake of Taleban bombing that resulted in the killing of several dozens of school children.

A good number of executions followed.

Other countries that backed out from moratorium includes Gambia, Taiwan, Indonesia, Kuwait, and Nigeria (Penal Reform International), after they went through similar bitter incidents.

BACK GROUND OF 1973 ACT

When our legislators enacted the 1973 Act, the horrendous memory of the genocide committed by Paki army in collaboration with their Bengali cronies, were fresh in their minds. They saw or heard of the extent and the horror that atrocities committed by them left behind, which shattered the conscientious people throughout the

world. Their memories were also vibrant at that time as to the ramification these holocaust left behind for generations and with such fresh memories they placed death sentence at the peak of the list of sentences. Indeed, when we affirmed death sentence, we had to reminisce the magnitude of the atrocities Paki forces committed with the help of their local outfits. Nobody can remain oblivious of the harrowing events that was followed by the so-called "Operation Search Light".

Atrocities of the nature, involving genocide, mass extermination, mass and indiscriminate sexual atrocities, which can only be equated with those committed by the Nazis during the second great war, petrified the whole world.

In the backdrop of the events that remained pervasive for the nine months period, death sentence alone must have been the only appropriate one, as that is commensurate with the gravity of the offences, whether we apply general deterrent rational or retributive rational or desert rationale along side the doctrine of proportionality. In doing so we took account of all aggravating and mitigating factors and there is no error that can be traced from the Judgment and hence review prayer on that account is also destined to flop.

This is also to be borne in mind that our general law that defines offences and prescribes punishment, i.e., the Penal Code also provides for death sentence with the only alternative sentence of life

imprisonment for murder. Although previously reason had to be furnished when life imprisonment was awarded instead of death sentence, after the amendment brought about in Section 367 of the Code of Criminal Procedure (Crl. P.C.), reasons are to be furnished in either case.

So, penalties provided by the Act is at no variance with our general law provision notwithstanding that offences enumerated under Section 3 of the Act is much more heinous than an ordinary murder.

Though not verbally canvassed, the petitioner put a ground to the effect that to attract Crimes Against Humanity the offence has to be wide spread and systematic.

This again falls out of consideration for the simple reason that nothing in Section 3 imports any such requirement. This is an International Law requirement, but in Abdul Quader Mollah, Supra, we left no doubt whatsoever on the principle that provisions of public International Law is not applicable to our tribunals, which are domestic tribunals.

So, if we follow the “rarest of the rare” principle even then nothing short of death penalty for the offences under Charge No.3 would satisfy the needs of justice. There was no error on our Appellate judgment on sentencing.

The other points as noted above were agitated during the hearing of the appeal and hence, these cannot not be grounds for review.

GENERAL AMNESTY MISCONSTRUED

Mr. Khandker's submission that Bangabandhu exonerated all Criminals Against Humanity, is founded on erroneous belief and is hence legally untenable. The truth is that Bangabandhu granted mercy to those collaborators only who committed no criminal offence. He did certainly not insulate those who were accused of criminal offences during the liberation war period. As a matter of fact by dastardly killing him the anti liberation forces delayed the trial of those guilty of Crimes Against Humanity.

Mr. Khandaker tried to have us to accept that the Military Tribunal at Nuremberg only tried military personnel for Crimes Against Humanity, without realising that this has no relevance with the truth and is based on inaccurate appreciation of fact and law. Contrary to what Mr. Khandker submitted people other than military personnel were also tried at the Nuremberg Tribunal.

IN AFFIRMING DEATH SENTENCE

It is axiomatic that in affirming death sentence, we followed ICPR guidelines, doctrine of just desert having proportionality and commensurability as its touch stone and the predicament the victims, their families and the country as a whole suffered, and, of course also looked at the presumed intention of the legislators.

NO ERROR DETECTED TO WARRANT REVIEW

As we have narrated above the review petition reveals nothing to say that any error is apparent in our appellate judgment. Indeed Mr. Khandakar, quite candidly submitted that he is aware of the limitations that a review petition faces.

Resultantly, the instant review petition is dismissed.

C.J.

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The 6th April, 2015
Hamid/B.R/ *Words 7,991*