10 SCOB [2018] AD

Appellate Division

PRESENT
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique
Mr. Justice Mirza Hussain Haider

CRIMINAL APPEAL NO. 27 OF 2013 WITH JAIL PETITION NO. 10 OF 2013.
(From the judgement and order dated 19th of March, 2012 passed by the High Court Division in Death Reference No.60 of 2006 heard along with Criminal Appeal No.6688 of 2009 and Jail Appeal No.1229 of 2007).

Kamal alias Exol Kamal	.... Appellant
Versus	
The State	... Respondent
For the Appellant	: Mr. Helal Uddin Mollah Advocate, instructed by Mr. Md. Zahirul Islam Advocate-on-Record
For the Respondent	: Mr. Biswajit Deb Nath Deputy Attorney General instructed by Mrs.Madhumalati Chowdhury Barua Advocate-on-Record
Date of hearing & judgement	: The 10th of October, 2017

Commutation of Sentence:
On the question of commutation of the sentence, we are to take into consideration the heinousness of the offence committed in juxtaposition with the mitigating circumstances. It is by now established that in Bangladesh the sentence for the offence of murder is death which may be reduced to one of imprisonment of life upon giving reasons. It has been the practice of this Court to commute the sentence of death to one of imprisonment for life where certain specific circumstances exist, such as the age of the accused, the criminal history of the accused, the likelihood of the offence being repeated and the length of period spent in the death cell. … (Para 20)

The death sentence is the most severe and irretrievable form of punishment. Once the sentence is carried out, it cannot be redeemed. It is certainly a cruel form of punishment which is an affront to human dignity. However, the death sentence is not unconstitutional in Bangladesh. … (Para 25)

J U D G E M E N T

MUHAMMAD IMMAN ALI, J:-

1. This criminal appeal is directed against the judgement and order dated 19.03.2012 passed by the High Court Division in Death Reference No.60 of 2006 along with Criminal Appeal No.6688 of 2009 and Jail Appeal No.1229 of 2007 accepting the death reference and dismissing the criminal appeal and the jail appeal and thereby affirming the judgement and order of conviction and sentence under sections 302/34 of the Penal Code, passed by the learned Sessions Judge, Narayangonj in Sessions Case No. 28 of 2006.

2. The prosecution case, in brief, was that on 02.3.2004 at about 20.00 hours when the informant's father Giasuddin (deceased) returned to his residence, the accused persons named in the First Information Report (FIR) entered the residence and the appellant told the victim to come outside on the plea of having some urgent and important conversation with him. When the victim Giasuddin came out from inside his house, the convict-appellant opened fire from his firearm indiscriminately aiming at him, on the road near the wall of Bond Fabrics, close to the house, inflicting multiple bleeding injuries on the person of the victim. Convict Ibu, Rubel, Janu and Kala Rafique also shot him from their respective firearms and, thereafter, they went away towards the west. The victim was then taken to Khanpur Hospital by the informant and P.W.10 Ali Hossain and one Zaker. In the Hospital the doctor on duty declared him dead. The informant's father used to protest the evil acts and misdeeds of the convict persons and he also formed a peace committee locally to maintain law and order in the area and out of the grudge the accused persons killed the victim Giasuddin by gun-shots. The informant, his mother, brother, wife, younger sister and others saw the occurrence by electric light. Hence, he lodged the FIR.

3. We find from the record that during investigation of the case, the police visited the place of occurrence, held inquest over the dead body of the victim and sent the same to the hospital morgue for postmortem examination, examined the witnesses under section 161 of the Code of Criminal Procedure, seized the alamats as per seizure lists, prepared the sketch map of the P.O. with separate index and after having found strong prima facie case against the accused persons, submitted charge sheet against the convict appellant and eight others.

4. Then the case record was finally sent for disposal before the Sessions Judge, Narayanganj and at the commencement of the trial charge was framed under sections 302/34 of the Penal Code against all of them, apart from charge-sheeted accused Ibrahim @ Ibu who died in the meantime. The charge was read over and explained to the accused persons present in the dock. They pleaded their innocence and claimed to be tried in accordance with law.

5. The prosecution examined 19 witnesses. After close of the evidence from the side of the prosecution, the convict-appellant and others were examined under section 342 of the Code of Criminal Procedure and their statements were recorded thereunder when they repeated their innocence and declined to adduce any witness in their defence.

6. The defence plea, as it appears from the trend of cross-examination of the prosecution witnesses and the statements of the accused persons recorded under section 342 of the Code of Criminal Procedure is that of innocence and that they had been falsely implicated in this case out of previous enmity and grudge.

7. Considering the evidence and materials on record, the learned Sessions Judge, Narayangonj, by judgement and order dated 03.07.2006 convicted the appellant and 2 others under sections 302/34 of the Penal Code and sentenced them to death and also to pay a fine of Tk.50,000/- each, in default to suffer rigorous imprisonment for 1(one) year more; fifty (50%) of the amount of fine would be paid to the deceased's family and the rest would be paid to the State. Four of the accused persons were acquitted while another died during the trial.

8. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death of the three condemned accused, which was registered as Death Reference No.60 of 2006.

9. Before the High Court Division Criminal Appeal No.6688 of 2006 and Jail Appeal No.1229 of 2007 were preferred by condemned prisoner Kamal @ Exol Kamal, which were heard along with the death reference.

10. By the impugned judgement and order, the High Court Division accepted the reference and dismissed Criminal Appeal No.6688 of 2006 and Jail Appeal No.1229 of 2007 preferred by the condemned prisoner Kamal @ Exol Kamal thus maintaining the judgement and order of conviction and sentence passed by the Sessions Judge, Narayangonj in Sessions Case No. 28 of 2006.

11. Mr. Helal Uddin Mollah, learned Advocate appearing on behalf of the appellant submitted that the impugned judgement and order of conviction and sentence is bad in law and on merits and the same is liable to be set aside for the ends of justice. He further submitted that the conviction of the appellant is against the weight of evidence and materials on record. The convict appellant (condemned prisoner) is totally innocent of the charge leveled against him and he has been falsely implicated in the case and he is not in any way involved with the alleged murder. He submitted that P.W.1 is the wife of the deceased, P.W.2 is the informant, a son of the victim, P.W.3 is the daughter, P.W.4 is the son and P.W.5 is the daughter-in-law of the deceased, who are alleged to be eye witnesses of the occurrence and stated in their evidence that the convict appellant fired shots on the deceased with a pistol. But the informant did not mention in the FIR that the convict appellant fired pistol shot on the deceased and only mentioned it as "firearm". The doctor who held the postmortem examination on the dead body of the deceased could not identify the injuries caused on the body of the deceased, whether they were by pistol or by revolver shots, which creates doubt and the appellant is entitled to get the benefit of doubt. He submitted that no case under the Arms Act was filed against the convict appellant nor the alleged pistol was recovered from his possession, which proves that he has been falsely implicated with the alleged occurrence out of previous enmity. He submitted that the convict appellant did not make any confession under section 164 of the Code of Criminal Procedure and P.W.6 is the doctor, P.Ws.7, 8, 9, 10 (declared hostile) 11, 12, 13, 14, 15, 16 are not eye witnesses and P.Ws.17, 18 and 19 are police personnel's. He submitted that the most vital and independent witnesses who took the victim to the hospital, i.e. Ali Hossain was examined as P.W.10 who was tendered and Zakir was not examined which creates doubt as to whether anyone saw the occurrence. P.Ws.1, 2, 4 and 5 made contradictory statements and at the time of holding inquest none stated anything, which proves they are not the eye witnesses. He submitted that I.O. stated at the time of inquest that he found 14 gunshot injuries, whereas the doctor did not find any gunshot injury on the dead body and the appellant was not examined under section 342 of the Code of

Criminal Procedure and the P.W.1 stated that she identified the assailant by electric light and she also stated that there was no light in the street, and as such the identification is doubtful, but the High Court Division upheld the conviction of the appellant on the ground that P.W.1 saw the occurrence, but at the inquest none said that he saw the occurrence.

12. Mr. Biswajit Deb Nath, learned Deputy Attorney General appearing for the respondent made submissions in support of the judgement and order of the High Court Division. He submitted that the victim was brutally shot from short range only because he was a thorn in the path of their criminal activities. He submitted that the appellant and his cohorts are a constant threat to law abiding citizens of the country.

13. We have considered the submissions of the learned Advocate for the appellant and the learned Deputy Attorney General appearing for the State and perused the impugned judgement and other connected papers on record.

14. We find from the judgement of the trial Court that the depositions of the prosecution witnesses were elaborately discussed. The trial Court noted that the learned Advocate for the defence could not elicit any serious contradiction from the cross-examination of the prosecution witnesses. It was also noted that the victim Gias Uddin was a Muktijoddha and Adviser to the local Law and Order Committee and was active against the terrorist activities of the accused persons. He also took part in the *shalish* and decided against the accused persons, as a result of which they became angry which ultimately led to the victim being mercilessly murdered. It transpires that during the course of trial the accused were granted bail and were absconding at the time of delivery of judgement.

15. The High Court Division noted that in view of the brutality and circumstances of the case, there was no cogent ground to commute the death sentence imposed upon the convict appellant.

16. It has been argued by the learned Advocate appearing on behalf of the appellant that there was no independent witness to the occurrence of murder. However, we cannot ignore the fact that the occurrence took place at 8 O'clock at night when the victim had just returned home and the appellant and other accused persons came to the house of the victim and called him outside and the victim was shot by the appellant a few feet away from his gate. The witnesses recognised the assailants by electric light. Naturally, the inhabitants of his household would be the persons who would witness the occurrence from close quarters. The wife, children and daughter-in-law of the victim are the most natural and competent witnesses in the facts and circumstances of the case. We note that P.W.7, who is a local shopkeeper, deposed that he came to the place of occurrence on hearing shots, saw the victim, who had been shot and also saw the appellant and co-accused Junu running away from the place of occurrence. He stated that he did not know the names of the other assailants. The evidence of P.W.7 is thus independent corroborative evidence of the occurrence.

17. We note from the evidence of the Investigating Officer that no contradictions were elicited from him in respect of the statements of the witnesses recorded under section 161 of the Code of Criminal Procedure.

18. P.W. 6, the doctor, who deposed with regard to the post mortem report, stated that he found 10 bullet injuries on the chest and other parts of the victim's body. The learned Advocate on behalf of the appellant tried to argue that there was no clear evidence as to

whether the injuries were caused by a pistol or by a revolver. In this regard we have to say that to a lay person there is little difference between a pistol and a revolver both fire bullets. The only real distinction is that the revolver has a revolving chamber from which the bullets are fired, whereas a pistol may have a magazine containing between 7 to 16 bullets. The fact remains, the victim suffered as many as 10 bullet injuries, which according to the eye witnesses, were fired from short range.

19. The learned Advocate for the appellant finally submitted that the sentence of death may be commuted in view of the age of the convict, contradiction in the evidence of the witnesses and the lack of independent corroborative evidence. With regard to the appellant's conviction under section 302 of the Penal Code, we are left in no doubt about the correctness of the findings of the trial Court. We can find no fault in the assessment of the evidence of the witnesses and other evidence on record. The High Court Division has correctly upheld the finding of guilt of the appellant.

20. On the question of commutation of the sentence, we are to take into consideration the heinousness of the offence committed in juxtaposition with the mitigating circumstances. It is by now established that in Bangladesh the sentence for the offence of murder is death which may be reduced to one of imprisonment of life upon giving reasons. It has been the practice of this Court to commute the sentence of death to one of imprisonment for life where certain specific circumstances exist, such as the age of the accused, the criminal history of the accused, the likelihood of the offence being repeated and the length of period spent in the death cell.

21. In the facts and circumstances of the instant case, we cannot ignore the fact that the victim was repeatedly shot from close range. Ten bullet injuries were found on the victim, which is indicative of the vehemence with which the victim was done to death. The appellant called the victim out of his house on the pretext of some urgent discussion and within a few feet of the gate of his house, was repeatedly and mercilessly shot causing his death.

22. We find from the evidence that the victim was actively involved in ensuring law and order in the locality, and as a result his activities were inimical to the activities of the criminal groups. Clearly, this is a case where the victim was an obstruction in the path of local terrorist/criminal gangs, which had to be eliminated. It is equally plain to any law abiding citizen that the accused would do the same again to anyone who made a stand against criminal activities.

23. Although, it is usual for this Court to take into consideration the youth of the accused, such consideration is given only due to the fact that the young of age act in the heat of the moment without considering the consequence of their action. However, in the facts and circumstances of the instant case it is quite apparent that the appellant deliberately, in a preplanned manner, went to the house of the victim armed with firearms with the sole purpose of removing the obstruction in the path of their criminal activities. Hence, it cannot be said that the action of the accused was resultant from his immaturity of mind. His action was purposeful and intentional, which led to cold-blooded murder of the victim.

24. The facts of the case taken as a whole naturally give rise to the apprehension that the appellant would not desist from committing a similar offence when it suited him. He would again commit murder to get rid of anyone in his way. The PCPR of the appellant was that he was accused in Fotulla P.S. Case No. 48(8) 02 and No. 37(9)02.

25. The death sentence is the most severe and irretrievable form of punishment. Once the sentence is carried out, it cannot be redeemed. It is certainly a cruel form of punishment which is an affront to human dignity. However, the death sentence is not unconstitutional in Bangladesh. In this regard we may refer to the case of ***Gregg Vs. Georgia,(1976) 428 U.S. 153***, where the majority view was that the death penalty was not unconstitutional. The majority view as quoted in the case of ***Nalu v. The State, 32 BLD(AD)247*** was expressed as follows:

> *"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."*

26. In our view, the appellant is a threat to law and order and a menace to society. He would do away with anyone, who stands for upholding law and order. In view of the way the victim was murdered, we do not find that the sentence of death is at all disproportionate to the crime alleged. We, therefore, do not find any illegality or infirmity in the judgement and order of the High Court Division confirming the sentence of death.

27. In the result, the criminal appeal and the jail petition are dismissed. The judgement and order of conviction and sentence passed by the High Court Division is maintained.