3 SCOB [2015] HCD 74

High Court Division
(Criminal Appellate Jurisdiction)

Death Reference no. 50 of 2010

The State

Versus

Abul Kalam,

….. Condemned-prisoner

Mr. Forhad Ahmed, D.A.G. with
Mr. Bashir Ahmed, A.A.G. and
Mr. Kazi Md. Mahmudul Karim, A.A.G.
.... For the State.

Mr. M. Ashraf Ali, Advocate,
..... For the condemned prisoner
With
Criminal appeal no. 5149 of 2010

Abul Kalam,
….. Convict-appellant.
Versus
The State,
….. Respondent.

Mr. M. Ashraf Ali, Advocate
……. For the convict-appellant.

With

Jail appeal no. 256 of 2010

Abul Kalam,
……. Convict-appellant.
Versus

The State,
……..Respondent

No one appears,
…. For the convict-appellant.

Mr. Farhad Ahmed, D.A.G. with
Mr. Bashir Ahamed, A.A.G. and
Mr. Kazi Md.; Mahmudul Karim, A.A.G.
.... For the State-Respondent.

Heard on: 23-02-2015, 01-03-2015, 02-03-2015, 03-03-2015, 04-03-2015, 05-03-2015 and Judgment delivered on 08-03-2015

Present:
Mr. Justice Syed Md. Ziaul Karim
And
Mr. Justice Sheikh Md. Zakir Hossain

Penal Code, 1860
Section 302
Sentencing Discretion:
Sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice. ... (Para 96)

How to attach weight to the testimony of witness:
The weight to be attached to the testimony of witness depends in a large measure upon various consideration some of which are in the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility, it is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because of some suggestion against truthfulness of the witness. ... (Para 98)

Judgment

Syed Md. Ziaul Karim, J:

1.This death reference under Section 374 of the Code of Criminal Procedure (briefly as the Code) has been made by learned Judge of Nari-O-Shishu Nirjatan Daman Tribunal no.2, Netrokona (briefly as Tribunal), for confirmation of death sentence of condemned-prisoner.

2. The learned Judge by the impugned judgment and order of conviction and sentence dated 04-08-2010, in Nari-O-Shishu Case no. 124 of 2002 convicted the condemned prisoner under section 11(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000(briefly as Ain 2000) and sentenced him to death by hanging and also to pay a fine of Tk.10,000/-.

3. By the above appeals the appellant (condemned prisoner) has challenged the legality and propriety of the aforesaid judgment and order of conviction and sentence.

4. This death reference and the above appeals having arisen out of a common judgment, these have been heard together and are being disposed of by this judgment.

5. The prosecution case as projected in the first information report (briefly as FIR) and unfurled at trial are that Kachan Akter alias Ambia aged about thirty five years (briefly as victim) (since deceased) was married with accused Abul Kalam(condemned prisoner)(briefly as accused). Since marriage the accused used to torture her for dowry. On 25-04-2002 the accused demanded Tk. 50,000/- to her as dowry. On her refusal to bring the same all the FIR named accused numbering five namely Abul Kalam, Abdus Salam, Helauddin, Salma Akter, Nazma Akter and mother of the other accused inflicted fist and leg blows upon her person causing swelling bleeding injuries. On the same day at 8.00 p.m. all the accused repeatedly assaulted her and accused Abul Kalam pressed her neck and strangulated her to death. Al Amin (P.W. 6) and Milon Mia(P.W.3) sons of victim (sons of her former husband) witnessed the occurrence. At the time of occurrence the victim was carrying for 4/5 months. After committing murder all the accused wrapped her neck by rope and poured poison and it was given out that the victim committed suicide. The incident was informed to the parent's, home of victim by Abul Kasem(P.W. 4). Having had heard the incident Md. Hossain Ali (P.W. 1) brother of victim rushed to Digjan (Naopara) conjugal home of victim. Later, the prosecution was launched by him as informant by lodging an FIR with the local Police Station which was recorded as Netrokona P.S. Case no. 36(4) of 2002, corresponding to G.R. no. 141(2) of 2002.

6. The Police after investigation submitted charge sheet under Section 11(ka) of the Ain, 2000 accusing three accused namely Abul Kalam, Abdus Salam and Helaluddin and other FIR named co-accused were let off.

7. Eventually, all the accused were called upon to answer the charge under Section 11(ka) of the Ain 2000 which was read over to them who pleaded not guilty and claimed to be tried.

8. In course of trial the prosecution in all produced nineteen witnesses out of twenty six charge-sheeted witnesses, of them examined sixteen witnesses and three witnesses were tendered by the prosecution and the defence examined none.

9. After closer of the prosecution case, the accused were examined under section 342 of the Code and again they repeated their innocence but led no evidence in defence.

10. The defence case as it appears from the trend of cross-examination of the prosecution witnesses are that of innocence and false implication. It is divulged in defence that the victim committed suicide in the conjugal home and due to previous enmity and internal feud the accused were falsely implicated at the instance of local rivals.

11. After trial the learned Judge by the impugned judgment and order of conviction and sentence convicted only the accused Abul Kalam as aforesaid, however acquitted the other co-accused namely Abdus Salam and Helaluddin holding:

(a) The prosecution successfully proved the charge against the accused by corroborative evidence.

(b) The evidence against the accused was consistent, uniform and corroborative in nature and accused failed to explain the cause of death of the victim.

12. Feeling aggrieved by the impugned judgment and order of conviction and sentence the appellant preferred the instant appeals.

13. The learned Deputy Attorney General appearing for the State supports the reference and submits that it is a wife killing case and all the prosecution witnesses by corroborative evidence proved that the victim Kachan Akter alias Ambia died at the custody of her husband in her conjugal home. So the accused is under obligation to explain the cause of death. He adds that although in the postmortem report the doctor did not specifically opined the cause of death but from the ocular evidence it clearly indicates that the death was homicidal in nature as the body bore multiple injuries upon the cadaver. He further submits that P.Ws. 3 and 6 were the eye witnesses of assaulting the victim and P.W. 1 also stated that prior to the occurrence the accused used to torture the victim for the cause of dowry. He submits that the circumstances also proved that the accused had the complicity with the crime of murder of his wife and the learned Judge of the Court below after considering the materials on record rightly convicted the accused which calls for no interference by this Court.

14. In support of his contentions he refers the following cases:

(a) In the case of Ramnaresh and others Vs. The State of Chhattisgarh (2012)4, Supreme Court cases -257 at paragraph 52 wherein it was observed:

" It *is a settled principle of law that the obligation to put material evidence to the accused under Section 313 CrPC is upon the Court. One of the main objects of recording of a statement under this provision of CrPC is to give an opportunity to*

the accused to explain the circumstances appearing against him aswellas to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313 CrPC, insofar as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law. "

(b) In the case of State of U.P. Vs. Krishna Gopal and another (1988)4 Supreme Court Cases -302 wherein at paragraph -24 it was observed:

" It is trite that where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the orality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudiced making any other evidence, including medical evidence, as the sole touch stone for the test of such credibility. The evidence must be tested for its inherent consistency and the interest probability of the story; consistency with the account of their witnesses held to be creditworthy ; consistency with the undisputed facts; the credit of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. "

(c) In the case of Dayal Singh and others Vs. State of Uttaranchal (2012)8 Supreme Court cases 263 wherein at paragraph 14 it was observed:

" This Court has repeatedly held that an eyewitness version cannot be discarded by the court merely on the ground that such eyewitness happened to be a relation or friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, examine the possibility of discarding such statements. But where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the court to discard the statements of such related or friendly witness. "

(d) In the case of Abul Kalam Azad alias Ripon (Md) Vs. State 58 DLR(AD)-26 held:

" Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain (XVIII of 1995)

Section 10(1)

Even if there is no specific mention of demand of dowry in Material Exhibit I(c) but as the trial Court has observed on reading the writings in the diary in its entirety it cannot be said that the fact of torturing the victim for not meeting the demand of dowry was totally absent.

(e) In the case of Md. Abdul Majid Sarkar vs. The State 40 DLR-83 held:

"Penal Code (XLV of 1860)

Section 300, Exception 4 read with Evidence Act (I of 1872)

Section 105

S. 105 of the Evidence Act casts a burden upon the accused to prove the existence of circumstances bringing the case within any special exception or

provision contained in any other part of the Penal Code. There has been complete failure on the part of the defence to prove those circumstances.

The learned counsel sought to argue before us that Exception 4, to section 300 is attracted in the facts of the present case and as such the appellant ought to have been convicted for culpable homicide not amounting to murder. This argument can hardly be considered by us now when evidently no endeavor was made on behalf of the appellant to plead the aforesaid Exception at any stage earlier. Section 105 of the Evidence Act casts a burden upon the accused to prove " the existence of circumstances bringing the case.....within any special exception or proviso contained in any other part of the same (Penal) Code ". There has been a complete failure on the part of the defence to prove or bring on record those circumstances which would bring the case within the aforesaid Exception 4. Except the denied suggestion there is nothing on record to show that the offence was committed in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. In the absence of any foundation of fact it is now idle to suggest that Exception 4 is attracted. Indeed, as already noticed, it has never been argued before that the offence committed by the appellant was one of culpable homicide nor amounting to murder.

The learned counsel also made an argument that since the deceased died in the hospital admittedly 14 days after the occurrence, the nature of the injury was not obviously such as was likely to cause death and as such the appellant should have been convicted under section 304 Penal Code. "

15. The learned Advocate appearing for the convict appellant opposes the reference and seek to impeach the impugned judgment and order of conviction and sentence on five fold arguments:

Firstly: There is no specific evidence against the accused that he demanded dowry. Prior to the occurrence the victim did not disclose such facts of demanding dowry to her relations. So according to him the demand of dowry to her was not proved by evidence.

Secondly: The prosecution although produced two alleged eye witnesses namely PWs. 3 and 6 but their presence at the place of occurrence (briefly as P.O.) was doubtful inasmuchas the other witnesses in their evidence did not support the presence of such alleged eye witnesses.

Thirdly: The prosecution failed to produce the independent witnesses and all the witnesses were inter related. So their evidence should not be relied and if the independent witnesses be examined they would not have supported the prosecution case.

Fourthly Over the self same evidence one set of accused were acquitted and there is no cause to convict the rest one having considering the same evidence.

Fifth and lastly: The judgment and order of conviction and sentence based on misreading and non consideration of the evidence on record which cannot be sustained in the eye of law.

16. In support of his contentions he refers the following cases:

(a) In the case of The State vs. Mofazzal Hossain Pramanik 43 DLR(AD) 64(A) held:

" Burden of proving alibi in a wife-killing case-It is true that the burden of proving a plea of alibi or any other plea specifically set up by an accused-husband for absolving him of criminal liability lies on him. But this burden is somewhat lighter than that of the prosecution. The accused could be considered to have discharged his burden if he succeeds in creating a reasonable belief in the existence of circumstances

that would absolve him of criminal liability, but the prosecution is to discharge its burden by establishing the guilt of the accused. An accused's burden is lighter, because the court is to consider his plea only after, and not before, the prosecution leads evidence for sustaining a conviction. When the prosecution failed to prove that the husband was in his house where his wife was murdered, he cannot be saddled with any onus to prove his innocence."

(b) In the case of C.K. Raveendran Vs. State of Kerala 2000 Supreme Court Cases (crl.) 108 held:

" Penal Code, 1860-Ss. 302 and 201- Uxoricide or suicide- The doctor issuing post-mortem certificate reserving his opinion as to the cause of death pending the result of chemic al analysis- In the final report issued on getting the report of Chemical Analyser, the doctor stating that it was not possible to say whether the injuries on the dead body were ante-mortem or post-mortem- The deceased was allegedly last seen in the company of the accused as long as 27 days before the dead body was found- In such circumstances, held, High Court erred to holding that the death was homicidal."

(c) In the case of Atahar and others Vs. State 62 DLR-302 held:

" Defence plea- There is a basic rule of criminal jurisprudence that if two views are possible on the evidence adduced in a case of circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the Court should adopt the view favorable to the accused. If we consider the entire evidence we can safely conclude that the prosecution has totally failed to prove its case, moreso the version put forward by the defence has a reasonable possibility of being true. Hence the accused is entitled to get benefit of doubt, not as a matter of grace but as a matter of right.

In the instant case, if we place defence version and its supporting evidence and circumstances and the prosecution case side by side in order to arrive at a correct decision, it will appear to us that the defence version of the case will come our prominently in order to defeat the prosecution case but the learned trial Court did not virtually outsider the defence version. If the defence put forward in alibi on behalf of the accused which seems to be true the accused is entitled to a verdict of benefit of doubt.

17. In order to appreciate their submissions we have gone through the record and given our anxious consideration to their submissions.

18. Let us now weigh and sift the evidence on record as adduced by the prosecution to prove the charge.

19. P.W.1 Md. Hossen Ali is the informant and elder brother of the victim. He is not the eye witness of the occurrence. He deposed that the victim was married with the accused before 5/7 years. On 12th Baishakh he came to learn from his relation Abul Kasem that all the accused in collaboration with each other murdered his sister Kachon. Accordingly he along with his other inmates rushed there and reached at the conjugal home of the victim at 3:00 p.m. and found the dead-body on the floor of the dwelling hut of accused Abul Kalam. He also found a mark of finger at the throat of victim, and multiple injuries on her person. At that time accused Abul Kalam and other inmates were absent. He came to learn from the neighbouring people that all the accused murdered the victim for the cause of dowry for Tk. 50,000/-. The accused used to torture the victim Kachon for dowry and to that effect the victim instituted criminal case. The victim had two children by accused Abul Kalam. He

informed the incident to the Police who happened at the scene of occurrence and held inquest upon the cadaver of the deceased. After autopsy the Police handed over the deadbody to them. He lodged the ejahar (Exhbt.1) and his signature on it Exhbt. 1/1. He proved the inquest report as Exhbt. 2 and his signature on it Exhbt. 2/1. He identified the accused on dock.

20. In cross-examination he stated that victim Kachon was the second wife of accused Abul Kalam, prior to her marriage with Kalam she was married with Hafiz before 20 years of the occurrence. Victim Kachon came to their home and asked for money for her husband Abul Kalam as dowry. Prior to the occurrence victim Kachon instituted a criminal case against accused Abul Kalam which was ended in a final report. He denied the suggestion that the accused did not assault Kachon for the cause of dowry and deposed falsely.

21. P.W. 2 Md. Hadiz, behai of victim. He deposed that he hailed from village Tenga. He heard about murder of victim Kachon from Alamin and rushed there and found the dead-body at the P.O. He did not find any inmates around the P.O. and heard from the locals that the victim Kachon was murdered by the accused on the previous night.

22. In cross-examination he stated that there were many houses around the P.O. and denied the suggestion that accused were not present at the P.O. and they did not commit the offence.

23. P.W. 3 Milon Mia, is the son of the victim by her former husband. He is eye witness of the occurrence. He deposed that accused Abul Kalam is the second husband of his mother victim Ambia . On 12th Baishakh at 8:00 p.m. on hearing hue and cry he and his brother Alamin went to the dwelling hut of accused Abul Kalam wherein they found that accused Salam, Kalam and Helal were assaulting their mother inside the hut of Kalam. Salam and Helal inflicted fist and leg blows on victim Ambia and Kalam dealt ruler blows on the different parts of Ambia. Thereafter Helal fell her down on the ground and Kalam pressed her neck then Salam and Helal dealt incriminate fist blows on the person of victim. At one stage mother of the accused told to eliminate the victim. Salma and Nazma, sisters of the accused chased the victim to the door. After sometime he and Alamin came to the hut of Kalam and found that Kalam is pressing her knee and Kalam throatling his mother who later succumbed to the injuries. He was examined by the I.O. He identified all the accused on dock.

24. In cross-examination he stated that he did not state to the I.O. about assaulting his mother by accused Salam and Helal inside the hut of Kalam. He found 15/20 persons assembled at the P.O. He did not go inside the P.O. however witnessed the occurrence from 200 cubits away. Because of extramarital relation between his mother and accused Kalam, his father drove her away. He denied the suggestion that the occurrence did not take place as stated by him.

25. P.W. 4 Abul Kasem is the behai of victim and not eye witness of the occurrence however heard the same. He deposed that after hearing the occurrence from Alamin he went to the hut of accused Kalam and found the dead-body of Kachon on the floor . Alamin told him that accused Kalam , Salam and Helal assaulted victim Kachon to death. At that time accused were found absent there. He was examined by the I.O.

26. In cross-examination he stated that he informed the informant about the incident and denied the suggestion that accused Kalam did not assault the victim for dowry and he was deposing falsely.

27. P.W. 5 Osman Goni, sister's husband of the victim and not the eye witness. He deposed that he heard the occurrence from Alamin that all the accused assaulted the victim Kachon. He rushed to the P.O. and did not find any accused.

28. In cross-examination he stated that he did not see the occurrence. Prior to the occurrence accused used to torture the victim Kachon for dowry and she narrated the same to them. He denied the suggestion that Alamin did not state anything to him about the death of Kachon by assaulting.

29. P.W.6 Alamin is the son of victim Kachon. His father name is Md. Hafizuddin. He deposed that on 12th Baishakh at 7:30 p.m. he along with his brother Milon went to the dwelling hut of Abul Kalam and found that Kalam, Salam and Helal dragging their mother. Abul Kalam sat at the chest and brought out the victim Kachon, all the accused assaulted her, at about 12:0 Clock at mid night victim succumbed to the injuries at the dwelling hut of Kalam. Accused Abul Kalam used to assault the victim Ambia for dowry so she filed a case against Abul Kalam, prior to the occurrence, he identified the accused on dock.

30. In cross-examination he stated that at the time of occurrence he along with his brother Milin were present at the P.O. He witnessed the occurrence standing 30 cubits away. One Sahid and 2/3 unknown persons also witnessed the occurrence. He denied that he did not state to the I.O. that accused Kalam sat on the chest of Kachon and murdered her and death of Ambia was natural death.

31. P.W. 7 Sahid Ali is the local witness. He was tendered by the prosecution however in cross-examination he stated that he did not see any injury on the person of victim Ambia. Accused Salam and Lat Mia took the victim in hospital for treatment. He did not see Milon and Alamin at the relevant time. He was operating husking machine at the P.O.

32. P.W. 8 Babul Mia. He was a rickshaw puller by profession. He carried the victim Kachon to the hospital by his rickshaw. Salam and Kalam also accompanied to the hospital. Subsequently Kalam told him that the patient died.

33. In cross-examination he stated that he was not the eye witness to the occurrence.

34. P.W.9 Abdur Rashid also local witness. He is not an eye witness to the occurrence. He disowned the prosecution case so he was declared hostile. He deposed that the victim died at the dwelling hut of the accused. On hearing hue and cry he rushed to the P.O. and found the wife of Kalam was lying on a bed in unconscious condition. He heard on the following day about the death of that lady at that stage he was declared hostile by the prosecution.

35. In cross-examination by the prosecution he denied the suggestion that accused Kalam murdered his wife Kachon and fled away and was deposing falsely.

36. In cross-examination by the defence he stated that there is a good relationship between the accused and victim. He had no knowledge about demanding dowry by the accused. He did not find any injury on the person of the victim. Accused Salam and Kalam

carried the deceased to the hospital. Later he heard that the victim died. He did not depose falsely.

37. P.W. 10 Siddiqur Rahman, is the local witness. He deposed that while he was returning home he heard the screaming at the dwelling hut of Abul Kalam. He rushed there and found that wife of Kalam was assaulted. He returned home, on the following day he heard about the death of the wife of Kalam and saw the victim there. He found the mark of injuries at the ear of deceased. Police also held inquest upon the cadaver and in inquest report he stood as one of the witness. He proved his signature as Exhbt. 2/2. The deceased died by torture of accused for the cause of dowry.

38. In cross-examination he stated that he was examined by the Police he denied the suggestion that the accused did not assault the victim for the cause of dowry and he was deposing falsely.

39. P.W. 11 Chand Mia was a local witness. He deposed that the victim Ambia was the wife of accused Kalam and found that she was taken to hospital by rickshaw of Babul wherein victim sat and suddenly she became senseless. She died at the hospital. He saw dead-body and present at the time of burial.

40. In cross-examination he stated that victim Ambia was the wife of Hafizuddin prior to the marriage with accused Abul Kalam. At the time of occurrence or prior to it, he did not find Milon and Alamin at the dwelling hut of Abul Kalam.

41. P.W. 12 Lat Mia was a rickshaw puller by profession. Victim Ambia was the wife of accused Kalam. He find the victim Ambia unconscious at the dwelling hut of Abul Kalam. He carried the victim to the hospital wherein she died. Brother of Ambia instituted the case.

42. In cross-examination he stated that he did not find any injury on the person of the victim. He did not hear about the beating of victim and there was a good relation between them. The informant instituted the case with ill motive.

43. P.W. 13 Idris, P.W. 14 Sarwar alias Sawar Ali, P.W. 16 Shah Alam were tendered by the prosecution and defence declined to cross-examine them.

44. P.W.15 Mustafa Mia is a local witness. He deposed that on 12th Baishak at 8:00 p.m. he found the victim was carried to the hospital. In the morning he heard that the victim Ambia wife of accused Abul Kalam died.

45. In cross-examination he stated that the victim Ambia used to fall in senseless. He did not find any injuiry upon the person of victim Ambia and there was a good relation between husband and wife. He did not hear about demanding dowry to victim Ambia.

46. P.W. 17 Md. Ratan Mia, he also a local witness. He saw that the victim was carrying to the hospital. He heard on the following day the victim died. He had no knowledge how the victim succumbed to the hospital.

47. P.W. 18 Dr. A.K.M. Rafiqul Islam. He was also examined as P.W.20. He deposed that at the relevant time he was posted as R.M.O. of Netrokona sadar hospital. He held autopsy upon the cadaver of victim Ambia and found the following injuries:

মৃতার দেহে ৪টি জখম পাই ঃ

1. One mark bite of seen on left arm.
2. Heamatoma seen in right arm.
3. Swelling with bruise seen on left scapular region.
4. Ecchymosis seen in left side of neck.
5. Post-mortem staining seen in different parts of the body.

উক্ত জখমের প্রেক্ষিতে আমি নিম্নরুপ মতামত প্রদান করিঃ

Opinion kept pending till the report of chemical analysis of preserved viscera. After receiving report he opined that " As poison was not detected in preserved in viscera report by chemical in analysis and injured mentioned in viscera report was not sufficient to cause of death. So cause of death of the deceased could not be ascertained. He proved the postmortem report as Exhbt. 7 and his signature as Exhbt. 7/1.

48. In cross-Examination he stated that he did not mention the age of injuries, it may cause before or after the death. The injuries were simple in nature. He denied the suggestion that the victim died by breathing problem.

49. P.W. 19 S.I. Md. Abdur Rashid Sarkar was investigating officer of this case. He deposed that on 26-04-2002 he was attached with Netrokona sadar Police Station. He received the FIR and filled up its form. He was entrusted for investigation. He visited the place of occurrence, prepared sketch map with index, held inquest upon the cadaver of victim Ambia. Then he sent the cadaver for autopsy. During investigation he examined witnesses. He collected a copy of FIR and final report of Netrokona sadar Police station case no. 17 dated 20-04-1998 instituted by victim Ambia under the Ain, 2000. He also collected the other criminal case instituted under section 11(kha), 30 of the Ain, 2000. After investigation he submitted charge sheet under section 11(Ka) of the Ain, 2000 accusing the condemned prisoner and two others as accused.

50. In cross-examination he stated that at the time of holding inquest he found marks of injuries at the neck. He did not find any serious injuries on her person. He denied that except Alamin and Milon no other person witnessed the occurrence, and occurrence was fictitious one.

51. These are all of the evidence on record adduced by the prosecution to prove the charge.

52. Now the question calls for consideration how far the prosecution could proved the charge against the appellants. Such question along with the submissions of the defence should be answered in the following manner:

53. In approaching and answering to the points drawn up, the cardinal principles of criminal jurisprudence in awarding conviction followed by sentence upon an indicted person demands meditation. A legal survey of law, appraisal of evidence, browsing eye on materials brought on record, analysis of fact and circumstance of the case, inherent infirmities disturbing and striking facts of prosecution case are also required to be taken into consideration. Rival contentions surged forward from both sides shall be also addressed and considered by us.

54. Fundamental principles of criminal jurisprudence and justice delivery system is the innocence of the alleged accused who should be presumed to be innocent until the charges are proved beyond reasonable doubt on the basis of clear, cogent and credible evidence and that onus of proving everything essential to the establishment of charge against the accused lies upon the prosecution which must prove charge substantially as laid to hilt and beyond all reasonable doubt on the strength of clear, cogent credible and unimpeachable evidence. In a criminal trial, the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and on its failure, it cannot fall back upon the evidence adduced by the accused in support of his defence to rest its case solely thereon. Proof of charge must depend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny. Prosecution version is also required to be judged taking into account the overall circumstances of the case with a practical, pragmatic and reasonable approach in appreciation of evidence.

55. It is always to be remembered that justice delivery system cannot be carried away by heinous nature of crime or by gruesome manner in which it was found to have been committed and graver the charge is greater is the standard of proof required. It should also bear in mind that if the accused can create any doubts by adducing evidence or cross examining the PWs in the prosecution case, the accused is entitled to get benefit of doubt. It is conveniently observed that though sad, yet is a fact that in our country there is a tendency on the part of the people to rope in as many people as possible for facing trial in respect of any criminal case. It has been even found that innocent person, including aged infirm and rivals, are booked for standing on dock. Some are acquitted by the Court of first instance and some by appellate Court, but only having been in incarceration for years. Such efforts on the part of relatives of victim and other interested persons invariably is done and thus it becomes difficult on the part of a Court to find out the real culprit. Under such circumstances and in view of the prevalent criminal jurisprudential system, a judge is to find out the truth from a bundle of lies and to shift the grain out of chaff. A Judge does not preside over a criminal trial merely to see that no innocent person is punished. A Judge, also presides to see that guilty man does not escape. Both are public duties. Law therefore, cannot afford any favour other than truth and only truth.

56. *We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged with crime, the following principles should be taken into consideration.*

a) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.

b) The evidence must be such asto exclude to a moral certainty every reasonable doubt of the guilt of the accused.

c) In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffer.

d) There must be clear and unequivocal proof of the corpus delicit.

e) The hypothesis of delinquency should be consistent with all the facts proved.

Inspite of the presumption of truth attached to oral evidence under oath if the Court is not satisfied, the evidence inspite of oath is of no avail.

57. On going to the evidence on record it transpires that the prosecution in all produced nineteen witnesses. Of them, examined sixteen witnesses and three witnesses were tendered by the prosecution and defence declined to cross-examine them.

58. P.W. 1 is the informant and elder brother of the victim. He heard the occurrence. P.Ws. 2, 3, 4, 5 and 6 are also relations of the victim. Of them, P.Ws. 3 Milon Mia and P.W. 6, Alamin witnessed the occurrence. P.Ws. 8,9,11, 12, 15, 17 found that the victim was carried to hospital by rickshaw. P.Ws. 9 and 10 were also local witnesses they found that the victim died at the homestead of the accused. P.Ws. 18 and 20 appeared to be the same witnesses who is doctor and held autopsy upon the cadaver. P.W. 19 is the investigating officer of this case. After concluding investigation he submitted charge-sheet accusing the condemner-prisoner and two others as accused.

59. On meticulous examination of the evidence on record it is evident that the case in our hand is absolutely rest upon the evidence of P.Ws. 3 and 6 who are the full brothers, sons of the victim and their father was Hafizuddin(former husband of the victim). Other witnesses were examined to corroborate them. P.W. 3 categorically stated that on 12th Baishakh he along with his brother Alamin(P.W. 6) on hearing hue and cry went to the house of accused Abul Kalam and found that accused namely Salam, Kalam and Helal were assaulting their mother inside the house. They repeatedly inflicted fist and legs blows upon the victim and at one stage victim fell down on the ground, then Kalam pressed her and sat on the chest and strangulated her to death. P.W. 6 Alamin who was also an eye witness of the occurrence corroborated the evidence of P.W.3 in respect of assaulting the victim. Other witnesses namely P.Ws. 2,4,5 also stated that they heard the occurrence about assaulting of the victim from Alamin. P.W. 18(same as PW. 20), Dr. A.K.M. Rafiqul Islam Sarker who held autopsy upon the cadaver categorically found four injuries on the persons of the victim. P.Ws. 8,11, 12, 15, 17 also found that the victim was carried to the hospital in serious injured condition although sons of the victim stated that the victim died in her conjugal home and other witnesses stated that on the way to the hospital she died. P.Ws. 9 and 10 were the local witnesses, they also corroborated the other evidence in respect of assaulting of the victim inside the house of accused. Although P.Ws.9 was declared hostile by the prosecution but he categorically stated that the victim died in the accused house. Therefore, we hold that assaulting the victim by causing injuries upon her person i.e. in accused Kalam's dwelling hut) and causing her death during custody of her accused husband Abul Kalam are consistent, uniform and corroborative with each other with all material particulars. There is absolutely no reason to disbelieve the consistent and corroborative evidence of those competent witnesses having no reason whatsoever to depose falsely against the accused appellant. The defence extensively cross-examined them but nothing could be elicited to shake their credibility in any manner whatsoever. So the same are invulnerable to the credibility.

60. The doctor opined that the injuries inflicted upon the victim was not sufficient for causing death. We are unable to accept his opinion inasmuch as there are sufficient ocular evidence that the victim were mercilessly beaten by the three accused. Of them, accused Abul Kalam pressed her on the ground and sat on her chest and then strangulated her, consequently she succumbed to the injuries at the dwelling hut of accused Abul Kalam. Therefore we hold that the injuries inflicted upon the victim were severe in nature which were sufficient for causing death. In our country doctor may sometime cannot provide correct view regarding cause of death of victim, in such cases we are to rely upon the evidence of ocular eye witnesses, where ocular evidence is sufficient to come to an conclusion to determine the cause of death, then the ocular evidence shall prevail over the opinion of doctor. To that end in view that the opinion of the doctor should be left out of consideration.

61. On further meticulous examination of the evidence on record we find that prior to the occurrence the victim did not tell to any of the witness regarding demanding of dowry to her by her accused husband Abul Kalam. Although previously she instituted a criminal case against her husband Abul Kalam for demanding dowry, but the same was ended. With this regard we hold that, the said case was ended on its own merit but in the instant case there is no evidence on record that prior to the occurrence the victim disclosed to her relation that the accused (condemned prisoner) Abul Kalam demanded Tk. 50,000/- to her and for the cause of non payment of such dower money for Tk.50,000/- murdered her. With this regard we hold that the victim was murdered by her accused husband during his custody, but not for the cause of dowry.

62. After committing murder it was given out by the accused that the victim committed suicide by wrapping rope at her neck and taking poison.

63. Let us now consider the medico- legal feature coupled with the injuries found on the neck and person of the victim.

64. According to MODI's Text book of Medical Jurisprudence and Toxicology violent death resulting chiefly from asphyxia are hanging strangulation throttling, Suffocation and Drowning.

65. Hanging is a form of death produced by suspending the body with a continuous ligature mark round the neck. The mark is usually situated above the thyroid cartilage between the larynx and the chin and is directed obliquely upward following the line of the mandible (lower jaw) and interrupted at the back or may show an irregular impression of a knot, reaching the mastoid processes behind the ears towards the point suspension. On the contrary strangulation is a violent form of death which results from constructing the neck by means of a non-continuous ligature mark or any other means without suspending the body. Such ligature mark usually situated lowdown in the neck below the thyroid cartilage and encircling the neck horizontally and completed.

66. It is in page 192 of the Parikh's Textbook of Medical Jurisprudence and Toxicology. Fifth Edition.

> " *Whether death was due to hanging"*
>
> *It is not uncommon in India to kill a victim and then suspend his body (post mortem hanging) from a tree or rafter to mislead the relatives and the police. In such a case, a ligature mart is usually found. Therefore, when a person is found dead and his body suspended, no opinion can be given from the ligature mark alone. Death could be attributed to hanging if one finds(1) a ligature mark with petechial hemorrhages and ecchymoses into or around its substance, (2) marks of dribbled saliva, (3) tear of the intima of carotid arteries with extravasation of blood within their walls, (4) congestion and hemorrhage in the lymph modes above and below the ligature mark, (5) fracture or dislocation of cervical vertebra and (6) absence of fatal injuries and poisoning :*

67. It is in page 257 of the MODI's Medical Jurisprudence and Toxicology. Twenty Second Edition:

> *"(1) Whether death was caused by hanging "In India, it is a common practice that to kill a victim and then to suspend the body from a tree or a rafter to avert suspicion. It is, therefore, necessary to find out if hanging was the cause of death in*

suspended body. The presence of ligature mark alone is not diagnostic of death from hanging, inasmuch as, being a purely cadaveric phenomenon it may be produced if a body has been suspended after death. Often a body is suspended after murder to simulate suicidal hanging. In such cases, a close examination of the direction of the friction marks on the fibers of the rope at the point of suspension, may indicate whether the body was pulled up by some one else or dropped down by its weight. Casper has illustrated by experiments that a mark similar to the one observed in persons hanged alive can be produced if suspended within two hours or even a longer period after death. Besides, a similar mark may also be produced by dragging a body along the ground with a cord passed round the neck soon after death. However, one can safely say that death was due to hanging, if, in addition to the cord mark, there was dribbling of saliva from the angle of mouth, ecchymosis and slight abrasions around the ligature mark, laceration of the intima of the carotid arteries with extravasation of blood within their walls and the post mortem sings of asphyxia, besides if there are no evidence of a struggle, scratches and nail marks, fatal injuries or poisoning."

68. Therefore it appears that there are non-continuous ligature marks at the neck of deceased, which is the violent forms of death caused by strangulation. So in the present case the death of the deceased could not be attributed to hanging.

69. In the instant case the injuries inflicted upon the victim found by the doctor are consistent with the ocular evidence, which was antimortem and homicidal in nature. Moreover the injuries present on the dead-body of the deceased were not consistent with suicidal death due to hanging. The ligature mark on the neck was post-mortem. No symptom of suicidal hanging was present.

70. According to the medico legal evidence it has been conclusively proved that the victim Kachon Akter homicidally assaulted and strangulated to death.

71. Undisputedly the deceased, who was the wife of the accused, met with death in the conjugal home, while she was living with her accused husband. Presence of the accused in the house at the material time is not disputed. No plea of alibi has been taken. Moreover presence of the accused at the material time is supported by the evidence on record. Thus the death of the deceased was in the special knowledge of the accused. He knew how she met with death. Ordinarily an accused has no obligation to account for the death for which he is placed on trial. But in a case like the present one where the accused has special knowledge of the death of the deceased, under section 106 of the Evidence Act, he is under obligation to explain how the deceased died. If he fails to explain the death of the deceased or if his explanation is found false the irresistible inference would be that none besides him caused the death of the deceased. With this regard reliance may be placed in the cases of (1) Abdul Motaleb Howlader vs. State 5 MLR (AD) 362= 6 BLC(AD)1, (2) Elais Hossain vs. State, 54 DLR (AD) 78, (3) Golam Mortuza, vs. State, 2004 BLD (AD)201=9 BLC (AD)229, (4) Gouranga Kumar Shaha, vs. State 2 BLC (AD) 126, (5) Dipak Kumar Sarker, Vs. State 40 DLR (AD), 139, (6) State Vs. Mofazzal Pramanik, 43 DLR(AD)65, (7) State Vs. Shafiqul Islam, 43 DLR(AD) 92, (8) State Vs. Kalu Bepari, 43 DLR(AD) 249, (9) Shamsuddin vs. State, 45 DLR 587, (10) Abdus Salam vs. State, 1999 BLD 98, (11) Abdus Shukur Miah vs. State 48 DLR 228, (12) State vs. Afazuddin Sikder, 50 DLR 121, (13) Abul Kalam Molla vs. State 51 DLR 544, (14) Joynal Bhuiyan vs. State 52 DLR 179, (15) Fazar Ali vs. State, 5 MLR 351= 5 BLC 542, (16) State Vs. Azizur Rahman 2000 BLD 467= 5 BLC 405.

72. In the case of Abul Hossain Khan vs. State 8 BLC(AD) 172, it is held-

> *" The un-denied position is that death of petitioner's wife occurred in the house of the petitioner. It is not the case of the petitioner that he was away from the home while death occurred to his wife or that some miscreants whom he could not resist caused death of his wife. The petitioner tried to explain the cause of death by stating that the deceased committed suicide by hanging. The explanation offered as to how death occurred to the petitioner's wife was found to be not correct because of the evidence of P.Ws. 12 and 13, the Medical Officers who held post-mortem examination of the dead-body of petitioner's wife. The Medical Officers have stated that cause of death of the victim was homicidal and not suicidal. Since death to the wife was caused while she was residing in the house of her husband, the convict petitioner, is competent to say how death occurred to his wife and that the explanation which he offered having been found untrue, the conviction and sentence that was passed by the learned Sessions Judge has rightly been affirmed by the High Court Division.*

73. The facts and circumstances of the above case are fully consistent with those of the case in our hand and as such the principle of law enunciated in that case is applicable in this case.

74. It is pertinent to point out that the accused has no obligation to account for the death for which he is placed for trial. The murder having taken place while the wife was with the custody of her husband, then the accused husband under Section 106 of the Evidence Act, is under obligation to explain how his wife had met with her death. In absence of any explanation coming from his side it seems, none other than the accused husband was responsible for causing death.

75. It is well settled that when it is established that the husband and wife were residing in the same house at the relevant time, the husband is duty bound to explain the circumstances how his wife met her death and in absence of any explanation coming form the husband, irresistible presumption is that it is the husband who is responsible for her death. In this regard reliance can be placed in the case of State Vs. Aynul Huq 9 MLR 393= 9 BLC 529. This view receives support in the case of Gouranga Kumar Saha vs. State 2 BLC (AD) 126. Abdul Mutaleb Howlader vs. State 5 MLR(AD)92= 6 BLC(AD)1, Dipok Kumar Sarkar vs. State reported in 40 DLR(AD) 139 and Sudhir Kumar Das alias Khudi Vs. State 60 DLR-261.

76. In the case State vs. Azam Reza 62 DLR(AD) 406 held:

> *" Wife killing case- The deceased was the wife of the accused who met with death in the bed-room of the accused, while she was living with the accused. The presence of the accused in the house of the material time is not disputed rather is supported and proved by evidence on record and the death of the deceased was within the special knowledge of the accused."*

77. On appraisal of the evidence on record therefore, we find that the evidence of the prosecution witnesses regarding staying of the victim with her accused husband at her conjugal home are consistent, uniform and corroborative with each other. There is absolutely no reason to disbelieve those competent witnesses, therefore, the same are invulnerable to the credibility.

78. The convict-appellant stood charged and convicted for offence of section 11(ka) of the Ain 2000. Section 11(ka) enjoins that if the husband of a woman or father, mother, guardian, relation or any other person on behalf of the husband for dowry cause death to a woman or ventures to cause death or causes hurt or have a try to cause hurt that husband, father, mother, guardian, relation or the person (a) shall stand sentenced to death for causing death or shall stand sentenced to imprisonment for life for mounting endeavour to cause death and in both the counts he shall be, also, liable to pay fine and (b) shall be sentenced to imprisonment for life causing hurt or be sentenced to rigorous imprisonment for a period not more than 14(fourteen) years and less than 5(five) years for striving to cause hurt and in both counts shall be liable to fine.

79. In order to attraction 11(Ka) of the Ain 2000, it is to be proved that death was caused in view of demand of dowry put forward from the side of husband or father, mother, guardian, or relation of the husband or any person for and on behalf of husband.

80. From circumstantial evidence it has come to light that convict-appellant had caused the death of deceased and a clear case of murder had been brought home to the door of appellant.

81. This takes us to a legal debate of fundamental character, which is,

i. Whether the convict-appellant can be graced with a verdict of acquittal when charge of section 11(ka) of the Ain of 2000 could not be pressed against him;

ii. When a clear case of murder has been established by circumstantial and medical evidence against him whether the convict-appellant can be convicted for the offence of murder punishable under section 302 of the Penal Code.

iii. Whether the case is required to be sent back to Tribunal or Court of sessions for fresh-trial.

82. Section 25 of The Ain of 2000 postulates that Tribunal defined section 2(Gha) shall be treated as Court of Sessions and Tribunal shall be able to exercise all powers of Sessions Court in holding trial of an offence.

83. Section 26 of The Ain 2000 enshrines that Tribunal so constituted shall be recorded as Nari-O--Shishu Nirjatan Daman Tribunal and shall be constituted with one Judge and Judge of Tribunal shall be appointed from amongst District and Sessions Judge to the Government, if necessary, shall appoint any District and Sessions Judge as Tribunal Judge in addition to his charge. Section 20 further enjoins that under the section Additional District and Sessions Judge shall, Also, stand included as District and Sessions Judge.

84. From the above it becomes manifestly clear that a Tribunal trying a case under the Ain of 2000 is, also, a Court of District and Sessions Judge. When a Judge sits in a Tribunal or Special Tribunal Case holding trial of an offence under a Statute or Special Statute is a Tribunal or Special Tribunal and a Judge when sits in Sessions Case trying an offence punishable under Penal sections of Penal Code sits as Sessions Judge.

85. The case is hand, although, tried by a Tribunal constituted under The Ain of 2000 that Tribunal was, also, the court of Sessions. In the judgment, learned Judge was described as Additional District and Sessions Judge, as well as Nari-O-Shishu Nirjatan Daman Tribunal no.2. Judgment demonstrates that learned Additional District and Sessions Judge has been, also, exercising the power and Jurisdiction of the Nari-O-Shishu Nirjatan Daman Tribunal.

Fate of the convict-appellant and result of the case would have been the same whether it would have been tried either as a Nari-O-Shishu case by the Tribunal or as a sessions case by learned Sessions Judge and if section 11(ka) of the Ain of 2000 was not attracted in respect of convict-appellant the offence of section 302 the Penal Code could be very much pressed into service against the convict-appellant, and he could be conveniently tried and convicted for offence of section 302 of the Penal Code.

86. In the case of Asiman Begum vs. The State 51 DLR(AD)-18 held:

"*When it is found after a full trial that there was a mis-trial or trial without jurisdiction, the Court of appeal before directing a fresh trial by an appropriate Court should also see whether such direction should at all be given in the facts and circumstances of a particular case.*

It is found that there was no legal evidence to support the conviction then in that case it would be wholly wrong to direct a retrial because it would then be a useless exercise. Further, the prosecution should not be given a chance to fill up its lacuna by bringing new evidence which it did not or could not produce in the first trial."

87. As regards remand of the case, we may profitably refer the above decision in the case of Asiman Begum vs. state reported in 51 DLR(AD) 18 *wherein it has been decided that the remand order for trial of the case as a Sessions case in the particular circumstances of the case will be a mere formality because Nari-O-Shishu Case no.2 of 1996, although tried under Bishes Bidhan Ain, 1995 by a Bishesh Adalat, the presiding officer was no other than the Sessions Judge himself and, as such, it was unlikely that the result would be anything different if the case was tried by him as a Sessions case.* Appellate Division thus sent the appeal to High Court Division to consider the case on merit and to pass whatever order or orders it might think appropriate in the interest of justice.

88. In State vs. Abul Kalam , 5 BLC 230 one Abul Kalam stood convicted for offence of section 10(1) of The Ain of 1995 for murder of his wife for dowry by learned Sessions Judge and Special Tribunal no.1, Noakhali. Consequential sentence was death. Condemned-prisoner preferred Jail appeal and, also, regular Criminal appeal before High Court Division. There had been, also, Death Reference. A Division Bench of High Court Division heard Death Reference, Jail appeal and Criminal appeal together and disposed of those by a common Judgment. High Court Division found that there had not been cogent evidence asto committing murder for dowry and no evidence had been led as to the real cause of killing of wife by husband and held that the case did not come under section 10(1) of The Ain of 1995 and the case comes under section 302 of the Penal Code. The High Court Division further held that Sessions Judge, in fact, was the Special Tribunal no.1 who tired the case and for no fault of the accused the case had been tried as Special Tribunal case. High Court Division instead of sending the case back for fresh trial under Section 302 of The Penal Code by learned Sessions Judge disposed of the appeal. High Court Division altered conviction from section 10(1) of The Ain,1995 to one under section 302 of the Penal Code. Sentence of death was altered to one of imprisonment for life. The High Court Division in rendering decision took into account the case of Asiman Begum vs. State (Supra).

89. In the case of Shibu Pada Acharjee vs. State reported in 56 DLR 285, accused-appellant was convicted for offence of section 4© of The Ordinance of 1983 for commission of rape upon victim Ratna Rani but ingredients of section 4© of the Ordinance of 1983 could not be brought home to accused-appellant. In the case is had been laid down:

> *" To take the prosecution out of Court on a question of technicality, will be a travesity of Justice and technicality must bend to cause of justice inasmuch as ends of law is Justice."*

90. *Accused-appellant can be fastened for offence of section 376 of the Penal Code and conviction under section 4(c) of the Ordinance of 1983 can be altered to one of section 376 of The Penal Code.*

91. In the said case conviction under section 4(c) of The Ordinance of 1983 was altered to one of section 376 of the Penal Code.

92. In the case of The State vs. Mahbur Sheikh alias Mahabur ILNJ 139 i.e. I The Lawyers & Jurist 139 held:

> *" Since offence of murder punishable under section 302 of Penal Code was carried to the door of convict-appellant he can be very much convicted for offence of Section 302 of the Penal Code and as such we convert the offence of section 11(Ka) of the Ain 2000 to offence of section 302 of the Penal Code. Convict-appellant, thus stands convicted for offence of section 302 of the Code.*

93. In the event of sending the case either to Tribunal or Court of Sessions for fresh trial proceeding would be protracted which cannot be allowed in the interest of true dispensation of criminal Justice.

94. Since offence of murder punishable under section 302 of the Penal Code was carried to the door of convict-appellant he can be very much convicted for offence of section 302 of the Penal Code and as such we convert the offence of section 11(ka) of The Ain of 2000 to offence of section 302 of Penal Code. Convict-appellant, thus stands convicted for offence of section 302 of the Penal Code.

95. Legal debate stands solved in the following terms and language:

i. Convict-appellant Abul Kalam cannot be graced with a verdict of acquittal;
ii. Convict-appellant can be convicted for the offence punishable under section 302 of the Penal Code.
iii. Case is not required to be sent either to Tribunal or Court of Sessions for fresh-trial.

96. With regard to the sentence imposed upon convict-appellant we are of the view that sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice.

97. The credit to be given to the statement of a witness is a matter not regulated by rule of procedure, but depends upon his knowledge of fact to which he testifies his disinterestedness,

his integrity and his veracity. Apportion of oral evidence depends on such variable in consistence which as a human nature can not be reduced as a set formula (40 DLR 58).

98. The weight to be attached to the testimony of witness depends in a large measure upon various consideration some of which are in the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility, it is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because of some suggestion against truthfulness of the witness.

99. Evidence of close relations of the victim cannot be discarded more particularly when close relations does not impair the same. Straightforward evidence given by witness who is related to deceased cannot be rejected on sole ground that they are interested in prosecution. Ordinarily close relation will be last person to screen real culprit and falsely implicate a person. So relationship far from being ground of criticism is often a sure guarantee of its truth (40 DLR 58).

100. In the light of discussions made above and the preponderant Judicial views emerging out of the authorities referred to above we are of the view that the impugned Judgment and order of conviction and sentence under section 11(ka) of the Ain 2000 suffers from legal infirmities, but the same will be proper under section 302 of the Penal Code. In respect of sentence of condemned prisoner Abul Kalam, we hold that he was aged about 38 years when he was examined under section 342 of the Code. Record indicates that he is not a hard criminal and has been languishing in the condemned-cell for about fifty five months with suffering of mental agony of death within the death-cell. Taking an account of aggravated and mitigating circumstances ends of justice will be met if the death sentence is altered to one of imprisonment for life. Condemned-prisoner Abul Kalam thus, stands sentenced to suffer imprisonment for life.

101. In the result:-

(a) Death reference no. 50 of 2010 is rejected;

(b) The impugned judgment and order of conviction and sentence dated 04-08-2010 passed by the learned Judge of Nari-O-Shishu Nirjatan Damon Tribunal no.2, Netrakona, is modified to the effect that the condemned-prisoner Abul Kalam is convicted under Section 302 of the Penal Code and sentenced to suffer imprisonment for life and also to pay a fine of Tk.10,000/- in default to suffer rigorous imprisonment for six months more.

102. In view of the provisions laid in section 35A(1) of the Code of Criminal Procedure the total period the condemned-prisoner Abul Kalam have been in custody before conviction in connection with this offence shall be deducted from the period of imprisonment for life awarded to him.

(c) Accordingly, Criminal appeal no. 5149 of 2010 and Jail appeal no. 256 of 2010 are allowed in part with modification of conviction and sentence in above terms.

103. The Office is directed to send down the records at once.