

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman

Mr. Justice Borhanuddin

Ms. Justice Krishna Debnath

CRIMINAL APPEAL NO.59 OF 2014 WITH JAIL PETITION NO.19 OF 2015.

(From the judgment and order dated 06.03.2014 passed by the High Court Division in Death Reference No.113 of 2008, Criminal Appeal No.7397 of 2008 and Jail Appeal No.1090 of 2008.)

Mohammad Ali @ Sakil. :Condemned-Prisoner-Appellant/Petitioner.
(In both the cases)

-Versus-

The State. :Respondent.
(In both the cases)

For the Appellant/Petitioner. (In both the cases) : Mr. S.M. Shahjahan, Senior Advocate,
instructed by Mr. Bivash Chandra
Biswas, Advocate-on-Record.

For the Respondent. (In both the cases) : Mr. Md. Jahangir Alam, Deputy Attorney
General, instructed by Mrs. Shirin
Afroz, Advocate-on-Record.

Date of Hearing. : The 25th May, 2022.

Date of Judgment. : The 31st May, 2022.

J U D G M E N T

Borhanuddin, J: Challenge in this appeal is to the judgment of a Division Bench of the High Court Division dated 06.03.2014 confirming Death Reference No.113 of 2008 made by the learned Additional Sessions Judge, 2nd Court, Bagerhat, awarding death sentence upon the condemned-appellant arising out of Sessions Case No.227 of 2007 arising out of Kachua Police Station Case No.11 dated 17.08.2007 under sections

302/201/34 of the Penal Code corresponding to G.R. Case No.147 of 2007.

Background facts in a nutshell are as follows:

"The informant was informed by his son's wife at about 12.30 hours at night on 17.08.2007 that dacoits have entered into her dwelling house and she managed to come out of the house; Receiving such information, the informant rushed to the said house and started searching for his wife Fatema (victim) but she was not found inside the house; Dead body of Fatema was found at about 20 cubits away from the dwelling house; Being nearer the informant found her slaughtered dead body; Meanwhile, Mosharaf Ali Howlader and some other people came to the place of occurrence but none of them found any alamats of dacoity; The informant sent his sister's son Mosharaf to the Kachua Police Station at about 5 a.m.; Md. Haider Ali Bepari informed through cell phone that the accused has been apprehended; PW-6, Tuhin Sikder, a van puller, carried the accused from the occurrence village and said PW-6 suspected the said passenger to be the accused; PW-6 stated that the condemned-prisoner was apprehended when he was trying to flee away by a bus; The condemned-prisoner was taken to the Police Station and the FIR was lodged at about 9 a.m.; The Police officials went to the occurrence house, seized alamats prepared sketch map and index, sent the dead body to the morgue; Thereafter, as per discloser made by the condemned-prisoner he has taken to the occurrence house and as per his own showing a

knife was recovered, a seizure list was prepared; The condemned-prisoner admitted the fact that he has slaughtered the victim by knife."

The condemned-prisoner was produced before a Magistrate, First Class, on 18.08.2007 where he made statement under section 164 of the Code of Criminal Procedure admitting his guilt.

On completion of investigation, Police submitted Charge Sheet against the condemned-prisoner and his sister Rabeya Begum under sections 302/201/34 of the Penal Code.

At commencement of the trial, the learned Additional Sessions Judge, 2nd Court, Bagerhat, framed charge against both the accused including condemned-prisoner under sections 302/34 of the Penal Code. The charge was read over to them to which they pleaded not guilty and claimed to be tried.

At the trial, the prosecution examined 10 witnesses in all to substantiate its case. Both the accused were examined under section 342 of the Code of Criminal Procedure who again claimed innocence but led no evidence.

The learned Additional Sessions Judge after considering the evidence on record found the accused Rabeya

Begum to be not guilty of the charges leveled against her and thus acquitted her but the condemned-prisoner was found guilty under section 302 of the Penal Code and sentenced him to death with a fine of Tk.10,000/- in Sessions Case No.227 of 2007.

Being aggrieved by and dissatisfied with the judgment and order of the trial court, the condemned-prisoner preferred Jail Appeal No.1090 of 2008 and thereafter preferred the Regular Appeal being No.7397 of 2008. The trial court also made reference under section 374 of the Code of Criminal Procedure for confirmation of the sentence of death. The death reference, jail appeal and regular appeal were heard together. The High Court Division by the impugned judgment and order dated 06.03.2014 accepted the death reference dismissing the Criminal Appeal being No.7397 of 2008 and Jail Appeal No.1090 of 2008.

Feeling aggrieved, the condemned-prisoner Mohammad Ali @ Shakil as appellant has preferred instant criminal appeal before this Division from jail.

In support of the appeal the stands taken before the High Court Division are reiterated by the learned Senior Counsel for the appellant and the state.

We have considered the submissions of the learned Senior Counsel for the appellant and the learned Deputy Attorney General for the state, the impugned judgment and order alongwith materials on record. Both the High Court Division and the trial court concurrently arrived at a finding that the prosecution proved that condemned-appellant slaughtered the victim which he admitted in his confessional statement. Those findings of the court below are based on proper appreciation of evidence on record.

The High Court Division and the trial court found that the confessional statement, exhibit-01, of the condemned-appellant is true and voluntary. The confessional statement has been quoted in the judgment of the High Court Division and we have gone through the confessional statement vis-a-vis the evidence of PW-1, Mr. Soroj Kumar Nath, the Executive Magistrate who recorded the confessional statement under section 164 of the Code of Criminal Procedure and we find that the confessional statement is true and voluntary.

Let us now come to the question of the sentence of death imposed on the condemned-appellant. During recording of his confessional statement under section 164 of the Code of Criminal Procedure, the condemned-appellant Mohammad Ali @ Shakil stated that he was aged about 21 years. Having considered the evidence on record, the confessional statement as well as the statement recorded under section 342 of the Code of Criminal Procedure, we are of the view that the condemned-appellant was not a minor at the time of commission of the offence. Therefore, he was not entitled to get the privilege under the Children Act, 1974 so far as those relate to youthful offenders.

However, condemned-prisoner was very young at the time of commission of the offence and as it is appears from his confessional statements that he committed the offence being disgusted with the behaviour of the victim to her sister, the victim was the mother-in-law of his sister. From the charge sheet it appears that the P.C. and P.R. (Previous Conviction and Previous Records) of the appellant are nil. Therefore, it appears that the petitioner is not a veteran criminal.

Regarding death penalty, we like to quote a few paragraphs from the judgment of this Division passed in *Nalu Vs. State*, reported in 17 BLC (AD) (2012) 204. The author judge Syed Mahmud Hossain J, eloquently discussed:

18. *"In the case of Gregg vs. Georgia, (1976) 428 US 153, the majority of the Judges endorsed and approved of imposition of death penalty being not unconstitutional. While writing the majority opinion, Justice Stewart stated as under:*

"But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offence, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it."

19. *While writing the minority opinion Justice Brennan stated as under:*

"Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment, therefore, the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less

severe punishment can adequately achieve the same purposes invalidates the punishment.

The fatal constitutional infirmity in the punishment of death is that it treats 'members of the human race as non-humans, as objects to be toyed with and discarded. It is thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.'---I, therefore, would hold, on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause, "Justice of this kind is obviously no less shocking than the crime itself, and the new official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first."

20. From the minority opinion, it appears that the death sentence treats a human as non-human and that taking into consideration the eighth amendment to the US Constitution which states, "Excessive bail shall not be required, nor excessive fines 'imposed, nor cruel and unusual punishments' inflicted," the learned Judge found that the punishment of death is inconsistent with fundamental premise of eighth amendment to the Constitution.

21. Admittedly, death is irremediable. Death is unknowable, it goes beyond the world.

In the case in hand the only aggravating circumstances is that for the purpose of saving his sister from

humiliation and physical and mental torture the condemned-appellant committed the offence.

Mr. S.M. Shahjahan, learned Counsel submits that the condemned-appellant seeks mercy of this court and that his sentence of death may be commuted to one of imprisonment of life. Though there is no scope for showing mercy in a court of law but it is not out of place to quote a few lines from "The Nature of Judicial Process by Benjamin Cardozo" as under:

There is an old legend that on one occasion god prayed, and his prayer was "Be it my will that my justice be ruled by my mercy."

(quoted from the cited judgment.)

In view the facts and circumstances of the case it is found that the trial court was correct in its decision convicting the appellant and subsequently High Court Division affirmed the same and we also give our opinion that the appellant was rightly found guilty by both the courts below but we think that justice would be made if the sentence of death is commuted into imprisonment for life as the appellant is in pang of death since pronouncement of the trial court and subsequent affirmation by the High Court Division and as such the sentence of death is commuted into

imprisonment for life. The appellant will get the benefit of section 35(A) of the Code of Criminal Procedure in calculation of his sentence. Jail Petition No.19 of 2015 is disposed of in the light of the judgment delivered in the Criminal Appeal No.59 of 2014.

The concerned Jail Authority is directed to shift the appellant from condemned cell to general ward forthwith.

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

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