

LEX/BDAD/0159/2016

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IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Criminal Petition for Leave to Appeal No. 568 of 2015

Decided On: 28.07.2016

Md. Sukur Ali **Vs.** The State

Hon'ble Judges/Coram:

Surendra Kumar Sinha, C.J., Syed Mahmud Hossain and Mirza Hussain Haider, JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: Zainul Abedin, Senior Advocate instructed by Zahirul Islam, Advocate-On-Record

JUDGMENT

Mirza Hussain Haider, J.

1. This criminal petition for leave to appeal is directed against the judgment and order dated 07.07.2015, passed by a Division Bench of the High Court Division in Death Reference No. 39 of 2010 heard along with Criminal Appeal No. 3904 of 2010 and Jail Appeal No. 183 of 2010 by which the death reference has been rejected and the conviction has been altered from Section 302 of Penal Code to Section 304 (part-1) of the Penal Code and thereby modifying the sentence of death penalty to imprisonment for life and both the aforesaid criminal appeal as well as the jail appeal preferred by the convict petitioner have been dismissed. Facts leading to filing of this criminal petition for leave to appeal in short are that:

One Md. Ohidul Islam, Officer-in-Charge of Dhupchachaia Police Station, Bogra, lodged First Information Report (FIR) stating that pursuant to G.D. entry No. 367 dated 10.06.2006 made on the basis of an information received from one Aynal Bepari, a Union Parishad Member, that 'a dead body of an unknown woman is floating on the water of "Iramoti Khal", he accompanied by other police constables went to the said khal at about 11.00 a.m. and found the said dead body as informed. The persons present there could not identify/recognize the same. Thereafter upon preparing the Inquest Report, taking picture of the dead body and preparing sketch map he sent the dead body to the morgue for post-mortem and seized a red coloured blouse, black "brassiere" and red-coloured two petticoats, the wearing apparels of the dead body. Thereafter during investigation two persons, namely Khokon and Serajul Islam, claiming to be the son and brother respectively of one woman called Mahbuba came to the said police station on 26.6.2006 and upon seeing the wearing apparels of the deceased recognized the same to be of the said Mehbuba, the mother of Khokon. Accordingly in course of investigation the investigating officer recorded the statements of witnesses under section 161 of the Criminal Procedure Code and apprehended the accused Sukur Ali on 12.07.2006 at 1.00 a.m. who confessed his guilt by disclosing that the victim Mehbuba was his second wife; That on 08.06.2006 in the name of taking her to the doctor for treatment he took the victim, Mehbuba, at the place of occurrence "Iramoti Khal" side and

killed her by throttling and to conceal the dead body he immersed the same into the water of that "khal". The investigating officer then went to the place of occurrence along with the accused Sukur Ali who identified the place of occurrence and again confessed his guilt stating that he personally killed his wife Mehbuba. Then, the accused Sukur Ali was placed before a Magistrate, First Class, for recording his confessional statement under section 164 of the Criminal Procedure Code and the Magistrate recorded his statement accordingly. After closer of investigation the investigating officer submitted charge sheet No. 54 dated 09.08.2006 against the accused Sukur Ali under Section 302/201 of the Penal Code.

2. The case was then registered as Sessions Case No. 327 of 2006 and was transferred to the Court of Additional Sessions Judge, Bogra for trial, who framed charge under sections 302/201 of the Penal Code against the accused petitioner and read over the same to him to which he pleaded not guilty and claimed to be tried.

3. At trial the prosecution examined 8 witnesses and the defence examined none. The accused was examined under section 342 of the Criminal Procedure Code wherein he again claimed to be innocent.

4. From the trend of cross-examination of the witnesses the case of the present petitioner appears to be that he is innocent and in no way he is connected with the killing of his wife Mehbuba who since after marriage found to be involved in leading immoral life which made the relationship between them bitter. But he is not, in any way, connected with her death/killing. The victim, Mehbuba, might have been killed by any unknown miscreant, not by the convict-petitioner, Sukur Ali.

5. On conclusion of the trial the learned Additional Sessions Judge, upon considering the evidence and the materials on record, found the accused petitioner guilty and convicted him under section 302 of the Penal Code and sentenced him to death and to pay a fine of TK. 20,000/- by judgment and order dated 16.06.2010.

6. A reference under section 374 of the Criminal Procedure Code was sent to the High Court Division which was registered as Death Reference No. 39 of 2010. The condemned-prisoner himself also preferred Criminal Appeal No. 3904 of 2010 and Jail Appeal No. 183 of 2010 against the said judgment and order of conviction and sentence.

7. A Division Bench of the High Court Division heard the death reference and the aforesaid two appeals together and on consideration of the materials on record, rejected the death reference and dismissed both the appeals but 'altered the sentence under section 304 (Part-I) from section 302 of the Penal Code' and commuted and substituted the death sentence by imprisonment for life, as mentioned above, giving him the benefit of section 35A of the Criminal Procedure Code.

Hence this criminal petition for leave to appeal has been filed by the convict petitioner before this Division.

8. Mr. Zainul Abedin, the learned Senior Counsel appearing on behalf of the convict petitioner submits that the High Court Division erred in law in relying upon the confessional statement of the petitioner which is not true and voluntary rather the same has been obtained by duress, coercion and torture. Even if the confessional statement is taken to be correct then the same cannot be the basis for convicting the petitioner because it does not attract section 302 of the Penal Code and there being no

corroboration of the same by any other witnesses the judgment and order of conviction and sentence is not sustainable in law. He submits that since there is no eye witness of the occurrence and since admittedly the actual cause of death could not be ascertained by the doctor as the dead body of the victim was highly decomposed and since there is no ocular evidence that the dead body is that of the victim Mehbuba, who happened to be the wife of the convict petitioner and since the case is not a case of culpable homicide amounting to murder, under section 300 of the Penal Code, the judgment and order passed by the High Court Division is not a proper judgment of conviction and as such the petitioner should be acquitted. He further submits that the prosecution has miserably failed to prove the case beyond all reasonable doubt and there are many discrepancies amongst the depositions of the PWs which led the whole prosecution story unworthy of belief and as such the impugned judgment is liable to be set aside.

9. None represented the respondent.

The main contention of the learned Counsel for the convict-petitioner is that the prosecution failed to produce any ocular evidence that the dead body was that of his wife Mahbuba; and in the absence of any eye witness to prove that the convict killed the victim and that the dead body being highly decomposed actual cause of death could not be ascertained by the doctor; and that the confessional statement, which was the basis for conviction, being not voluntary, true rather the same being obtained by duress, coercion and torture, which is not admissible under the criminal justice system, as such the conviction and sentence is not sustainable in law. To answer the aforesaid questions we need to examine the materials on record.

10. From the record it appears that the FIR was lodged on 10.06.2006 by the Officer in Charge, Dupchachia Police Station, Bogra, on the basis of an information received from Aynul Bepari, a local Union Parishad Member, as to floating of a dead body of a woman on the "Iramoti khal". In this respect one thing is to be noted that the prosecution could not give the actual date of death. The only date as it appears from the record is 10.06.2006 when the FIR was lodged.

11. From the post mortem report it appears that the said dead body was sent to the morgue on 10.06.2006 at about 13.15 hours and on 11.06.2006 at about 14.00 hours the autopsy was held wherein the injuries as found on the dead body has been mentioned as follows:

"২.যখম-অবস্থান, আকার ও ধরণ:-Bruise black in colour over the skin just below right mandible on dissection bruise and haematoma just below the skin.

২.যখম-অবস্থান, আকার ও ধরণ:-Fracture thyroid cartilage-congestion of larynx and trachea."

Other organs of the dead body have been found "intact"/healthy except the lungs which have been found "congested".

On the basis of the aforesaid findings the doctor opined:

12. "In my opinion Death was due to Asphyxia resulting from throttling which was ante mortem and homicidal in nature."

From the inquest as well as the post mortem report read with the evidence of PWs 1, 2 and PW 7, the Doctor, it is clear that the dead body was highly decomposed and as such from the post mortem report it appears that the injuries could not be specifically mentioned. Admittedly there is no eye witness of the occurrence. Reading the evidence

of the PWs it cannot be concluded that the convict petitioner is the assailant of the victim. Under such circumstances only thing remains is confessional statement made by the convict petitioner before the Magistrate under section 164 of the Criminal Procedure Code. The trial Court, relying on the said confessional statement, made before the Magistrate (PW-8), convicted the petitioner under section 302 of the Penal Code and sentenced him to death penalty. The High Court Division, as the appellate Court, converted the conviction from section 302 to under section 304 (Part-I) of the Penal Code and sentenced the petitioner to suffer imprisonment for life. The High Court Division also granted the benefit of section 35A of the Criminal Procedure Code to the petitioner in counting the period of sentence.

13. On perusal of the confessional statement, it appears that the accused clearly narrated as to how he committed the offence of killing the victim but he did not confess as to throwing the dead body into the water of the "Iramoti khal". On the other hand, PW-1, the informant as well as the investigating officer, stated that the convict petitioner was arrested on 12.7.2006 at about 1.00 am and was taken to the place of occurrence as there was no nearby police station. Thereafter at about 10 AM on the same day he was taken to the Magistrate for recording his confessional statement.

14. The High Court Division on scanning the evidence on record along with the confessional statement came to a definite finding that the convict petitioner has admitted that on 08.06.2006 he and his wife (the victim) had altercations at the bank of "Iramoti Khal" and the victim caught hold of his collar when the convict petitioner caught hold the victim by her neck and throttled her to death'. Thus the High Court Division observed that 'the convict petitioner prior to commission of the offence was not in cool brain rather there was a provocation from the side of the victim'. The High Court Division also took into consideration that the victim and the convict petitioner, since their marriage, engaged themselves in altercations and quarrels off and on. Relying on the evidence of PWs 3 and 4 (the son and father of the victim), the High Court Division held that 'since the convict petitioner took the victim away from her parents' house on 08.06.2006 on the plea that she would be taken to doctor for her treatment but subsequently she did not return' the convict cannot escape the liability, as has been held in the case of Hamidur Rahman (Ms.) Vs. State, reported in 15 BLC(AD) 127. Considering the above mentioned facts and circumstances the High Court Division found the convict petitioner guilty under section 304 (Part-I) of the Penal Code not under section 302 of the said Code as the facts and circumstances of the case clearly proved that the death was caused by the convict petitioner which amounts to culpable homicidal not amounting to murder and thereby modified the sentence from death to life term imprisonment by the impugned judgment and order.

15. Now question remains whether an accused can be convicted on the basis of his confessional statement which is not true and voluntary rather obtained by coercion and torture as claimed by Mr. Abedin.

It has already been stated earlier that the convict petitioner was arrested on 12.7.2006 at 1.00 am and was taken to the place of occurrence and thereafter was taken to Dupchachia Police Station before he was sent to the Magistrate for recording his confessional statement at 10.00 am. So after the arrest till producing him before the Magistrate, 09(nine) hours have been spent. From the evidence on record we do not find any material to hold that the convict petitioner was tortured by police or there was any coercion for obtaining confessional statement. From the evidence of PW-8, the Magistrate, it also appears that 'he did not find any mark of injury on the body of the petitioner nor the convict petitioner made any statement/complaint to him about

torture'. The said PW clearly stated that 'after producing the accused before him at around 10 AM, he was given sufficient time upto 2 PM to think over the matter alone in his chamber and then he recorded the statement which was voluntary and obtained the signature of the accused along with the date'. In the evidence the Magistrate specifically stated that 'in column No. 8 he has specifically mentioned that there is no mark of injury on his body. The confessional statement was made voluntary and the same is true'. Along with this evidence on perusal of the statement itself it appears that the voluntariness of the statement is correct and the allegation regarding torture appears to be not proved. From the said statement it appears that the convict petitioner while making the confessional statement, admitted that he was arrested at 1.00 am on 12.7.2006 and he was taken to Dupchachia police station on the same day and then he was sent to the Magistrate for recording the statement at 10 AM. So from his own statement along with the evidence on record it is clear that the confessional statement was not obtained by duress, coercion or torture rather it was voluntary and true. It is true that any statement or confession made by a person while he is in custody of the police is inadmissible unless the same is made at the immediate presence of a Magistrate, because a person in the custody of the police is presumed to be under their influence and the presence of a Magistrate is a safe-guard and guarantee of a confessional statement as not made by influence. Again a confessional statement made by an accused, in accordance with law, is very much admissible even without examining the Magistrate who recorded the same. In the case of Babul Vs. State reported in 42 DLR (AD) 186, seven confessions were used by the prosecution and the said confessions were not formally proved by examining the Magistrate. Under such situation this Division held "the High Court Division was justified in holding that under section 80 of the Evidence Act, the court was entitled to presume that the documents (containing confession) were genuine"; It further held that "any statement as to the circumstances under which it was taken, purporting to be made by the person signing it were true and that the confessions were duly taken." It was also held that "the examining Magistrate is required to be produced only for the purpose of cross examining him when a confession is retracted for the purpose of ascertaining the voluntariness of the confession."

16. In the instant case, confession as to killing the victim Mehbuba by the convict petitioner, though not corroborated by any other independent witness, even then the same can be taken to be true, voluntary and inculpatory in nature and as such maker of such confession can be convicted relying upon it. Moreover, there is no material on record to show that the confessing accused ever took a plea that he made any retraction to the confession made. In view of the above proposition of law there is no legal ground to disbelieve the confessional statement on the ground of its truth and voluntariness. Thus the confession appears to be inculpatory as well as true and voluntary. It is now well settled that confession when it is found voluntary and true, whether retracted or not, if believed, can be the sole basis of conviction against the maker without further evidence (A.K.M. Nazmus Sakib Vs. State, 12 BLC(AD) 203).

17. Another question may arise in this case as to whether the accused can be convicted under section 302 or he should be convicted under section 304 (part-I) of the Penal Code relying on the confessional statement. It is to be noted here that there is no eye witness as to the killing of the victim by the convict petitioner. The High Court Division also found that it happened due to sudden provocation and therefore it convicted the convict petitioner under section 304 (Part-I). But in the absence of any independent or other witness merely on the ground of confession it cannot be deemed that the commission of the offence falls under section 304 (Part-I). Section 304 of the Penal Code reads as follows:

"304. Punishment for culpable homicide not amounting to murder.-Whoever commits culpable homicide not amounting to murder, shall be punished with (imprisonment) for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death."

18. The aforesaid provision contains two parts the first part deals with the intention to cause death and if the death is caused with the intention of causing such bodily injury as is likely to cause death and if such act falls within any of the exceptions enumerated in Section 300 of the Penal Code then the offence will fall within the ambit of the first part of the said section. On the other hand, the second part of the said section is applicable to a case when the act is done with the knowledge that it is likely to cause death or bodily injury as is likely to cause death but without any intention to cause death. So it is clear that the first part applies to a case where there is guilty intention and the second part applies where there is no such intention but there is guilty knowledge that such act may cause death.

19. In the instant case, it appears that the accused petitioner admittedly had altercations and quarrel with the victim and at one stage when the victim caught hold of his collar it prompted rather provoked the convict petitioner to catch hold of her neck/throat and accordingly at one stage the victim died. This cannot be termed as culpable homicide not amounting to murder rather it can at best be held that the death of the victim was caused not with the intention of causing death or causing bodily injury as was likely to cause death.

20. Considering the aforesaid aspect and from the facts and circumstances discussed above, it appears that the victim was throttled to death by the convict petitioner which was done not with the intention of causing her death but due to sudden provocation which took place, resulting the death of the victim.

21. In the case of Willie (William) Slaney Vs. State of Madhya Pradesh reported in MANU/SC/0038/1955 : AIR 1956 SC 116 'the accused was in love with the sister of the deceased who did not like the intimacy and on the day of occurrence there was a quarrel between the deceased and the accused and the accused was asked to get away from the house of the sister. Shortly afterwards the accused returned with his younger brother and called the sister to come out of the house but the deceased only came out when there was a heated exchange of words between them and the accused slapped the deceased on her cheek. The accused lifted his fist and the accused snatched a hockey stick from his younger brother and gave one blow on his head with a hockey stick with the result that his skull was fractured'. In the opinion of the doctor the injury was likely to cause death and on the given facts and circumstances the Indian Supreme Court in the aforesaid decision held that "on the facts and circumstance of the case the offence fell under section 304 Part II and not under section 302. Admittedly there was no premeditation and there was a sudden fight. The nature of the injury was such that the accused could not be attributed with the special knowledge required by section 300, nor was the injury sufficient in the ordinary course of nature to cause death."

22. In the instant case also death was caused not on pre-meditated act or with intention to kill but on a sudden fight when the deceased caught hold of the neck of the convict petitioner by his collar the petitioner also caught hold of the neck/throat of the deceased in course of altercations and quarrels. Thus it is clear that the convict petitioner did not have the intention to kill the victim. The death was caused because of not only sudden provocation but also as a measure of defence or saving himself on the event of being attacked or in course of free fight. Another thing is to be kept in mind that PWs 5, admitted that the convict petitioner and the deceased had regular altercations and quarrels on different issues when they had been living as husband and wife. But no evidence has been led that the convict petitioner ever took any such attempt to kill her earlier.

23. From the above fact and circumstances it can easily be concluded that neither of the five exceptions to section 300 can be attracted in the present case. This Division in the case of Superintendent and Remembrancer of Legal Affairs, Govt. of Bangladesh Vs. Siddique Ahmed reported in 31 DLR (AD) 29 held:

"where the finding is that the accused has the guilty intention of causing such injury as is likely to cause death the offence cannot be converted into one under Part I of the Code, unless it is brought to any of the 5 exceptions of section 300."

It also held:

"the first part applies to a case where there is guilty intention and the second part where there is no such intention but there is guilty knowledge."

24. From the above it can be concluded that the conviction under section 302 or 304 (Part-I) cannot be attracted in this case rather from the facts and circumstances it can clearly be brought within the ambit of section 304 (Part-II) of the Penal Code.

25. Accordingly, we are of the view that this criminal petition for leave to appeal should be disposed of with modification of the conviction and sentence.

26. Hence, the conviction and sentence as handed down by the trial Court and subsequently by the High Court Division is modified upon converting the same under section 304 (Part-II) and accordingly the sentence which has been handed down by the High Court Division be reduced to the sentence already undergone.

27. Thus this criminal petition for leave to appeal is disposed of with above modification of the conviction and sentence passed in the impugned judgment and order of the High Court Division. The convict petitioner Md. Sukur Ali, son of late Md. Rostom Ali Bepari, Village-Uttar Boyra, Police Station-Sonatola, District-Bogra, be released from the custody at once if not wanted in connection with any other case(s).

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