

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, C.J.

Mr. Justice M. Enayetur Rahim

Mr. Justice Jahangir Hossain

CRIMINAL APPEAL NO.65 OF 2015

(From the judgment and order dated 8th January, 2012 passed by a Division Bench of the High Court Division in Criminal Appeal No.2185 of 2006 along with Death Reference No.43 of 2006 with Jail Appeal Nos.407, 408, 409, 410, 411 and 412 of 2006)

Milon @ Md. Milon and another : . . . Appellants

-Versus-

The State : . . . Respondent

For the Appellants : Mr. Md. Jahangir Kabir, Advocate
instructed by Mr. Zainul Abedin,
Advocate-on-Record

For the Respondent : Mr. Sayem Mohammad Murad, Assistant
Attorney General instructed by Mrs.
Madhumalati Chy. Barua, Advocate-on-
Record

Date of hearing : **The 11th day of January, 2023 and**

Date of Judgment : **The 15th day of January, 2023**

J U D G M E N T

M. Enayetur Rahim, J: This appeal, under Article 103(2) (b) of the Constitution of the People's Republic of Bangladesh is directed against the judgment and order dated 05.01.2012 and 08.01.2012 passed by a Division Bench of the High Court Division in Criminal Appeal No.2185 of 2006 heard along with Death Reference No.43 of 2006 and Jail Appeal Nos.407, 408, 409, 410, 411 and 412 of 2006 dismissing the Criminal Appeal in part thereby affirmed the judgment and order dated 18.05.2006 passed by the

Nari-O-Shishu Nirjatan Daman Tribunal No.2, Bogura so far relates to present-appellants, who were convicted under section 9(3) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and sentenced each of them to death by hanging until death and also to pay a fine of Taka 1,00,000/-, each.

The relevant facts for disposal of the present appeal are as follows:

The present appellants along with 04 others were put on trial before the Nari-O-Shishu Nirjatan Daman Tribunal No.2, Bogura in Nari-O-Shishu Case No.228 of 2004 and charge was framed against them under section 9(3) of the Nari-O-Shishu Nirjatan Daman Ain,2000.

The appellants and other accused pleaded not guilty to the charges brought against them and claimed to be treated.

The prosecution case, in a nutshell, are that on the night following 13.08.2000 victim Shahnaj Akhter Banu alias Sumi daughter of Abdus Satter (P.W-1) was in asleep in her father's dwelling hut. At about 11:00 p.m. the accused persons called her out of the house on a pretext to get meet with her paramour Alam. Later on she was raped and killed. Subsequently, the dead body was found by Rofiquel floating in the pond and it was brought to the courtyard of the informant. The body bore multiple injuries having marks of sexual violence. On 14.04.2000 the incident was informed to the father of the victim who was then Station Master at Adomdighi gate No.4, over telephone by Md. Belayet Hossain alias Nantu (P.W-6). He,

then rushed to his home and heard the occurrence from his wife Rowshan Ara Begum (P.W-2) to the effect that. Since 11.00 p.m. victim Sumi was found missing; Sumon son of domestic worker Md. Ashraful (P.W-7), neighbour Rafiqul, and Delower (P.W-4) unsuccessfully searched her and on the following morning her dead body was found inside the pond by Rafiqul.

The prosecution was launched by lodging a first information report by Abdus Sattar (P.W-1) as informant which was recorded as Adamdighi Police Station case No.9 dated 14.08.2000 corresponding to G.R. No.90 of 2000.

The police after conducting investigation submitted charge sheet against 06(six) persons including the present appellants under section 9(3) of the Nari-O-Shishu Nirjatan Daman Ain,2000.

At the trial the prosecution in all examined 13 (thirteen) witnesses to prove the case. The defence cross examined the said witnesses but did not adduce any defense witness.

On conclusion of the trial the learned judge of the Tribunal found the present appellants guilty along with 4(four) others under section 9(3) of the Nari-O-Shishu Nirjatan Daman Ain,2000 and sentenced each of them to hang till death and also fine of taka 1,00,000/-.

In view of the provision of section 374 of the Code of Criminal Procedure the learned Judge of the Tribunal made reference to the High Court Division for confirmation of the death sentence. The said reference was registered as Death Reference No.43 of 2006. All the convicts had

preferred Criminal Appeal No.2185 of 2006 and present appellants also filed Jail Appeal Nos.407 of 2006 and 409 of 2006 respectively. The other convicts also preferred separate Jail Appeals.

A Division Bench of the High Court Division heard the said Death Reference along with the above Criminal Appeal and Jail Appeals and by the impugned judgment and order dated 05.01.2012 and 08.11.2012 accepted the reference in part and maintained the sentence of death of the present appellants and acquitted the other convicts from the charges brought against them.

Accordingly, the Criminal Appeal No.2185 of 2006 was allowed-in-part and Jail Appeal No.407 of 2006 and 409 of 2006 were dismissed.

Being aggrieved by the said judgment and order the present appellants have prepared this appeal.

Mr. Md. Jahangir Kabir, learned Advocate appearing for the appellants having referred to the impugned judgment, evidence and other materials on record submits that the prosecution has failed to examine any independent and disinterested witnesses to support its case and thus, the trial court as well as the High Court Division committed serious error in relaying the evidence of the said partisan witnesses.

He further submits that no one saw the occurrence and the alleged confessional statement made by appellant-Milon cannot be said to be true and voluntary one. Moreover, at the time of the examination under section 342 of the Code of Criminal Procedure he categorically stated that the

said confession was the outcome of torture and coercion; but the High Court Division failed to consider this aspect and maintained the conviction and sentence relying on the said confessional statement which is not true and voluntary.

Mr. Kabir further submits that the trial Court and the High Court Division erred in law in relying on the alleged extra judicial confession made by appellant-Rabiul alias Habul, though such extra judicial confession has got no evidentiary value.

On the other hand, Mr. Sayem Mohammad Murad, learned Assistant Attorney General submits that the trial Court and the High Court Division on proper consideration of the evidence and materials on record rightly and legally found the present appellants guilty under section 9(3) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and there is no illegal or infirmity in the impugned judgment and as such there is no scope to interfere with the same.

We have heard the learned Advocates for the respective parties, perused the impugned judgment as well as the evidence and other materials on record.

It is true that in the instant case there is no eye witness of the alleged occurrence.

The appellant-Milon made a statement under section 164 of the Code of Criminal Procedure before the Magistrate (exhibit-4) which runs as follows:

“আমি আপনার জিজ্ঞাসাবাদে জানাচ্ছি যে, গত ১৩-০৮-২০০০ তারিখে দিবাগত রাতে রবিউল পিতা-হাবু, হেলাল পিতা-আলেফ, আসলাম পিতা নজরুল ওরফে নজু, মুসাদ্দেক পিতা-মনসের, মান্নান পিতা-সামাদ এবং আমি রাত অনুমান ১১ টার দিকে আমাদের প্রাননাথপুর গ্রামের সান্তারের

বাড়ির খোলানে যাই। হেলাল ও রবিউল সান্তারের মেয়ে শাহনাজ যে ঘরে থাকে সেই ঘরের জানালায় হাত দিয়ে টোকা মারে এবং শাহনাজকে বলে তার প্রেমিক আলম এসেছে। শাহনাজ তার ঘর থেকে বের হয় এবং মই দিয়ে বাড়ির প্রাচীরের উপরে উঠে এবং আসলাম শাহনাজকে হাত দিয়ে ধরে প্রাচীরের বাইরে নামায়। আমাদের সঙ্গে অল্প কিছু দূরে অনুমান ২০/২৫ হাত যাওয়ার পরে শাহনাজ আলমের কথা জিজ্ঞেস করে। আলম পুকুর পাড়ে বলে হেলাল জানায়। আসলাম কাপড় দিয়ে শাহনাজের মুখ চেপে ধরে এবং হেলাল শাহনাজকে পাঁজাকোলা করে শাহনাজ ওরফে সুমির পিতার বাড়ির পূর্ব দিকে অবস্থিত মান্নানের পিতার বনপাতির জমিতে নিয়ে যায়। আমি নিকটবর্তী পুকুরের পাড়ে বসে পাহাড়ায় ছিলাম যাতে অন্য লোকজন টের না পায়। প্রথমে হেলাল, তারপর আসলাম, তারপর মুসাদ্দেক, তারপর রবিউল, তারপর মান্নান এবং সর্বশেষে আমি শাহনাজকে হাত পা জোর করে রেখে এবং মুখে কাপড় চেপে ধরে ধর্ষণ করা হয়। ধর্ষণের পরে আসলাম ও হেলাল শাহনাজের ওড়না দিয়ে ওখানেই শাহনাজের গলায় ফাঁস লাগায় গলায় পৌঁচিয়ে। মারার সময় মান্নান শাহনাজের পা ও রবিউল হাত ধরে ছিল। মুসাদ্দেক আমাকে এই ঘটনা প্রকাশ করতে নিষেধ করে। হেলাল আমাকে বলে যে এই ঘটনা ফাস করলে তাকে মারব। হেলাল, আসলাম ও রবিউল এই তিন জন শাহনাজের লাশ সান্তারের পুকুরের পূর্ব পাড়ে নিয়ে আসে হাত দিয়ে তুলে ধরে। শাহনাজের লাশ তারা পুকুরের পূর্ব পাড়ে রাখে পানিতে, মাথাটির কিছু অংশ পানির উপরে পুকুরের পাড়ে মাটিতে ছিল। আমরা সবাই চলে গেলাম। আমি বাড়িতে গেলাম। পরদিন বিকেলে আমি বিরামপুরে যাই।”

P.W-11, Md. Alamin, Magistrate, 1st Class recorded said confessional statement of appellant-Milon. P.W.-11 in his deposition categorically and consistently stated that he recorded the said statement after complying all the legal requirements as laid down under section 364 and 164 of the Code of Criminal Procedure. He proved said confessional statement of appellant-Milon, as exhibits-4 and his 10 signatures thereon, as exhibits-4/1-4/10. He also proved the thump impression of appellant-Milon thereon.

P.W-11 was duly cross-examined by the defense but nothing could be elicited to shake his credibility in any

manner whatsoever. Moreover, at the time of recording the statement under section 164 of the Code of Criminal Procedure appellant-Milon did not say anything to the recording magistrate about the alleged torture on him by the police before recording the said statement. Further, it emerges from the record that the appellant-Milon was arrested on 02.09.2000 and on the very same day he was produced before the Magistrate, P.W-11 and his confessional statement was recorded on the same day.

As such, the appellant-Milon's plea at the time of examination under section 342 of the Code of Criminal Procedure that his confessional statement was not true and voluntary and he was compelled to make such statement before the Magistrate is not at all tenable.

We have also scrutinized Exhibit-4 as well as the evidence of P.W-11. The Magistrate after recording the confessional statement of appellant-Milon certified (স্মারক মন্তব্য) to the effect:

স্মারক মন্তব্য

“আমি আসামী মিলনকে বুঝিয়ে দিয়েছি যে, তিনি দোষ স্বীকার করতে বাধ্য নন এবং যদি তিনি তা করেন তাহলে তা তার বিরুদ্ধে সাক্ষ্য হিসেবে ব্যবহৃত হতে পারে। আমি বিশ্বাস করি যে, এই দোষ স্বীকারোক্তি স্বেচ্ছা মূলকভাবে করা হয়েছে। তিনি তা নির্ভুল বলে স্বীকার করেছেন এবং তিনি যে বিবৃতি দিয়েছে, তাতে তার পূর্ণাঙ্গ ও সত্য বিবরণ রয়েছে।”

Column 8 of the form has been filed by the P.W-11 in following manner:

“যেহেতু আসামীকে বিকেল ৪ টা থেকে সন্ধ্যা পর্যন্ত আমার কোর্ট চেম্বারে মুক্ত চিন্তা করার জন্য সময় দেয়া হয় এবং এই ফর্মের ৬নং ক্রমিকে উল্লিখিত প্রশ্নগুলো করার পরও আসামী দোষ স্বীকারোক্তিমূলক জবানবন্দি প্রদান করেছেন। কাজেই আমি মনে করি যে, আসামী

স্বৈচ্ছায় এই দোষ স্বীকারোক্তিমূলক জবানবন্দি প্রদান করেছেন। আসামীর শরীরে কোনও প্রকার জখম ও আঘাতের চিহ্ন দেখা যায়নি। ”

In view of the above, we have no doubt about the truth and voluntariness of the confessional statement (exhibit-4) of appellant-Milon.

It is now well 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. **[Reference: Islamuddin (Md) alias Din Islam Vs. The State, 13 BLC (AD) page-81, Hazrat Ali and others Vs. The State 44 DLR (AD) ,page-51]**.

In view of the above proposition, we have no hesitation to concur with the findings of the High Court Division as well as the trial Court that the confessional statement (exhibit-4) made by appellant-Milon is true and voluntarily and relying on the same conviction can be awarded safely.

In the case of **State Vs. Abdul Kader alias Mobail Kader, 67 DLR (AD), 6**, this Division has held that retraction of a confession has no bearing whatsoever if it was voluntarily made so far the maker is concerned.

At the time of examination under section 342 of the Code of Criminal Procedure the plea of appellant-Milon that the alleged confessional statement made by him is outcome of torture by the police has got no legal basis, rather in our opinion said plea is afterthought and brain child of the learned Advocate for the defence.

Moreover, immediate after the occurrence convict-Milon fled away from the village and he was arrested from

another place. From this circumstances we may also draw inference about his involvement in the Commission of offence.

In the instant case it is the prosecution case that victim-Shahnaj Akter Banu @ Shumi was killed after she had been being raped by the accused persons.

P.W-12 Dr. Nehar Ranjan Mozumder, held autopsy upon the cadaver of victim-Shahnaj Akter Banu. She proved the post mortem report and his signature thereon, exhibits-5 and 5/1 respectively.

P.W-12 found the following injuries;

- "1. One continuous, transverse ligature mark present below the thyroid cartilage, breadth $\frac{1}{2}$ "
2. One bruise on the tip of nose, size $\frac{3}{4}$ " X $\frac{1}{2}$ ".
3. One bruise on the back of left elbow joint, size 1" X $\frac{1}{2}$ ".
4. Multiple bruises on the upper and medial aspect of both thighs of various sizes.
5. Multiple scratch abrasions on the upper and medial aspect of both thighs and genitalia of various sizes.
6. Extensive bruise in the labia majora and minora of both side and vaginal canal.

On detailed dissection extravasations of clotted blood found present at the side of the injuries. The skin, soft tissue, muscles, trachea were found highly congested. Hyod bone both cornu was found fractured. Uterus empty. Stomach contains

semi digested food. All the visceras were found highly congested. High vaginal swab was taken for pathological examination and sent to the department of pathology. S.Z.M.C. Bogra, as per memo. No.SZMC/PM/2000/265. dated 16.08.2000.

Doctor opined that death was due to asphyxia as a result of strangulation by ligature following forceful sexual act on her which was ante mortem and homicidal in nature.

The above autopsy report manifests that the victim-Shahnaj was killed after she being raped. Thus, the prosecution has been successfully able to prove that manner of occurrence that the victim was murdered after she being raped.

P.Ws-3,5,6 and 7 in their respective depositions categorically stated that on the morning of 13.08.2000 Rafiqul found the dead body in the pond and thereafter her dead body was taken to the house of the informant. The witnesses found marks of violence on the body of victim. The said witnesses further deposed that Rabiul's father nabbed Rabiul and in presence of the village peoples said Rabiul disclosed that he along with the other accused committed the alleged occurrence.

P.W-7 Md. Ashraful in his deposition stated that when Rabiul made the said statement it was recorded by them in a tape recorder cassette and the said cassette was produced before the Tribunal and marked as material exhibit-VI.

In cross-examination, P.W-3 Md. Yar Ali asserted to the effect;

“রবিউলের স্বীকারোক্তির সময় আমি, বাদী সাক্ষর সহ অন্যান্য লোক ছিল। আসামী রবিউল স্ব-ইচ্ছায় স্বীকারোক্তিমূলক জবানবন্দি দিয়াছে। রবিউলের দেওয়া জবানবন্দি আর লিখি নাই। তাহার জবানবন্দি ক্যাসেটবন্দী করা হয়।”

P.W-5 Md. Ayub Hossain in his cross-examination also asserted to the effect;

“রবিউল ওরফে হবুলকে তাহার বাবা ধরিয়ান আনে এই কথা পুলিশের নিকট বলিয়াছি। হবুলের বক্তব্য ক্যাসেট করার কথা পুলিশের নিকট সাক্ষর কালে বলিয়াছি।”

P.W-6 Md. Belayet Hossain alias Nantu also asserted his communication-in-chief in cross-examination to the effect:

“আমার সামনে হবুলের কথা রেকর্ড করা হয়। সেই সময় আমি উপস্থিত ছিলাম। এই সেই রেকর্ডিং ক্যাসেট (যাহা শোনা হয়) এই ক্যাসেটটিতে যে কথা শোনা গেল তাহা আসামী হবুলের কণ্ঠ। এই সেই ক্যাসেট (ফিতা) বস্তু প্রদর্শনী-VI (যাহাতে আসামী হবুলের কণ্ঠ রেকর্ড করা আছে।”

P.W-7 Md. Ashraful in his cross-examination also stated to the effect:

“হবুলের পিতা তাকে ধরিয়ে দেয়। হবুল ধরাপরার পর সে সকলের সামনে স্বীকারোক্তি দেয় যে, সে সহ অন্যরা সুমিকে ধর্ষণ করে খুন করেছে। হবুলের সেই স্বীকারোক্তি ক্যাসেট করা হয়। তখন আমি উপস্থিত ছিলাম।”

The above evidence of the witnesses are very consistent and corroborative in nature and the defence has failed to shake their credibility of the said witness of the said witnesses. As such, it is proved beyond reasonable doubt by the prosecution that the father of the Habul alias Rabiul nabbed his son and in presence of the villagers Rabiul made extra judicial confession as to his involvement along with the other accused in commission of the offence. If we consider this aspect along with the

confessional statement, exhibit-4 made by the appellant-Milon, then we have no hesitation to hold that the appellant-Milon and Rabiul were involved with the commission of the alleged offence of rape and murder.

Mr. Jahngir Kabir, learned Advocate appearing for the appellant submits that the alleged extra judicial confession made by the Rabiul alias Habul in presence of the villagers has got no evidentiary value and the trial court as well as the High Court Division have committed serious error in relying on such statement in finding the guilty of appellant Habul alias Rabiul.

In the case of **Nausher Ali Sarder and others vs. The State, 39 DLR (AD), 194**, this Division has observed that since the accused made extrajudicial confession to the witnesses before arrival of the 'Dafadar' this confessional statement is voluntary and true as it agrees with the established facts of the case.

In the said judgment (paragraph-8) this Division observes:

"Mr. Serajul Huq has tried to bring this confessional statement within the mischief of sections 25 and 26 of the Evidence Act which make any confession to, or in custody of, a police officer inadmissible. After Nausher was caught and detained in the shop of Toyeb Ali, local Dafadar (P.W.13) appeared and also questioned him about the reason of his being present and caught there. Mr. Serajul Huq contends that this statement was made in presence of and during custody of a police officer, which expression includes a Chowkidar/Dafadar. This

attempt by the learned Counsel is found to be an exercise in futility, for the evidence of Toyeb Ali and Akram Ali, read with evidence of Dafadar Hasen Ali, clearly shows, that the statement was made, first of all, to Toyeb Ali and Akram Ali before the arrival of the Dafadar. If any further statement had been made when the Dafadar arrived, the earlier statement would not be affected as it was made not in presence of, or while the accused was in custody of, the police. This confessional statement is voluntary and true as it agrees with the established facts of the case. [Underlines supplied]

In this particular case, P.Ws-3,5,6 and 7 in their respective dispositions and cross-examinations categorically stated that in presence of the village peoples Rabiul alias Habul confessed his guilt in commission of the alleged offence. Further, statement of Rabiul was recorded in tape recorder cassette, material exhibit-VI. Defence did not put any suggestion to the said witnesses to the effect that at the time of making such statement by Rabiul, police personnel were also present.

If we consider the evidence of said P.Ws coupled with the proposition of law as enunciated in the case of **Nausher Ali Sarder and others vs. The State**, then we are of the opinion that the extra judicial confession made by appellant-Rabiul has got evidentiary value and we can safely rely on the same in awarding conviction of its maker.

In the case of **State Vs. Abdul Kader @ Mobile Kader,** **67 DLR(AD) 6** this Division in interpreting section 30 of the Evidence Act has held that when more than one person are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other of such persons as well as against the person who makes such confession.

In this particular case confession of convict-Milon lends support to the extrajudicial confession of convict-Rabiul.

Having considered and discussed as above, we are of the view that in maintaining of conviction of the present appellants under section 9(3) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 the High Court Division did not commit any error and illegality and as such there is no scope to set aside the order of conviction.

However, having considered the proposition of law settled **in the case of Nalu Vs. The State, reported in 17 BLC(AD), 204** in regard to award sentence coupled with the attending facts and circumstances of the present case, in particular, at the time of the alleged occurrence the appellants were just attended in majority, and that Milon in his confession stated that he did not take part in murdering the victim rather other two accused namely Aslam and Helan, who were acquitted by the High Court Division and the State did not prefer any appeal against such acquittal, killed the victim by pressing her neck, and

that the appellants are in death cell for about 17 years and during that period the appellants have suffered great mental agony, and that the father of Rabiul having nabbed him handed over to the villagers on coming to know about his involvement with the commission of the offence, we are of the view that justice would be best served if the sentence of death is commuted to one imprisonment for life.

Accordingly, the sentence of both the appellants is commuted from death to one imprisonment for life with a fine of Tk.1,00,000 (one lac) each, in default to suffer imprisonment for 5(five) years more. The Jail Authority is directed to shift the appellants from death cell to normal cell.

Accordingly, with the above modification of sentence, the appeal is dismissed.

C.J.

J.

J.