15 SCOB [2021] HCD 94

HIGH COURT DIVISION

Death Reference No. 26 of 2015 with
Criminal Appeal No. 1695 of 2015
And
Jail Appeal No. 46 of 2015

The State and another
-Versus-
Md. Abdus Salam and another

Ms. Kazi Shahanara Yeasmin, Deputy Attorney General with Mr. Zahid Ahammad (Hero) and Ms. Sabina Perven, Assistant Attorney Generals.
.....for the State
(In the reference and respondents in both the appeals)

Mr. Md. Mozammel Haque with Sakib Mahbud, Advocates
.....for the condemned-prisoner-appellant
(In Crl. A. No.1695 of 2014 and Jail A. No. 46 of 2015)

Judgment on 25.01.2021

Bench:
Mr. Justice S.M. Emdadul Hoque
And
Mr. Justice Bhishmadev Chakrabortty

Editor's Note
This is a case under section 11 (Ka) of Nari-o-Shishu Nirjatan Daman Ain, 2000. There was no ocular witness in the case and among the 12 witnesses examined, PWs 1, 2 and 4 were declared hostile and PWs 3, 6, 7 and 8 were tendered. On sifting, assessing and appraising evidence of witnesses, High Court Division found that the prosecution failed to bring home the charge of making demand of dowry and committing murder for its nonpayment. The autopsy report and evidence of PW10 proved that at first the victim was strangulated to death and thereafter her body was set on fire as the burn was caused after the death of victim. The above fact was further corroborated by the confession of the condemned-prisoner. The High Court Division analyzing the confessional statement of the condemned prisoner found it to be true and made voluntarily. However, the High Court Division also found from the confessional statement that the act of wife killing was done by the condemned prisoner in exercise of his right to private defense. Consequently, the High Court Division found that the condemned prisoner was not guilty of murder, but he could have been awarded punishment under section 201 of the Penal Code. Considering the prison term already undergone by the condemned prisoner the High Court Division without sending the case in remand for trial of the condemned prisoner under section 201 of Penal Code, rejected the Death Reference and set aside the judgment and order of conviction and sentence of the tribunal.

Key Words:
Section 164 of Code of Criminal Procedure 1898; Section 11 (Ka) of Nari-o-Shishu Nirjatan Daman Ain, 2000; Section 100 of Penal Code, 1860; Right to private defence

Section 164 of Code of Criminal Procedure 1898:
We find that police arrested the convict at about 6.15 pm on 30.08.2008 and took him to the police station. They produced him before the Magistrate in the afternoon on 31.08.2008 to record his confession. The learned Magistrate had not enough time on that day to record the confession and consequently he sent the accused to jail *hajat*. On the next day, i.e., on 01.09.2008 he was produced again before the learned Magistrate. The Magistrate kept him under the custody of his peon and giving him enough time for reflection recorded the confession and sent the accused to jail. We find that the columns of the printed form were filled up according to law. The accused was asked every questions of column No.6 and answers were written thereto. In the bottom of the confession the Magistrate ascertained the truth and voluntariness of it by his own writing- "আসামীর শরীরে কোন মারপিটের চিহ্ন নাই। আসামী স্বেচ্ছায় দোষ স্বীকারোক্তি দিয়াছে মর্মে প্রতীয়মান হয়"। **PW 12, the recording Magistrate deposed supporting the correctness of the confession exhibit-8. He was cross-examined by the defence elaborately but nothing came out adverse. We find the confession made by the condemned-prisoner true and it was voluntary. ...(Para 30)**

A judicial confession of an accused must be considered as a whole and should be judged whether any part of it is contradictory:
It is well settled position of law that a judicial confession of an accused must be considered as a whole and should be judged whether any part of it is contradictory, if there are sufficient grounds for doing so. In the case of the State Vs. Lalu Miah 39 DLR (AD) 117 our appellate division has adopted the above view. We find no reason to depart from the *ratio* of above cited case in the absence of legal evidence to contradict the portion of the confession which supports the defence. We also do not find any cogent reason to reject outright the portion of the confession supporting defence plea in it on the ground of improbability. On a thorough reading of the entire confession it inspires us to believe that it is an honest statement which reveals the cause behind the incident and it can be accepted safely. ...(Para 33)

Section 100 of Penal Code, 1860:
Homicide in self-defence is justifiable only upon the plea on necessity and such necessity only arrived in the prevention of forcible and atrocious crime. A person who apprehends that his life is in danger or his body is in risk of grievous hurt, is entitled to defend it by killing his attacker. In order to justify his act, the apprehension must have to be reasonable and the violence used not more than what was necessary for self-defence. In the second clause it does not require as a condition precedent that grievous hurt must be caused by the aggressor. The accused may not even wait till the causing of grievous injury; apprehension of it that would be the consequence of the assault is enough for exercising the right. The right of private defence is available to a person who is suddenly confronted with immediate necessity of averting an impending danger of his life or property which is real or apparent but not of his creation. A person has the right to defend himself particularly when he has suffered a grievous injury or the apprehension of sustaining such injury in the event of taking recourse to such injury. This right subsists so long the apprehension of the aggressive attack continues.
...(Para 36)

In this particular case, we find that the victim grasped the genital organ of the convict tightly and compressed it by applying force. The appellant requested her to leave him but she did not release it, thereafter he pressed the throat of the victim to get rid of the attack and to release his scrotum. He had no intention or preplan to commit any offence. It was just an accident at the event of exercising his right of private defence to save him from his aggressive wife, the deceased. ...(Para 37)

In dealing with the question as to whether more harm has been caused than is necessary, or if that was justifiable under the prevailing circumstances, it would be so inappropriate to adopt test of detached objectively. That is why in some judicial decisions it has been observed that the means which a threatened person adopts or the force he uses should not be weighed in golden scales. ... (Para 38)

The burden of proof of self-defence rests on the accused but this burden is not an onerous as the unshifting burden which lies on the prosecution to establish every ingredients of the offence with which the accused is charged. ...(Para 39)

Section 100, 300 and 302 of Penal Code and Section 11 (Ka) of Nari-O- Shishu Nirjatan Daman Ain 2000:
We find that the defence version or explanation of the convict in the confession about victim's death is acceptable than that of the prosecution version. The condemned-prisoner has been able to substantiate his plea of self-defence and he has not exceeded the right, for which he is entitled to get benefit of section 100 of the Penal Code. The offence disclosed in this case in no way comes within the meaning of 'murder' defined under section 300 of the Penal Code and as such the convict cannot be punished under section 302 of the same Code or under 11(Ka) of the Ain. The Tribunal has totally ignored this aspect of the case and found the appellant guilty of the charge under section 11(Ka) of the Ain. In view of the above position, the judgment under challenge cannot be sustained in law and should be set aside. ...(Para 44)

JUDGMENT

Bhishmadev Chakrabortty, J:

1. Learned Judge of Nari-o-Shishu Nirjatan Daman Tribunal, Sirajgonj (the Tribunal) has made this reference under section 374 of the Code of Criminal Procedure (the Code) for confirmation of the sentence of death awarded upon condemned-prisoner Md. Abdus Salam son of Md. Sukur Ali alias Sukra in terms of the judgment and order dated 23.03.2015 passed in Nari-o-Shishu Nirjatan Daman Case No. 10 of 2009 finding him guilty of offence under section 11(Ka) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (the Ain).

2. Against the aforesaid judgment and order of conviction and sentence the condemned-prisoner filed a jail appeal and subsequently a regular criminal appeal. Since the reference and the appeals have arisen out of the same judgment and order, these have been heard together and are being disposed of by this judgment.

3. Prosecution case as narrated by PW1 Md. Golbar Hossain, the maternal uncle (*mama*) of Fatema Khatun (the victim/deceased) in the first information report (FIR), in brief, is that the victim was given in marriage with accused Abdus Salam ten years ago. During

subsistence of their marriage she was blessed with two sons. After the marriage, the accused husband, his parents and other relations started demanding dowry from the victim. On two occasions they paid taka fifty thousand to them. The accused persons demanded further taka fifty thousand and were creating pressure upon the victim for it. They used to torture her both physically and mentally to meet up the abovesaid demand. A *salish* was held for it and the victim made a General Diary Entry (GDE) with the concerned police station for the same reason. Since the victim refused to pay the dowry, all the accused at night on 26.07.2008 throttled her to death in the house of accused No.1. Then they carried victim's dead body out of the house, tied it with a date tree, poured kerosene oil on it and set fire. The fire had dazed victim's ears, eyes and other parts of body and those became blackish. Having received the news from his nephew Ziaur Rahman (PW3) at about 6:00 am, he rushed to the occurrence house and found gathering there. He further found *alamots* of murder in the house and burnt dead body tied with a date tree. All the accused fled away from the house taking victim's two minor sons with them.

4. On the aforesaid allegation Ullapara Police Station Case No. 21 dated 27.07.2008 corresponding to GR No. 210 of 2008 under sections 11(Ka) and 30 of the Ain against the condemned-prisoner and 8 (eight) others was started.

5. PW11 Md. Sadequar Rahman, a Sub-Inspector (SI) of police who was posted to Ullapara police station at the material time investigated the case. In his turn, he visited the place of occurrence, held inquest of the corpse and prepared a report. He recorded statements of witnesses under section 161 of the Code, arrested the accused husband and forwarded him to the learned Magistrate for recording his confession. After investigation, he found offence only against the husband (condemned-prisoner) *prima facie* to be true and submitted a charge sheet on 09.11.2008 against him under section 11(Ka) of the Ain. However, in the charge sheet he did not send up other eight accused named in the FIR.

6. Eventually, record of the case came for trial to the Nari-o-Shishu Nirjatan Daman Tribunal, Sirajgonj. The informant filed a *naraji* therein against the police report. The Tribunal upon hearing rejected the *naraji* and accepted the charge sheet and framed charge against sole accused under section 11(Ka) of the Ain. The charge so framed was read over to him, to which he pleaded not guilty and claimed to be tried.

7. During trial, the prosecution examined 12 (twelve) witnesses out of 14 (fourteen) cited in the charge sheet; of them PW1 informant Md. Golbar Hossain stated that the occurrence took place at night on 26.07.2008. On the following morning his nephew Ziaur Rahman through a telephone call informed him about the victim's death. He rushed there and found the dead body lying under a date tree near the dwelling house of the accused. He then conveyed the said message to the police station. Police went to the house of the accused but did not find them there. In his presence police held inquest and prepared a report. He proved the FIR and inquest report exhibits-1 and 2 respectively and identified his signatures thereon. He proved the seizure of alamots through exhibit-3. He could not say how the victim died. At this stage he was declared hostile and cross-examined by the prosecution while he stated that he could not say whether the victim was throttled to death for dowry at the night on 26.07.2008. He could not say whether the accused tied the victim with a date tree, or kerosene oil/diesel was poured on her person and set it on fire. Due to the burn, the body of victim became blackish. He denied the suggestion of the prosecution that they had made a compromise with the accused and to save him he deposed falsely. In cross-examination by the defence he stated that the Officer-in-Charge (OC) of the police station wrote the *ejahar,*

but it was not read over to him. The inquest report and the seizure list were not read over to him also. He did not hear about any bitter relationship between the accused and the victim. He did not hear that the victim committed suicide due to bellyache. He did not find any mark of injury on the person of the victim. Learned Judge of the Tribunal then asked him why he had filed the case against the accused, but he did not give any reply. Subsequently, he stated that he did not see the accused at home and that is why he suspected him and made him accused in the case. On recall by the defence he stated that on the day of occurrence he did not see the accused in his house. He has no complaint against the accused.

8. PW2 Laily, mother of the victim stated that the occurrence took place at night on 11 Shraban, 1415 BS. She received news through Chowkidar Abdus Sattar (PW5) and rushed to the house of the accused. But she was not allowed to see her daughter's dead body. At this stage she was declared hostile and cross-examined by the prosecution, while she stated that she could not say whether the accused throttled her daughter to death for dowry, or thereafter tying the dead body with a date tree poured kerosene oil and set fire on it. At the time of occurrence she was at Dhaka. She denied the suggestion of the prosecution of deposing falsely to save the accused. In cross-examination by the defence she stated that she did not hear about any altercation of the accused with the victim. Previously, the victim tried to commit suicide due to abdominal pain. The men appeared there told that the victim committed suicide by setting fire on her person.

9. PW3 Ziaur Rahman, PW6 Mst. Anna Khatun, PW7 Joynab and PW8 Mst. Hazara Khatun were tendered by the prosecution and the defence declined to cross-examine them.

10. PW4 Md. Nur Islam, brother of the victim stated that the occurrence took place at a night about 6 (six) years ago. He was at Dhaka while he received the sad news over telephone call. He reached the occurrence house and found his sister lying dead. Police came and held inquest on the corpse. He proved the report exhibit-1 and identified his signature thereon-1/2. At this stage he was declared hostile and cross-examined by the prosecution while he denied that he was acquainted with the fact that the accused demanded dowry from his sister and for its nonpayment at the night on 26.07.2008 he fastened her with date tree and burnt her to death. He further denied the suggestion of the prosecution of deposing falsely to save the accused. In cross-examination by the defence he stated that his sister had been suffering from abdominal pain since long and for it she tried to commit suicide on several occasions. He heard that his sister committed suicide on the day of occurrence. The accused was not at home on that day.

11. PW5 Md. Abdus Sattar, a *dafadar* stated that the occurrence took place 5/6 years ago. Victim Fatema had been suffering from abdominal pain. He heard that she committed suicide. He went to the house of the accused and found the dead body lying under a tree. Police came, held inquest on the corpse, prepared a report and took his signature thereon. He proved his signature on the inquest report as exhibit-1/3. He was a witness to the seizure too. He proved the seizure exhibit-4 and identified his signature therein. In cross-examination by the defence he stated that the accused was not at home on the day of occurrence. The seizure list was not read over to him.

12. PW9 Md. Khabir Uddin, a neighbour stated that the occurrence took place 5/6 years ago. He heard that the victim committed suicide due to bellyache. In cross-examination he stated that the IO did not examine him.

13. PW10 Shariful Haque Siddiqui, a Medical Officer of Sadar Hospital, Sirajgonj stated that he was a member of the constituted board for conducting autopsy of the victim. In autopsy they found the following injures:

1. Faint bruise around the neck.
2. Extensive burn injury throughout the whole body extending from head to toe.

14. They opined that the death was due to asphyxia as a result of strangulation followed by *postmortem* burning, which was *antemortem* and *homicidal* in nature. He proved the autopsy report exhibit-5 and identified his signature thereon-5/1. In cross-examination he stated that he found *rigor mortis* present on the corpse and further found stomach of the victim empty. He failed to state the age of injury he found on the corpse. He did not find any scratch mark on the throat or neck of the victim. He denied the defence suggestion that the death was suicidal. He denied that the autopsy report having not been a scientific opinion. He further denied that he furnished an obligatory report at the request of the interested quarter.

15. PW11 Md. Sadequr Rahman, an SI of police and the IO stated that he visited the place of occurrence, prepared a sketch map with index exhibit-6 and 7 respectively. He held inquest on the corpse, prepared a report and sent the dead body to the morgue for holding autopsy. He seized alamots with two seizures exhibits-3 and 4. He arrested the accused and forwarded him to the Magistrate for recording his confession. He collected necessary materials for prosecution and submitted a charge sheet under section 11(Ka) of the Ain against the accused husband only. He identified fifteen items of *alamots* as material exhibits–I-XV. In cross-examination he stated that he found the dead body under a date tree. It was about 100 cubits away from the accused's house. There were nine houses near the occurrence house. He denied the defence suggestion that they extracted the confession applying third degree method. He denied that it was not made voluntarily. He denied that on the day of occurrence the accused was not at home, or the accused did not commit any offence. He denied that he did not record the statements of witnesses, or did not go to the place of occurrence. He further denied of not seizing the *alamots* correctly and of submitting a perfunctory report.

16. PW12 Md. Nure Alam, a Judicial Magistrate stated that he recorded the confession of the accused on 01.09.2008. He kept the accused under the custody of his office peon from 12:45 pm to 4:00 pm and thereafter recorded the confession complying with requirements of the law. He took signatures of the accused in the confession. He did not find any injury on the person of the confessor. The accused told him that he made the confession at his own wish. He put signatures in every sheet of the confession. He proved the confession exhibit-8 and identified his signatures thereon-8/1 series. In cross-examination he stated that in the first page of the confession he wrote that the accused was produced before him on 31.08.2008. In its second page he wrote further that the accused was arrested at about 6:25 pm on 30.08.2008 from Purnimagati. The accused was again brought to him at about 12:45 hours on 01.09.2008. In the confession he did not write that the accused was brought before him twice. He denied the defence suggestion that at the bottom of column No.3 he did not write that the accused was kept in the custody of his peon from 12:45 pm to 4:00 pm. He did not fill up column No.5, but he wrote the answers in column No.6 at page 3. He denied the defence suggestion that he did not ask questions to the accused prescribed in column No.5. He did not violate any provisions of the law in recording the confession. He denied the defence suggestion that there were marks of assault on the body of the accused and he showed it to him. He denied the defence suggestion of not complying with formalities of the law in recording the confession. He sent the accused to jail at about 5:10 pm on 01.09.2008. He

further denied of writing the statements in seven additional sheets according to the version of police.

17. On conclusion of recording evidence of the prosecution witnesses, the learned Judge of the Tribunal examined the accused under section 342 of the Code, while he reiterated his innocence and demanded justice but did not examine any witnesses as defence. However, in reply to the above examination he submitted a written statement in the Tribunal. He stated there that the victim failing to bear the pain of her abdomen committed suicide. The IO tortured him inhumanly and extracted the confession. The IO told him to make statement to the Magistrate as tutored by him, otherwise he would be put on crossfire and accordingly he made the statement.

18. The defence case as it transpires from the trend of cross-examining the prosecution witnesses and the statements made while the accused was examined under section 342 of the Code are that the victim committed suicide by setting fire on her person due to her unbearable abdominal pain and the confession was extracted from him applying third decree method.

19. The Tribunal considered the evidence and other materials on record, found the accused guilty of offence under section 11(Ka) of the Ain and sentenced him thereunder to death with a fine of taka twenty thousand, giving rise to this reference and the appeals.

20. Ms. Kazi Shahanara Yeasmin, learned Deputy Attorney General taking us through the evidence and other materials on record submits that this is a wife killing case. The condemned-prisoner in a preplanned way murdered his wife brutally while she was under his custody. He throttled her to death in his house and thereafter took the dead body outside. He then tied it with a date tree, poured kerosene oil on it and set fire. Under section 105 of the Evidence Act it is the duty of a husband to explain how his wife met death while they were under the same roof. But the condemned-prisoner hopelessly failed to explain it. Although, most of the prosecution witnesses were declared hostile but in cross-examination the fact came out that the condemned-prisoner demanded dowry to the victim and for its nonpayment he murdered her. The defence case, that the victim committed suicide for chronic abdominal pain, has been proved false by medical evidence. The prosecution has been able to prove the charge against the condemned-prisoner beyond any shadow of doubt. The judgment and order of conviction and sentence passed by the learned Tribunal is based on legal evidence and it should be upheld.

21. Mr. Md. Mozammel Haque, learned Advocate for the appellant, on the other hand submits that the burden of proving certain fact solely lies upon the prosecution. The prosecution failed to prove the charge against the appellant under section 11(Ka) of the Ain. To convict a person under the aforesaid section, the prosecution is to prove that dowry was demanded by the accused and the victim was murdered because of its nonpayment. In this case PWs 1, 2 and 4, the vital witnesses were declared hostile by the prosecution and PWs 3, 6-7 and 8 were tendered. Although, the prosecution cross-examined PWs 1, 2 and 4 but failed to make out any case of making demand of dowry by the convict and killing the victim for its consequence. In cross-examination of the prosecution witnesses, the defence case has come out that the victim committed suicide by setting fire on her person due to unbearable abdominal pain and it has been supported in medical evidence.

22. Mr. Haque then submits that in this case the autopsy report is confusing. It does not disclose that the victim was murdered as claimed by the prosecution. Where there is a doubt

about the cause of death, the accused will get its benefit. Taking us through the written reply of the accused submitted at the event of his examination under section 342 of the Code, Mr. Hoque adds that there he explained that the victim committed suicide and the confession he made was not voluntary. It was extracted on duress and coercion. The confession so made cannot be used to pass conviction against him.

23. Mr. Haque further submits that if the confession is taken as true and made voluntarily, it does not disclose that the accused murdered the victim in a preplanned way. The appellant to save him from the serious attack of his wife exercised his right of private defence and pressed on her throat and consequently she died. The offence disclosed in the confession do not come within the meaning of murder for dowry under section 11(Ka) of the Ain. The Tribunal did not apply its mind and without assessing the evidence passed the impugned judgment and order, and hence it would be set aside and the convict be acquitted of the charge levelled against him.

24. In reply to the above submissions, the learned Deputy Attorney General submits that the offence committed by the condemned-prisoner does not come within the meaning of section 100 of the Penal Code. According to the confession, firstly the convict attacked the victim. He pulled her by the neck and then the victim attacked him to save her. She adds that the convict in his confession suppressed the fact of demand of dowry to the victim very cunningly. To save him from the heinous offence, he made the confession admitting the occurrence taking the plea of self-defence. Since the prosecution proved the charge against the convict husband beyond any shadow of doubt and the offence is heinous and brutal, the sentence of death awarded by the trial Court is justified and it should be upheld.

25. We have considered the submissions of the learned Deputy Attorney General and the learned Advocate for the appellant and gone through the evidence and other materials on record.

26. The prosecution produced 12 (twelve) witnesses for examination; of them PW 1 is the *mama* of the victim, PW2 is her mother and PW4 is the brother. PWs 3 and 5-9 are the neighbours of the accused. PW10 is a doctor who conducted autopsy on the corpse, PW11 is IO and PW12 is the Magistrate who recorded the confession of the accused and they are formal witnesses. Among the witnesses examined PWs 1, 2 and 4 were declared hostile and both the prosecution and defence cross-examined them. PWs 3, 6, 7 and 8 were tendered and the defence declined to cross-examine them.

27. Admittedly, there is no ocular witness to the occurrence but the dead body of the victim was found about 100 cubits away from the house of the condemned-prisoner. There were blackish marks on the throat and neck of the victim and most of the organs of her body were dazed. On appraisal of evidence of PWs 1, 2 and 4, hostile witnesses, we find that although they were relations of the deceased victim but somehow they became biased by the defence. Probably they thought about the future of the two children of the deceased and as such deposed favouring the accused to save him. In cross-examination, the prosecution put suggestions to them that the accused murdered the victim for nonpayment of dowry he demanded but they replied that they did not know it. The Tribunal considered the above reply as admission of killing the victim for dowry and passed the conviction under section 11(ka) of the Ain. The Tribunal in deciding so, has gone wrong in fact and law in assessing oral evidence. Here, the hostile witnesses (PWs1,2 and 4) replied that they were not acquainted with the fact as suggested; it does not mean that the witnesses admitted of committing the

murder for dowry. On sifting, assessing and appraising evidence of witnesses, we find that the prosecution failed to bring home the charge of making demanded of dowry and committing murder for its nonpayment.

28. The explanation of the condemned-prisoner as suggested to some prosecution witnesses that the victim committed suicide by setting fire on her person due to abdominal pain, has been proved false in the inquest and autopsy reports. In the inquest (exhibit-1) the IO found the 'tongue protruded and bitten by teeth' and further found 'blackish marks' on victim's throat. In the autopsy (exhibit-5) the doctor (PW10) found the 'tongue beaten by teeth' also. He further found 'faint bruise around the neck' and 'extensive burn injury throughout the whole body extending from the head to toe'. According to the necropsy report the death was due to asphyxia as a result of strangulation followed by *postmortem* burning which was *antemortem* and *homicidal* in nature. The autopsy report and evidence of PW10 prove that firstly the victim was strangulated to death and thereafter her body was set on fire as the burn was *postmortem*, i.e., it was caused after the death of victim. The above fact has been further corroborated by the confession of the condemned-prisoner.

29. In this case there is no ocular evidence against the condemned-prisoner that he committed the offence. There is no evidence that the convict was at home in the fateful night. The only circumstance available in the record is that he absconded after the occurrence. He remained in hiding and subsequently police arrested him. There is nothing in the record against him except his confession exhibit-8. For convenient of discussion the confession is reproduced below:-

"আমি নাটোর বনপাড়ায় প্লাস্টিকের ব্যবসা করি। ১৯ দিন পর শনিবার বিকাল ৫.০০ টার সময় আমি বাড়ী আসি। তখন বাড়ীতে এসে মা, আমার স্ত্রী, তিন ভাবীকে পাই। মাকে জিজ্ঞাসা করি পান-সুপারী লাগবে কিনা। আমার স্ত্রী সাবিনাকে বলি কি কি লাগবে? সাবিনা বললো সব বাজারই লাগবে। বাজার করে বেলা ডুবার পর (সন্ধ্যার পর) বাড়ী আসি। রান্না করতে বলে আমি পাগলা বাজার মোবাইল করতে যাই। বলে যাই ভাইদের বলে আসি নাই, তাই মোবাইল করে আসি। আমি পাগলা বাজার শাহীন ডাক্তারের দোকানে যাই। এই দোকান থেকে ফোন করি জেল হক (পাইকার) এর কাছে। তার বাড়ী চর সাতবাড়ীয়া, উল্লাপাড়া, সিরাজগঞ্জ। সে বলে সে রাজশাহীতে আছে। আমি জেল হকের নিকট ৭.৩০ টার পরে ফোন করি। সে বলে বনবাড়ী এসে মিসকল দিবে তখন যেন আমি ফোন দেই। আমি শাহীন ডাক্তারের দোকানে বসে থাকি। শাহীন ডাক্তার ছিল। আমি ঘন্টা খানেক বসে থাকি। অনুমান ঘন্টাখানিক পর জেল হক মিস কল দিলে আমি কল করি ।. তখন তিন ভাই এর সঙ্গে কথা বলি। আমি বলি তোরা চিন্তা করিসনা। আমি বাড়ী এসেছি। প্রথমে ০২ টাকা বিল দেই। পরে ০৮ টাকা বিল দেই। জেল হকের নম্বর মনে নাই। কার্ডে নম্বর ছিল। ৮.৩০ টার পর আমি আমি বাড়ী চলে আসি। এসে দেখি সব ঘরে বাতি নেভানো। আমি ডাক দিলে সাবিনা বলে দরজা খোলা আছে। আমি অন্য কাউকে ডাকি নাই। ঘরে ঢুকলাম । আমার নিকট ম্যাচ লাইট ছিল তা দিয়ে বাতি ধরাই। বউ চকির উপর শুয়ে ছিল। আমি ভাত চাই। বউ বলল যার যার ভাত সেই সে পাক করে খাউক । আমি ঘাড় ধরে নীচে নামাই। বলি ভাত পাক করে আমাকে ভাত দিবি। তার আগে আমি শুবনা। আমি চকির পাশে দাড়ানো। অমনি আমার নুনু (পুরুষাংগ সহ অন্ডকোষ) ধরে চাপ দেয়। আমি বলি ছেড়ে দে মান-সম্মানের ব্যাপার আছে। জানাজানি হলে মান ইজ্জত যাবে। যখন ছাড়ে না তখন আমি আমার দুইহাত দিয়ে সাবিনার গলা চাইপা ধরি। আমার বউ সাবিনা (তার নাম ফাতেমা খাতুন কিন্তু আমার কাকীর নাম ফাতেমা থাকায় বিয়ের সময় বউ এর নাম পাল্টিয়ে সাবিনা খাতুন করা হয়। সাবিনা নামেই কাবিন করা হয় এবং পরবর্তীতে সবাই সাবিনা নামেই ডাকে) কোচ/নুনু অন্ডকোষসহ না ছাড়লে আমি তার গলা আরো জোরে চেপে ধরি। আমাকেও জোরে চেপে ধরে। আমিও জোরে চেপে ধরি। কিছুক্ষণ পর আস্তে করে সে কোচ ছেড়ে দেয়। আমিও তার গলা ছেড়ে দেই। আমি দেখি সে নীচে পরে গেছে। আমি ডাকলে কোন জবাব দেয় না। আমি চকির উপরে বসলাম। বাড়ীর কাউকে ডাকি নাই। বউ এর শরীরে পানি ঢালিনাই বা কিছু করি নাই। ঘন্টা দুয়েক চকির উপর বসে থাকি। অনুমান ১২.০০ টার পূর্বে টেনে তুলে দেখি বউ সাবিনা মরে গেছে। আমি পাজা কোলা করে আমার ঘর হতে বের করে (পশ্চিমে) অন্যান্য ঘরের পিছন দিয়ে গিয়ে নুর ইসলাম বাড়ীর কানি দিয়ে যাই। নুর ইসলামের বাড়ীর পূর্ব দিকে টিউবয়েলের পাশে আম গাছের পাশে নিয়ে মাটিতে লাশ রাখি। তারপর পুনরায় ঘরে এসে ক্যারোসিন তেলের ডোব নিয়ে যাই (পৌনে দুই লিটার তেল ছিল)। তেল নিয়ে সারা শরীরে ঢালি। তখন আকাশে তারা ছিল। ম্যাচ লাইট দিয়ে আগুন ধরিয়ে দেই। আমি ৮-১০ হাত দূরে এসে দাড়াই। এক মিনিট পর আমি বাড়ী ফিরে আসি। ঘরে বসে থাকি ।

প্রায় ১/২ ঘন্টা পরে লোকজন আসে। তখন আমি ছোট ছেলেকে ঘুম হতে তুলে আমার মাইঝা ভাবীর নিকট দেই । সে ঘরের দুয়ারে কান্না করিতেছিল। ছোট ছেলেকে মাইঝা ভাবীর নিকট দিয়ে বাড়ী থেকে আমি পালিয়ে যাই। পূর্ব দিক দিয়ে পালাই। বিভিন্ন বাড়ীর উপর দিয়া গিয়ে পূর্নিমাগাতী যাওয়ার রাস্তায় উঠি। আমাদের গ্রামের পূর্বে দোহাপাড়া গ্রামে বন্ধু হাশেমের বাড়ী যাই। তখন রাত্রি ০৩.০০ টা বাজে। খানকা ঘরে থাকি। ফজরের দিকে বের হয়ে পূর্ব দিকে উল্লাপাড়ায় যাই। ওখান থেকে সিরাজগঞ্জ রোডে এসে ঢাকায় যাই। গাবতলী গিয়ে বালুর কাজ করি। ওখানে পাশের গ্রামের লোকজন কাজ করে। তারা বলে তোর জন্য গ্রামে লোকজন যেতে পারে না। তাই আমি নিজে থেকে গ্রামে চলে আসি। আমি পূর্নিমাগাতীতে আসার পর চকিদার আমাকে ধরে ফেলে। ওখান থেকে থানায় নিয়ে যায়। পরে কোর্টে নিয়ে আসে। ” *(emphasis supplied)*

30. It is well settled by our Apex Court in numerous cases that a confession, if it is found to be true and made voluntarily can be the sole basis of conviction of its maker. In this case firstly we have to ascertain whether the confession made by the accused is true and made voluntarily. We find that police arrested the convict at about 6.15 pm on 30.08.2008 and took him to the police station. They produced him before the Magistrate in the afternoon on 31.08.2008 to record his confession. The learned Magistrate had not enough time on that day to record the confession and consequently he sent the accused to jail *hajat*. On the next day, i.e., on 01.09.2008 he was produced again before the learned Magistrate. The Magistrate kept him under the custody of his peon and giving him enough time for reflection recorded the confession and sent the accused to jail. We find that the columns of the printed form were filled up according to law. The accused was asked every questions of column No.6 and answers were written thereto. In the bottom of the confession the Magistrate ascertained the truth and voluntariness of it by his own writing- “আসামীর শরীরে কোন মারপিটের চিহ্ন নাই। আসামী স্বেচ্ছায় দোষ স্বীকারোক্তি দিয়াছে মর্মে প্রতীয়মান হয়”। PW 12, the recording Magistrate deposed supporting the correctness of the confession exhibit-8. He was cross-examined by the defence elaborately but nothing came out adverse. We find the confession made by the condemned-prisoner true and it was voluntary.

31. Let us examine whether the offence disclosed in the confession comes under section 11(Ka) of the Ain or any other sections of other laws existing in this Country. As per convict’s version, he committed two different types of offence. Firstly, he caused the death of victim and secondly he blazed the dead body by setting fire to screen the offence. The confession narrates that the condemned-prisoner did work far away from his dwelling house. After nineteen days he returned home in the afternoon on the day of occurrence. He did shopping as wanted by his mother and the victim and then went outside the house to make necessary telephone calls. He returned home at about 8:30 pm and found the lamp of the house put out. He asked the victim to provide him the meal but she told him to cook his own rice to have it. He then pulled her by the neck, brought her down from the cot and told to cook for him. At this stage the victim grasped his penis along with scrotum and put pressure to compress it. The accused requested her to release it because it was related to his prestige, but she did not do it. He then held her by the throat with two hands and pressed it. Even then the victim did not release her hand from the genital organ of the accused. He then using more force pressed the throat of the victim. After some time the victim’s hand became lax slowly and the convict’s penis and scrotum was released, consequently he also released the throat of the victim. He called the victim by the name but she did not make any response. Subsequently, he was confirmed that the victim died. The accused thereafter took the dead body to a date tree near his dwelling house at about 12.00 hours at night. He brought kerosene oil from the house, poured it on victim’s body and set it ablaze, and in the early morning he decamped.

32. A plain reading of the confession, we find that the appellant has explained there which led him to the incident. The confession reveals the situation he faced at the material time. It corroborates the injuries which were found on the person of the victim. In the confession, the condemned-prisoner admitted of causing death of his wife. The narration of the confession and the circumstances described therein do not speak that the condemned-prisoner has made the confession cunningly, or he introduced a story of his self-defence to save him. The fact stated therein that the convict and the deceased did not take any food at night is supported by the autopsy report where the doctor found the stomach of the victim 'empty'. The occurrence took place while the victim kneaded/compressed his genital organ leading him to an unbearable situation. He made candid and frank confession disclosing everything without suppressing any fact which would be apparent from the fact that he requested the victim to release his genital organ but she did not. He then caused death of the victim as described therein.

33. It is well settled position of law that a judicial confession of an accused must be considered as a whole and should be judged whether any part of it is contradictory, if there are sufficient grounds for doing so. In the case of the State Vs. Lalu Miah 39 DLR (AD) 117 our appellate division has adopted the above view. We find no reason to depart from the *ratio* of above cited case in the absence of legal evidence to contradict the portion of the confession which supports the defence. We also do not find any cogent reason to reject outright the portion of the confession supporting defence plea in it on the ground of improbability. On a thorough reading of the entire confession it inspires us to believe that it is an honest statement which reveals the cause behind the incident and it can be accepted safely.

34. The genital organ (penis and scrotum) is one of the most sensitive limb of a man and if a violence is caused there, the man will be naturally frightened. Here the victim caused the violence compressing the genital organ of the condemned-prisoner by using her force. He repeatedly requested her to release the organ but she did not pay any heed to it. Under such circumstances, such violence was sufficient in the mind of the convict a reasonable apprehension of danger to his life.

35. Homicide in self-defence is justifiable under section 100 of the Penal Code only to the restriction imposed in section 99. The relevant portion of the section is as under:

> "100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-
>
> *First*-Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
> *Secondly*-Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
> *Thirdly* ---------
> *Fourthly* -------
> *Fifthly* ----------
> *Sixthly* ---------"

36. According to the above quoted law, a person upon whom a felonious attack is first made is not obliged to retreate, but may pursue the felon till he find himself out of danger. If

the felon is killed after he has been properly secured and when the apprehension of danger has ceased, such killing be murder. Homicide in self-defence is justifiable only upon the plea on necessity and such necessity only arrived in the prevention of forcible and atrocious crime. A person who apprehends that his life is in danger or his body is in risk of grievous hurt, is entitled to defend it by killing his attacker. In order to justify his act, the apprehension must have to be reasonable and the violence used not more than what was necessary for self-defence. In the second clause it does not require as a condition precedent that grievous hurt must be caused by the aggressor. The accused may not even wait till the causing of grievous injury; apprehension of it that would be the consequence of the assault is enough for exercising the right. The right of private defence is available to a person who is suddenly confronted with immediate necessity of averting an impending danger of his life or property which is real or apparent but not of his creation. A person has the right to defend himself particularly when he has suffered a grievous injury or the apprehension of sustaining such injury in the event of taking recourse to such injury. This right subsists so long the apprehension of the aggressive attack continues. [reliance placed on Hasan Rony Vs. the State, 56 DLR 580=24 BLD (HCD) 583].

37. In this particular case, we find that the victim grasped the genital organ of the convict tightly and compressed it by applying force. The appellant requested her to leave him but she did not release it, thereafter he pressed the throat of the victim to get rid of the attack and to release his scrotum. He had no intention or preplan to commit any offence. It was just an accident at the event of exercising his right of private defence to save him from his aggressive wife, the deceased. In the case of Karim Vs. the State, 12 DLR (WP) 92 it has been held-

> "The law relating to self-defence makes the accused the judge of his own danger, and permits him to repel the attack, even to the taking of life. The Courts are to judge him by placing themselves in the same position in which he was placed.''

38. In dealing with the question as to whether more harm has been caused than is necessary, or if that was justifiable under the prevailing circumstances, it would be so inappropriate to adopt test of detached objectively. That is why in some judicial decisions it has been observed that the means which a threatened person adopts or the force he uses should not be weighed in golden scales.

39. It is true that when an accused takes a plea of self-defence in view of the provisions of section 105 of the Evidence Act, it is his duty to introduce such evidence as will displace the presumption of absence of circumstances bringing his case within any exception and that will suffice to satisfy the Court that such circumstances may have existed. In criminal law, the onus of establishing all the ingredients, which could make a criminal offence, lies always on the prosecution and this burden never shifts upon the accused. [reliance placed on Muslimuddin and others Vs. the state 38 DLR (AD) 311 = 7 BLD (AD) 1]. The burden of proof of self-defence rests on the accused but this burden is not an onerous as the unshifting

burden which lies on the prosecution to establish every ingredients of the offence with which the accused is charged. (reliance placed on 56 DLR 580 = 24 BLD 583). In the case of Rukul Miah and another Vs. the State 8 MLR (HCD) 114 = 7 BLC 367 it has been held:

> ‘‘When the facts and circumstances of a case make out a case for the right of private defence, such a plea is clearly available to the accused even though it was not specifically pleaded or pleaded half heartedly.”

40. In the case in hand the defence case as suggested to the prosecution witnesses that the victim committed suicide for abdominal pain was taken by the convict’s Counsel half heartedly due to the lack of experience in conducting a criminal case like the present one. But the confession recorded under section 164 of the Code reveals the true version or actual defence in this case and considering the matter as a whole the defence version taken therein is accepted by us.

41. The act of the convict of catching hold of victim’s neck and pulling her from the cot and asking her to cook rice is generally the common character of a husband in our country of the status the convict belonged to. The above attack of the convict upon the victim was not so felonious for which she could have exercised the right of private defence. The submission made by the learned Deputy Attorney General on this point bears no substance.

42. In this case the FIR was lodged, statements of witness under section 161 of the Code was recorded, the charge sheet was submitted, charge was framed and trial was held all under section 11(Ka) of the Ain. On conclusion of trial, the Tribunal found the accused guilty of the offence under the aforesaid section of the Ain. The Tribunal without assessing the evidence and other materials on record upon misconception of fact and law held that the condemned-prisoner in a preplanned way committed the offence of murder for dowry. But such finding of the tribunal is beyond the materials on record and not tenable in the eye of law as we have observed earlier. The prosecution failed to prove the charge under section 11(Ka) of the Ain, or of murder under section 302 of the Penal Code, but the Tribunal convicted the accused under section 11(Ka) of the Ain and sentenced him thereunder to death. But considering the facts of the case, the confession and other materials on record the offence against the convict under section 201 of the Penal Code has been well proved.

43. In Asiman Begum’s case reported in 51 DLR (AD) 18, the accused was tried in the Tribunal under the relevant provisions of Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 but was sentenced under section 304 part I of the Penal Code. The High Court Division had set aside the judgment passed by the Tribunal and sent the case to the trial Court on remand to hold trial by the learned Sessions Judge. Against which the appellant went to the Appellate Division and our apex Court remanded it to this Division to dispose of the case on merit. In this case, we find that the condemned-prisoner committed offence under section 201 of the Penal Code for setting fire on victim’s dead body to screen the fact that he did earlier. Such

an offence could have been tried by general criminal Court constituted under the Code. His statement in the confession of setting fire on the dead body has been corroborated by the medical evidence. But no charge under section 201 of the Penal Code was framed against him. The Tribunal could have framed charge under the aforesaid section of Penal Code along with section 11(Ka) exercising its power under section 27(3) of the Ain, 2000. We find that if the accused was charged and tried under section 201 along with section 11(ka) of the Ain or any other law, he could have been found guilty under section 201 only and ought to have been sentenced by the Sessions Judge thereunder for 7(seven) years, i.e., the highest sentence provided under the section. But in this case, the condemned-prisoner has been in jail for more that 12 (twelve) years, out of which he is in the death cell more than 5 (five) years. If we send the case to the competent Court having jurisdiction to try the offence under section 201 of the Penal Code, in view of the *ratio* laid in the case of the State Vs. Nurul Amin Baitha (absconding) and another, [2019(1)] 15ALR (AD) 151, it will be a futile exercise of power and unnecessary harassment to the convict. The condemned prisoner will be seriously prejudiced by it. Moreover, the facts of the above cited case (*ibid*) do not match this case. So at this stage we are not inclined to send the case on remand for trial afresh, although, there is no bar in doing so.

44. We find that the defence version or explanation of the convict in the confession about victim's death is acceptable than that of the prosecution version. The condemned-prisoner has been able to substantiate his plea of self-defence and he has not exceeded the right, for which he is entitled to get benefit of section 100 of the Penal Code. The offence disclosed in this case in no way comes within the meaning of 'murder' defined under section 300 of the Penal Code and as such the convict cannot be punished under section 302 of the same Code or under 11(Ka) of the Ain. The Tribunal has totally ignored this aspect of the case and found the appellant guilty of the charge under section 11(Ka) of the Ain. In view of the above position, the judgment under challenge cannot be sustained in law and should be set aside. Accordingly, we find merit in the appeal.

45. In the result, the reference is rejected and the criminal appeal is allowed. The appellant is found not guilty under section 11(ka) of the Ain, 2000. The impugned judgment and order of conviction and sentence passed by the Tribunal is hereby set aside.

46. The concerned authority is directed to release the condemned-prisoner Md. Abdus Salam, son of Md. Sukur Ali alias Sukra of Village-Shreerampur Goyhatta, Police Station-Ullapara, District-Sirajgonj forthwith, if not wanted in any other cases. The jail appeal is accordingly disposed of.

47. Communicate the judgment and transmit the lower Court records.