16 SCOB [2022] AD 22

APPELLATE DIVISION

PRESENT:
Mr. Justice Syed Mahmud Hossain, Chief Justice.
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique
Mr. Justice Abu Bakar Siddiquee
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

CRIMINAL APPEAL NO.27 OF 2016 WITH JAIL PETITION NO.09 OF 2014
(From the judgment and order dated the 25th day of February, 2014 passed by the High Court Division in Death Reference No.86 of 2008 with Jail Appeal No.865 of 2008).

Md. Abdul Awal Khan **……Appellant/Petitioner (In both the cases)**

-Versus-

The State **…… Respondent (In both the cases)**

For the Appellant/Petitioner (In both the cases)	Mr. Md. Helal Uddin Mollah Advocate, instructed by Syeda Maimuna Begum, Advocate–on-Record
For the Respondent (In both the cases)	Mr. A.M. Amin Uddin Attorney General with Mr. Biswajit Deb Nath Deputy Attorney General Instructed by Mr. Haridas Paul and Ms. Shirin Afroz Advocates–on-Record
Date of Hearing	The 7th & 13th day of July, 2021
Date of judgement	The 14th day of July, 2021

Editors' Note
In the instant case the wife of the Appellant Awal Khan found dead at his dwelling house and the door of the room was open. Inside the house 2 sons of the accused were sleeping and the neighbours knew nothing about the occurrence of murder. There was no eyewitness of the occurrence. Trial Court believing the statement of P.Ws. 1, 4, 5 and 6 that the appellant confessed his guilt before them and accordingly the *chen dao* which was allegedly used to murder the victim was recovered from his shop, convicted the accused and sentenced him to death. High Court Division confirmed the death sentence of the appellant.

The Appellate Division, however, by majority decision came to the conclusion that the extrajudicial confession allegedly made by the appellant is inadmissible in evidence inasmuch as that was made in presence of police; that the recovery of the *dao* at the pointing out of the appellant is admissible evidence in view of section 27 of the Evidence Act but there was no legal evidence on record to show that the said *dao* was used to deal the blows upon the victim; that the appellant used to stay in his shop at night and nobody saw him staying with his wife at the night of occurrence and therefore he does not require to explain as to how his wife met her death and the incriminating evidence in the depositions of the prosecution witnesses being not placed before the appellant in accordance with law the examination of the appellant under section 342 of the Code of Criminal Procedure was not lawfully done by the trial Court and as such, the trial was vitiated. Honorable Chief Justice Mr. Justice Syed Mahmud Hossain, however, differed with the majority in above mentioned points except the point of admissibility of extra judicial confession in presence of police. Consequently the appellant was acquitted.

Key Words
Section 342 of Code of Criminal Procedure, 1898; Section 24 and 27 of Evidence Act, 1872; Wife killing case; Extra judicial confession

Minority View

Per Mr. Justice Syed Mahmud Hossain, CJ:

Burden of proof in wife killing case:
What is more surprising to note here is that the appellant has not provided any reasonable explanation as to the cause of the death of his wife although in wife killing case, the condemned-appellant is under the obligation to do so. He has given all contradictory suggestions to the witnesses imputing allegations that the victim was a lady of lose character having illicit connection with others. In a misogynistic society, character assassination of women is a regular feature. In the case in hand even after death victim's soul will not rest in peace because her two sons will know that their mother was a lady of questionable character. The condemned-appellant has failed to discharge his obligation by not explaining the cause of death of his wife in his house.
...(Paras 22 and 23)

Sections 24 and 27 of the Evidence Act, 1872:
It is of course true that the extra judicial confession made by the appellant before the witnesses in presence of the police is not admissible. But the fact remains that the chen/dao was recovered by the police from ceiling of the shop of the appellant at his instance in presence of the witnesses. Such recovery is admissible under section 27 of the Evidence Act. ...(Para 25)

Section 342 of Code of Criminal Procedure, 1898:
When a literate accused person re-calling witnesses cross-examine them, he is not at all prejudiced by minor defects in recording his statement under section 342 of the Code of Criminal Procedure:
Having gone through statement recorded under section 342 of the Code of Criminal Procedure, I find that the statement was not recorded specifying the evidence adduced by individual witnesses but it cannot be said that the appellant was prejudiced in any way by such minor omission because he is a literate person and at his instance P.Ws.5, 6

and 7 were recalled. After recalling the aforesaid witnesses they were again cross-examined none other than by the appellant himself. Therefore, I am of the view that the condemned-appellant being a literate person and the witnesses having been examined in his presence, he was not at all prejudiced by such a minor defect in recording his statement under section 342 of the Code of Criminal Procedure. ...(Para 32)

Majority Decision

Per Mr. Justice Muhammad Imman Ali, J Honorable Author Judge of the Majority Decision:

Section 342 of Code of Criminal Procedure, 1898:
We also find some merit in the submission of the learned Advocate appearing on behalf of the appellant that the examination of the appellant done by the trial court under section 342 of the Code of Criminal Procedure was not conducted properly as the incriminating evidence in the depositions of the prosecution witnesses were not placed before the appellant in accordance with law. Hence, we are of the opinion that the examination of the appellant under section 342 of the Code was not lawfully done by the trial Court. So, the trial conducted by the court below is liable to be vitiated.
...(Para 53)

Section 24 of the Evidence Act, 1872:
The learned trial Judge appears to have taken into consideration the alleged admission by the appellant in presence of P.Ws 2,3,4 and 5 but failed to appreciate that if there was such an admission, it was made when the appellant was accompanied by the police and hence inadmissible under section 24 of the Evidence Act. The conviction and sentence were thus not based on legal evidence. ...(Para 63)

Section 106 of the Evidence Act, 1872:
With regard to the victim's death while in the custody of her husband, the evidence on record shows that the appellant used to stay at his shop. There was no evidence that on that night he was sleeping in his own house. Hence, there is sufficient explanation from the appellant that he was not present in the house when his wife was attacked, and provision of section 106 of the Evidence Act are not applicable in the facts of the instant case. ...(Para 64)

JUDGMENT

Syed Mahmud Hossain, CJ: (Minority view)

1. I have had the advantage of going through the judgment written by my brother Muhammad Imman Ali,J. and I respectfully differ with the findings and decision arrived at by him. Therefore, I have decided to write a separate judgment.

2. This criminal appeal is directed against the judgement and order dated 23, 24 and 25.02.2014 passed by the High Court Division in Death Reference No.86 of 2008 heard along with Jail Appeal No.865 of 2008 confirming the death sentence passed by the learned Additional Sessions Judge, First Court, Gazipur by the judgment and order dated 20.08.2008 in Sessions Case No.3 of 2005 arising out of Kaligonj Police Station Case No.7 dated 16.07.2004 corresponding to G.R. No.278 of 2004 under section 302 of the Penal Code.

3. The facts leading to the filing of this criminal appeal, in brief, are:

The informant's daughter Nargis was given in marriage to condemned-appellant Awal Khan about 8 years back. The couple was blessed with 2 children. The condemned-appellant, Awal Khan had a stationery shop half a mile away from his house and used to sell mobile phones and other articles. Condemned-Appellant Awal Khan was in Saudi Arabia for 6 years. He returned and opened several businesses. On many occasions he used to sleep in his shop at night. On 16.07.2004 at about 6 A.M. the informant got news that his daughter had been murdered in her husband's house. Getting this news, the informant along with his wife went to the house of the appellant and found the dead body of their daughter in her room. As per the statement made in F.I.R. the Condemned-appellant Awal Khan was in his shop, and he came to his house at 4 A.M. and saw his wife dead and the door of the room was open. Inside the house 2 sons of the accused were sleeping and the neighbours knew nothing about the occurrence of murder. Informant Ibrahim Dewan lodged FIR with Kaligonj Police Station, Gazipur, on 16.07.2004 stating that the murder was committed by unknown persons.

4. Police after investigation prima facie found the appellant involved with the murder and submitted charge sheet against him under section 302 of the Penal Code.

5. After the framing of charge learned Additional Sessions Judge, First Court, Gazipur, held the trial, examined 7 witnesses, and upon assessing the evidence found the appellant guilty under section 302 of the Penal Code and sentenced him to death.

6. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death, which was registered as Death Reference No.86 of 2008.

7. Before the High Court Division, Jail Appeal No.865 of 2008 was preferred by condemned prisoner Md. Abdul Awal Khan, which was heard along with the death reference.

8. By the impugned judgment and order of conviction and sentence, the High Court Division accepted the reference and dismissed the jail appeal, and thereby maintained the judgment and order of conviction and sentence passed by the trial Court in Sessions Case No.3 of 2005.

9. Being aggrieved by and dissatisfied with judgment and order of conviction and sentence passed by the High Court Division, the condemned-appellant preferred Criminal Appeal No. 27 of 2016 and also filed Jail Petition No.9 of 2014 before this Division.

10. The instant criminal appeal and jail petition were heard by this Division using virtual means under the provisions of the আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহার আইন, ২০২০।

11. Mr. Helal Uddin Mollah, learned Advocate, appearing on behalf of the condemned-appellant submits that the circumstantial evidence is not knitted together to sustain the conviction and as such the judgment and order passed by the High Court Division should be set aside. He then submits that there is no eye-witness to the alleged occurrence and the prosecution depends on the circumstantial evidence. He further submits that the High Court Division on misreading and non-reading of evidence, non-consideration of materials on record and misconstruction of law, facts and circumstances of the case most illegally upheld the judgment and order passed by the trial Court confirming the death sentence and as such

the impugned judgment and order should be set aside. He further submits that the examination of the condemned-appellant under section 342 of the Code of Criminal Procedure was not in accordance with law. The depositions of the witnesses were placed in lump before the condemned-appellant without specifying the names of the witnesses and as such, the impugned judgment and order should be set aside. He then submits that the seized chen/*dao* did not contain blood stain and does not connect the condemned-appellant with the murder and as such the judgment and order passed by the High Court Division is liable to be set aside. He lastly submits that there is no place of occurrence marked in the sketch map and index in the investigation report submitted by the Investigating Officer which creates doubt about the place of occurrence and as such the judgment and order is liable to be set aside.

12. Mr. A.M. Amin Uddin, learned Attorney General, appeared on behalf of the State-respondent but no concise statement was filed on behalf of the respondent. According to Order XIX, rule 3 of the Supreme Court of Bangladesh (Appellate Division) Rules,1988 no submission could be advanced on behalf of the respondent if he does not submit concise statement but Sub-article (3) of article 64 of the Constitution provides that in performance of his duties, the Attorney General shall have the right of audience in all courts of Bangladesh. Therefore, the Appellate Division Rules cannot preclude the learned Attorney General from appearing in this appeal. The learned Attorney General submits that admittedly deceased Nargis was murdered in the house of her husband condemned-appellant Awal Khan who was under the obligation to explain the cause of her death. But no reasonable explanation was furnished by her husband Awal Khan and contradictory defence case was made out during trial and as such, the order of conviction and sentence should be maintained. He further submits that chen/*dao* alleged to have been used while murdering the deceased Nargis was recovered from the bamboo made ceiling of the shop of the appellant and that the condemned-appellant brought out the chen/*dao* from ceiling of the shop in presence of the witnesses. He continues to submit that the condemned-appellant did not explain why the chen/*dao* borrowed by the condemned-appellant from P.W.2, Md. Osman Gani, the Immam of the Mosque adjacent to his shop was kept on the ceiling. He further submits that P.W.2, Md. Osman Gani, the Immam of the Mosque was independent and disinterested witness and his evidence should not be discarded very lightly. He lastly submits that though the statement of the appellant under section 342 of the Code of Criminal Procedure was not recorded properly, the condemned-appellant being a literate person and being present before the Court had the opportunity to hear the evidence of the witnesses and therefore, such defect has not prejudiced the condemned-appellant in any way.

13. We have considered the submissions of the learned Advocate for the condemned-appellant and the learned Attorney General for the State-respondent, perused the impugned judgment and the evidence on record. Admittedly, the deceased Nargis was done to death in the residence of her husband condemned-appellant Awal Khan. It is also true that there is no eye-witness to the occurrence. But the fact remains that the occurrence took place in the house of the condemned-appellant Awal Khan and it is not expected that, even if, the inmates had witnessed the occurrence, they would come forward to depose against the appellant Awal Khan. The informant stated in the FIR that the appellant was in his shop during the time of occurrence and he did not disclose any suspicion about the appellant's involvement in the occurrence but P.W.2, the Immam of the Mosque in no uncertain terms stated that on the night of the occurrence, the condemned-appellant was in his house and the police arrested him from there. In cross-examination, he denied the suggestion as under:

> "আসামী রাতে দোকান হইতে আসিয়া ঘর দরজা ভাংগা দেখিয়া আওয়াল ডাকাতির কথা বলে এবং ডাকাতরা তার বউকে মারিয়া যায় কথা আওয়াল বলে-তা সত্য না।"

14. The Mosque is adjacent to the shop of the condemned-appellant and as such, P.W.2, the Immam of the Mosque is the most competent witness to say whether the condemned-appellant on the night of occurrence was in the shop or not.

15. The police went to the shop of the condemned-appellant accompanying him and the condemned-appellant himself unlocked his shop and brought out the dao/chen from the ceiling of the shop in presence of P.W.3 Afzal, who identified the dao/chen and he also put his signature on the seizure list.

16. P.W.4, Abul Kashem Moral also stated that police came to the shop of Awal Khan along with him who opened the door and brought out the chen/dao from ceiling of the shop. He identified the chen/dao and put his signature on the seizure list (exhibit-2) and his signature thereon as exhibit-2/1.

17. P.W.5, Md. Mozammel Hoque Master also stated that police seized chen/dao which was produced by Awal Khan and that it was about 12½ inch long including the handle and the 'chen' was about 7 inch long excluding the handle. This witness stated that the police prepared the seizure list of the chen/dao and he also proved the seizure list (exhibit-3) and his signature thereon as 3/1. Therefore, the prosecution was able to prove beyond reasonable doubt that the chen/dao which was borrowed by the condemned-appellant from P.W.2, the Immam of the Mosque, was brought out by the condemned-appellant himself from the ceiling of his shop.

18. It is contended that the chen/dao did not contain any blood stain and that the tip of the chen/dao was broken and it contained soil on its body.

19. The condemned-appellant is not such a fool that he would keep the doa/chen on the ceiling of his shop containing blood stain. Therefore, it is apparent that prior to keeping it on the ceiling he had cleaned the chen/dao.

20. P.W.7, Dr. Md. Salman found 7 injuries on the body of the deceased. Five of those injuries were bone deep cut injuries and two other injuries were penetrating injuries measuring 4 cm and 5 cm deep. Suggestion was made to P.W.7 that more than one person and more than one weapon was involved in the attack upon the victim, to which he replied that he did not know.

21. Admittedly, a *chen/dao* is a sharp cutting weapon and that the injuries inflicted on the deceased were bone deep cut injuries and as such, the tip of the chen was broken. Before breaking of the tip of the chen, it is possible to make penetrating injuries measuring 4 cm and 5 cm deep. No question was put to P.W.2, the Immam of the Mosque, that when the chen was borrowed from him, whether the tip of the chen was broken or not. Therefore, it can be concluded that the appellant borrowed the chen when the tip of the chen was not broken. The appellant has not explained why the chen was kept on ceiling of the shop which is not normally done. No explanation was given why the chen was hidden on the ceiling. Normally it is kept in a place accessible for its use.

22. What is more surprising to note here is that the appellant has not provided any reasonable explanation as to the cause of the death of his wife although in wife killing case, the condemned-appellant is under the obligation to do so. He has given all contradictory

suggestions to the witnesses imputing allegations that the victim was a lady of lose character having illicit connection with others. In a misogynistic society, character assassination of women is a regular feature. In the case in hand even after death victim's soul will not rest in peace because her two sons will know that their mother was a lady of questionable character.

23. The condemned-appellant has failed to discharge his obligation by not explaining the cause of death of his wife in his house.

24. In this connection reliance may be placed on the case of *Depok Kumar Sarkar vs. State ,40 DLR (AD)139* where it has been held at para 17 that the deceased was admittedly living with the appellant at the relevant time and thus he was obliged to give an explanation as to how his wife had met with her death although normally an accused is under no obligation to account for the death for which he is on trial. The consideration is bound to be different in a case like this.

25. It is of course true that the extra judicial confession made by the appellant before the witnesses in presence of the police is not admissible. But the fact remains that the chen/dao was recovered by the police from ceiling of the shop of the appellant at his instance in presence of the witnesses. Such recovery is admissible under section 27 of the Evidence Act.

26. As regards recovery of chen/dao at the instance of the condemned-appellant from the ceiling of his shop, I would like to rely on the case of *Abdus Samad Vs. The State, (1964)16 DLR (SC)261.* It has been held in the above case that the remains of the dead body were found from a very lonely place where no person would ordinarily go to search for clues to the child missing from the town four miles away, a reason has to be found why the police went to that place at all, and no other reason is offered than that the accused himself led them to that place.

27. In the case of *Khalil Mia Vs. State (1999)4 BLC (AD)223,* it has been held that at the showing of the accused some wearing apparels were recovered from a ditch behind BBI Jute Mills and that the condemned-prisoner himself recovered the articles getting down to the ditch while in police custody. The recovery of other wearing apparels and toiletries of the deceased at the showing of the condemned-prisoner while in police custody leads to the irresistible conclusion that the condemned-prisoner had the most intimate relationship with the deceased and that wearing apparels and toiletries of the deceased must have been either in the possession of the condemned-prisoner or within his knowledge as to where those articles were. These recoveries are admissible in evidence under section 27 of the Evidence Act.

28. Relying on these cases cited above, I am of the view that the recovery of chen/dao by the condemned-appellant is a relevant fact and is admissible under section 27 of the Evidence Act. This piece of evidence also supports the other evidence on record.

29. The principle expounded in the cases referred to above applies to the facts and circumstances of the case in hand.

30. Mr. Md. Helal Uddin Mollah, learned Advocate for the condemned-appellant, submits that statement of the condemned-appellant under section 342 of the Code of Criminal Procedure was not recorded in accordance with law and such defect is not curable and as such, the condemned-appellant is entitled to be acquitted of the charge levelled against him.

31. In the case in hand, 342 statement was recorded twice one on 07.05.2008 and the other on 24.06.2008 which was the actual 342 statement of the condemned-appellant under the Code of Criminal Procedure. The 342 statement is quoted below:

"আপনার বিরুদ্ধে রাষ্ট্রপক্ষের অভিযোগ এই যে, আপনি গত ইং ১৬/৭/০৪ তারিখ রাতে গাজীপুর কালীগঞ্জ থানাধীন সাইলদিয়া গ্রামের আপনার বসত ঘরে আপনার স্ত্রী নারগীসকে ছেনদা দ্বারা কোপাইয়া নির্মমভাবে খুন করিয়াছেন। এ ব্যাপারে মৃতার পিতা থানায় এজাহার করিলে পুলিশ মামলাটি তদন্ত করিয়া আপনার বিরুদ্ধে আনীত অভিযোগ প্রাথমিকভাবে প্রমানিত হইলে দন্ড বিধি ৩০২ ধারায় অভিযোগ পত্র দাখিল করে। তদন্তকালে আপনি উক্ত খুনের ঘটনার সাথে নিজের সম্পৃক্ততার কথা পুলিশের নিকট স্বীকার করিয়াছেন।

পরে মামলাটি অত্রাদালতে বদলী হইলে একই ধারায় চার্জ গঠন করিয়া উহা প্রকাশ্য আদালতে পাঠ ও ব্যাখ্যা করিয়া আপনাকে শুনানো হইলে আপনি নিজেকে নির্দোষ দাবী করেন এবং বিচার প্রার্থনা করেন। তৎপ্রেক্ষিতে রাষ্ট্রপক্ষ আপনার বিরুদ্ধে আনীত অভিযোগ প্রমানার্থে ৭ জন সাক্ষীকে আদালতে হাজির করিয়া তাহাদের জবানবন্দি রেকর্ড করে এবং আপনার পক্ষ থেকে সাক্ষীদের জেরা করা হয়। সাক্ষ্য গ্রহণ শেষে যথাযথ পদ্ধতি অনুসরণ পূর্বক গত ৭/৫/০৮ ইং তারিখে আপনাকে ফৌজদারী কার্যবিধির ৩৪২ ধারায় পরীক্ষা করা হয়। জবাবে আপনি নির্দোষ দাবী করিয়া পি, ডব্লিউ-৫ মোঃ মোজাম্মেল হক মাষ্টার, পি, ডব্লিউ-৬ নং মোঃ আবু বকর সিদ্দিক ও পি, ডব্লিউ-৭ ডাঃ মোহাম্মদ সালমান কে রিকল করতঃ পুনরায় জেরা করার সুযোগ প্রার্থনা করেন। আদালত আপনার প্রার্থনা মঞ্জুর পূর্বক উল্লেখিত সাক্ষীদের রিকল করে এবং আপনার পক্ষ থেকে উক্ত সাক্ষীদের জেরা করা হইয়াছে। আপনি আদালতে উপস্থিত থাকিয়া সাক্ষীদের জবানবন্দি ও জেরা শুনিয়াছেন। সাক্ষীরা আপনি উক্ত হত্যাকান্ড সংগঠিত করিয়াছে বলিয়া সুনির্দ্দিষ্ট এবং সুস্পষ্টভাবে সাক্ষ্য প্রদান করিয়াছেন। এখন আপনার বিরুদ্ধে আনীত অভিযোগ এবং গৃহীত সাক্ষ্যের ভিত্তিতে-

প্রশ্নঃ- আপনার জবাব কি?

উত্তরঃ- নির্দোষ।

প্রশ্নঃ- আপনি সাফাই সাক্ষী দিবেন?

উত্তরঃ- না।

প্রশ্নঃ আপনি লিখিত বা মৌখিকভাবে কিছু বলবেন কি?

উত্তরঃ না।"

32. Having gone through statement recorded under section 342 of the Code of Criminal Procedure, I find that the statement was not recorded specifying the evidence adduced by individual witnesses but it cannot be said that the appellant was prejudiced in any way by such minor omission because he is a literate person and at his instance P.Ws.5, 6 and 7 were recalled. After recalling the aforesaid witnesses they were again cross-examined none other than by the appellant himself. Therefore, I am of the view that the condemned-appellant being a literate person and the witnesses having been examined in his presence, he was not at all prejudiced by such a minor defect in recording his statement under section 342 of the Code of Criminal Procedure.

33. In this connection reliance may be placed on the case of The *State vs Md. Zakir Hossain (2018)23 BLC (AD)150* where Muhammad Imman Ali,J. stated in paragraph 21 as under:

> "An issue was raised by the advocate for the respondent, Rayhan that his attention was not drawn to his confessional statement when he was examined under section 342 of the Code. In this regard the fundamental issue is whether the accused was

> prejudiced by the omission to bring to his notice the fact that he had made a confessional statement implicating himself in the offence charged. The High Court Division considered several decisions where it had been held that "incriminating evidence or circumstances sought to be proved by the prosecution must be put to the accused during examination under section 342 of the CrPC otherwise it would cause a miscarriage of justice". The learned Advocate for the appellant has referred to the decision in the case of Mezanur Rahman vs State, 2 BLC (AD) 27, where it was held that the accused was aware of the fact that he had made a confessional statement and the magistrate had also deposed in respect of the recording of the confessional statement, and hence the accused was not prejudiced by the omission to specifically bring to his notice the confessional statement."

Reliance may also be placed on the case of 28 DLR (SC) 35 and 1 BLC (HCD) 345.

34. Relying on the cases referred to above, I am inclined to hold that the condemned-appellant was not at all prejudiced because of the minor omission made by the learned Additional Sessions Judge while recording the statement under section 342 of the Code of Criminal Procedure.

35. It is the defence case that on the night of occurrence, the appellant came to his house at 4 A.M. It is of course true that a person can come to his house at any time and it cannot be questioned by anybody but in the case in hand what prompted the appellant on the fateful night to come to his house at 4 A.M. had not been explained. It is not the defence case that on getting information of murder of his wife he rushed to his house. This fact also indicates that the appellant was in fact, responsible for causing the death of his wife.

36. Therefore, I am of the view that the prosecution has been able to prove the charge under section 302 of the Penal Code against the condemned-appellant beyond all reasonable doubt. As regards the sentence, I am of the view that there was rancorous relationship between the husband and wife which resulted in the death of the wife. When bitter relationship exists between the husband and wife for a long time capital sentence of death should not be inflicted in such a case.

37. Therefore, the sentence of death passed by the trial Court and affirmed by the High Court Division should be commuted to imprisonment for life.

38. Accordingly this criminal appeal is dismissed and the sentence of death passed by the trial Court and confirmed by the High Court Division is commuted to imprisonment for life and to pay a fine of Tk.50,000/-, in default, to suffer rigorous imprisonment for 1 (one) year more.

39. Jail Petition No.09 of 2014 is dismissed in the light of the judgment delivered in Criminal Appeal No.27 of 2016.

Muhammad Imman Ali, J (Majority view):

40. This criminal appeal is directed against the judgement and order dated 25.02.2014 passed by the High Court Division in Death Reference No.86 of 2008 heard along with Jail Appeal No.865 of 2008 confirming the death sentence passed by the learned Additional Sessions Judge, First Court, Gazipur in Sessions Case No.3 of 2005 convicting the appellant under section 302 of the Penal Code sentencing him to death in connection with Kaligonj Police Station Case No.7 dated 16.07.2004 corresponding to G.R. No.278 of 2004.

41. The facts of the case, in brief, are that informant's daughter Nargis was the wife of appellant Awal Khan and out of their wedlock 2 children were born. Appellant Awal Khan had a stationary shop half mile away from his house and he used to sell mobile phones with other articles. Appellant Awal Khan was in Saudi Arabia for 6 years. He returned and opened several businesses. On many occasions he used to sleep in his shop at night. On 16.07.2004 at about 6 A.M. the informant got news that his daughter has been murdered in her husband's house. Getting this news, the informant along with his wife went to the house of the appellant and found the dead body of their daughter in her room. Appellant Awal Khan was in his shop, and he came to his house at 4 A.M. and saw his wife dead and the door of the room was open. Inside the house 2 sons of the accused were sleeping and the neighbours knew nothing about the occurrence of murder. Informant Ibrahim Dewan lodged FIR with Kaligonj Police Station, Gazipur, on 16.07.2004 stating the murder was committed by unknown persons.

42. Police after investigation submitted charge sheet against accused Md. Abdul Awal Khan under Section 302 of the Penal Code.

43. After framing charge learned Additional Sessions Judge, First Court, Gazipur, held the trial, examined 7 witnesses, and upon assessing the evidence found the appellant guilty under section 302 of the Penal Code and sentenced him to death.

44. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death, which was registered as Death Reference No.86 of 2008.

45. Before the High Court Division, Jail Appeal No.865 of 2008 was preferred by condemned prisoner Md. Abdul Awal Khan, which was heard along with the death reference.

46. By the impugned judgement and order, the High Court Division accepted the reference and dismissed the jail appeal, and thereby maintained the judgement and order of conviction and sentence passed by the trial Court in Sessions Case No. 3 of 2005.

47. Hence, Criminal Appeal No. 27 of 2016 was filed before this Division and the condemned prisoner also filed Jail Petition No.9 of 2014.

48. The instant criminal appeal and jail petition were heard by this Division using virtual means under the provisions of the আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহার আইন, ২০২০।

49. Mr. Helal Uddin Mollah, learned Advocate appearing on behalf of the appellant submitted that there is no eye witness of the alleged occurrence. The circumstantial evidence is not knitted together to sustain the conviction, as such the judgement and order passed by the High Court Division is liable to be set aside. He also submitted that the High Court

Division due to misreading, non-reading, non-consideration of materials on record and misconstruction of law, facts and circumstances of the case most whimsically passed the judgement and order upholding the judgement and order passed by the trial Court confirming the death sentence, as such the judgement and order is liable to be set aside. He submitted that the informant in his FIR stated that "জামাই দোকানে ছিল" । There is no witness regarding "last seen" of the accused in connection with the occurrence, as such the judgement and order is liable to be set aside. He submitted that examination of the accused under section 342 of the Code of Criminal Procedure was not in accordance with law. No deposition of any P.W.s was placed before the accused as such the judgement and order is liable to be set aside. He further submitted that the police seized no wearing clothes of the deceased, and no blood-stained earth was seized from the place of occurrence. The *dao* seized was not blood stained and does not connect the appellant with the murder, as such the judgement and order of is liable to be set aside. The learned Advocate lastly submitted that there is no place of occurrence marked in the sketch map and index which creates doubt about the place of occurrence, as such the judgement and order is liable to be set aside.

50. Mr. A.M. Amin Uddin, learned Attorney General and Mr. Biswajit Debnath, learned Deputy Attorney General appeared for the State. It was submitted on behalf of the State that when the victim is killed while in the custody of her husband then the burden is upon the husband to explain how his wife met her death. The evidence is clear that the victim was killed in the bedroom inside her husband's house. Therefore, there can be no doubt she was in his custody at the time when she was killed. It was further submitted that the *dao* used for the killing was recovered from the shelf in the shop of the appellant at his pointing out. The learned Attorney General submitted that the facts and circumstances point to the guilt of the appellant and hence the impugned judgement does not call for any interference by this Division.

51. We have considered the submissions of the learned Advocate for the appellant and the learned Attorney General for the State, perused the impugned judgement and order of the High Court Division and other connected papers on record.

52. It appears that there is no eyewitness of the alleged occurrence. Moreover, there is no witness regarding the appellant being last seen with the victim in connection with the occurrence. The informant stated in his FIR that the appellant was in his shop during the time of occurrence, and he did not disclose any suspicion about the appellant's involvement. Later, the appellant was arrested by the police upon suspicion. According to the statement of P.Ws. 1, 4, 5 and 6 the appellant confessed his guilt before them and accordingly the *chen dao* which was used to murder his wife was recovered from his shop. The appellant refused to give any confessional statement when he was brought before the Magistrate. We note that if extra-judicial confession had been made, it was done in the presence of the police and is therefore not relevant under section 24 of the Evidence Act and cannot be the basis of conviction. The recovery of the *dao* at the pointing out of the appellant is admissible evidence in view of section 27 of the Evidence Act. However, there is no legal evidence on record to show that the said *dao* was used to deal the blows upon the victim.

53. We also find some merit in the submission of the learned Advocate appearing on behalf of the appellant that the examination of the appellant done by the trial court under section 342 of the Code of Criminal Procedure was not conducted properly as the incriminating evidence in the depositions of the prosecution witnesses were not placed before the appellant in accordance with law. Hence, we are of the opinion that the examination of

the appellant under section 342 of the Code was not lawfully done by the trial Court. So, the trial conducted by the court below is liable to be vitiated.

54. With regard to the evidence on record, the police recovered the *chen dao* with which the appellant is alleged to have killed his wife. The *dao* belonged to the Imam of the Mosque Mohammad Osman Goni (P.W.2) and it was recovered from the shelf inside the shop of the appellant at his pointing out. Md. Mozammel Hoque Master (P.W.5) was a witness to the seizure of the *dao*. In his cross examination he stated that he along with others including the Imam (P.W.2) went inside the shop of the appellant. Therefore, the seizure of the *dao* would have been done in the presence of the Imam (P.W.2). However, P.W.2 in his cross examination categorically stated that he did not see the recovery of the *dao*. Abul Kashem Moral (P.W.4) who also witnessed the recovery of the *dao* and was a witness to the seizure list stated that the seizure list was prepared 2/3 days later and that there was no identification marked on the *dao*. From the seizure list (exhibit-3) relating to the *dao* it appears that the *dao* had some soil on its body and the tip was broken. There is no evidence of any blood stain on the *dao* and in fact PW5 and the Investigating Officer stated in their respective cross examination that the *chen dao,* which was recovered did not have any blood stain. Hence, there appears to be some doubt whether the *dao* recovered was in fact used as the weapon to kill the victim. It was also not produced in Court at the time of cross examination of the prosecution witnesses. Had it been produced, then it could have been elicited whether there was any trace of blood on the *dao* and whether it was capable of causing penetrating injury with the tip of it having been broken. Doubts thus created will go to the benefit of the accused-appellant.

55. The evidence shows that seven deep injuries were inflicted upon the victim, which would naturally have caused spurts of blood to stain the clothes of the assailant. The appellant was at the scene of the occurrence from 4 AM. There was no evidence to suggest that his clothes were blood-stained or that he had changed his clothes or that he had washed the stained clothes.

56. Moreover, there was no seizure list to show how and when and from where the blood-stained clothes of the victim were recovered. With so many deep cut/penetrating injuries, it would be expected that the wearing apparel of the victim would also be cut. Bur there was no evidence in that regard.

57. The evidence of Dr. Md. Salman (P.W.7) in juxtaposition with the postmortem report (exhibit-6), shows that there were seven injuries on the body of the deceased. Five of those injuries were bone-deep cut injuries and two other injuries were penetrating injuries, 4cm and 5cm deep. It was suggested to P.W.7 that more than one person and more than one weapon was involved in the attack upon the victim, to which he replied that he did not know.

58. A *chen dao* when used as a weapon for the purpose of attacking someone would not create a penetrating wound, particularly since the tip of the *dao* was broken. It appears,

therefore, that a *dao* was not the only weapon used to inflict injur1ies upon the victim. Hence, there appears to be a serious doubt about the allegations as made out in the prosecution case.

59. The learned Judge of the trial Court observed that it was proved that the accused tied up the hands and feet of the victim before dealing blows upon her because there was no evidence of any injury on her hands. This is clearly surmise and conjecture of the learned Judge which is not supported by any evidence of on record. The learned Judge also observed that the accused admitted his guilt in the presence of P.Ws 3, 4, 5 and 6 and that there was no reason to disbelieve these witnesses. However, we find from deposition of the witnesses that the accused is alleged to have admitted having killed his wife when he was brought back to the village by the police. Any such admission in the presence of police should have been left out of consideration by the learned trial Judge. We find that P.W.5 categorically stated in his cross-examination that at the time of his arrest the accused did not admit the murder. Thus, the conclusion arrived at by the learned trial Judge were palpably erroneous, based on irrelevant evidence.

60. We note from the deposition of the informant (PW1) that the appellant is his nephew. Hence, the appellant and the victim were first cousins before their marriage, which took place 8/9 years prior to the occurrence, according to PW2, the Imam. The couple have two children and there is no allegation of any quarrel between them. We also find from the evidence on record that P.Ws 3, 4, and 5, whose evidence was relied upon by the learned trial Judge to convict the accused-appellant, stated in their evidence that the accused was a good person. There was no suggestion from any quarter that the appellant had a bad relationship with his wife or anyone else.

61. Md. Mozammel Haque Master (PW5) stated in his cross examination that the appellant admitted to the I.O. in the presence of himself, Kashem Member (PW4) and Afzal(PW3) that he killed his wife due to an illicit relationship with his sister-in-law and killed his wife because she protested. Such admission cannot be considered since if it was done in the presence of the police then it is irrelevant evidence.

62. On the other hand, it is admitted that there was some incident relating to the victim's sister Nasrin, who was married off from another house instead of from the house of her father (the informant). The defense suggestion was that Nasrin had been abducted by Kabir Dewan, Awlad Hossain and Musharraf and that the appellant brought her back and as a result due to that occurrence an enmity had developed and the said Kabir Dewan, Awlad Hossain and Musharraf came back to take revenge on the appellant, and not finding him in the house they killed his wife. In our view such circumstance cannot be brushed aside, and it goes in favour of the appellant.

63. The learned trial Judge appears to have taken into consideration the alleged admission by the appellant in presence of P.Ws 2,3,4 and 5 but failed to appreciate that if there was such

an admission, it was made when the appellant was accompanied by the police and hence inadmissible under section 24 of the Evidence Act. The conviction and sentence were thus not based on legal evidence.

64. With regard to the victim's death while in the custody of her husband, the evidence on record shows that the appellant used to stay at his shop. There was no evidence that on that night he was sleeping in his own house. Hence, there is sufficient explanation from the appellant that he was not present in the house when his wife was attacked, and provision of section 106 of the Evidence Act are not applicable in the facts of the instant case.

65. In the facts and circumstances discussed above we find that the doubt created by the evidence on record indicate the innocence of the convict appellant. The judgement of conviction and sentence awarded by the trial Court is not based on a proper assessment of the evidence on record. There was no legal evidence on which to base the conviction of the appellant. The High Court Division fell into the same error as the trial Court.

66. Accordingly, Criminal Appeal No.27 of 2016 is allowed by majority decision. The impugned judgement of the High Court Division as well as that of the trial Court are set aside. The convict appellant Md. Abdul Awal Khan, son of Aziz Khan of village, Saildia, Police Station-Kaligonj, District, Gazipur is acquitted of the charge levelled against him and his conviction and sentence are set aside. Let him be set at liberty forthwith if he is not wanted in connection with any other case.

67. Jail petition No.09 of 2014 is disposed of in the light of the judgement delivered in Criminal Appeal No. 27 of 2016.

68. Hasan Foez Siddique, J: I have gone through the judgments proposed to be delivered by my brothers, Syed Mahmud Hossain, C.J. and Muhammad Imman Ali, J. I agree with the reasoning, findings and decision given by Muhammad Imman Ali, J.

69. Abu Bakar Siddique, J: I have gone through the judgments proposed to be delivered by my brothers, Syed Mahmud Hossain, C.J. and Muhammad Imman Ali, J. I agree with the reasoning, findings and decision given by Muhammad Imman Ali, J.

70. Md. Nuruzzaman, J: I have gone through the judgments proposed to be delivered by my brothers, Syed Mahmud Hossain, C.J. and Muhammad Imman Ali, J. I agree with the reasoning, findings and decision given by Muhammad Imman Ali, J.

71. Obaidul Hassan, J: I have gone through the judgments proposed to be delivered by my brothers, Syed Mahmud Hossain, C.J. and Muhammad Imman Ali, J. I agree with the reasoning, findings and decision given by Muhammad Imman Ali, J.

Courts Order

80. The appeal is allowed and the jail petition is disposed by majority decision.