

LEX/BDAD/0185/2016

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IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Criminal Petition for Leave to Appeal No. 495 of 2015

Decided On: 25.07.2016

The State **Vs.** Nurul Amin Baitha and Ors.

Hon'ble Judges/Coram:

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

Counsels:

For Appellant/Petitioner/Plaintiff: S.S. Sarker, DAG instructed by Sufia Khatun, Advocate-on-Record

JUDGMENT

Mirza Hussain Haider, J.

1. This criminal petition for leave to appeal is directed against the judgment and order dated 17.05.2015, passed by the High Court Division, in Death Reference No. 22 of 2010 rejecting the death reference and modifying the conviction and sentence passed by the Tribunal under section 11(Ka)/30 of the Nari-O-Shishu Nirjaton Damon Ain, 2000 ("the Ain, 2000") to section 302/34 of the Penal Code in respect of the convict respondents and thereby sentencing each one of them to suffer imprisonment for life and to pay a fine of Tk. 10,000/- each in default to suffer imprisonment for six months more.

2. Facts leading to filing of this criminal petition for leave to appeal, in brief, are that Hasna Begum (deceased) aged about fifty years, daughter of late Rustum Ali of village Basuralga, Police Station-Nakla, District- Sherpur was married to present respondent No. 1, Md. Nurul Amin Baitha, son of late Abdus Samad of the same village before thirty years. Since marriage she used to stay with her husband at his house, at village Basuralga. During their wedlock they had two sons, two daughters and on the date of occurrence she was five months' pregnant. Since marriage her husband used to demand dowry of Tk. 50,000/- and on her failure to bring the same she was subjected to physical torture off and on. Prior to the date of occurrence the respondent No. 1 married Anjumanara Begum (respondent No. 2) as second wife. On 18.2.2005 corresponding to 6th Falgun, 1411 B.S., Friday, at around 4.00 p.m. Nurul Amin Baitha (Respondent No. 1) embroiled in a quarrel with his wife Hasna Begum (deceased). At one stage of quarrel when Hasna Begum asked Nurul Amin about the second marriage he became furious and again demanded Tk. 50,000/- as dowry to be paid at once. On her refusal to pay the same, her husband along with Anjuara Begum, the 2nd wife (respondents No. 1 and 2 respectively) started inflicting fists and blows causing severe injuries upon the person of Hasna Begum. At one stage, finding her in critical condition, they called the village doctor Aminul Islam and on his advice Hasna Begum was taken to the 'Nakla Health Complex' at around 8 pm, where, she succumbed to the injuries on the next day, i.e. on 19.2.2005 at around 11.30 a.m. Then the respondents took the dead body back

to the house of respondent No. 1 and upon leaving the dead body at the courtyard of that house they fled away. The relatives of the deceased upon hearing about the occurrence reported the same to the police at Chandrakona Investigation Centre, whereupon the incident was recorded as General Diary (GDE) No. 407 dated 19.2.2005. Thereafter on 26.2.2005 Md. Abdul Mannan (PW 2), younger brother of the deceased, filed a complaint petition in the Court of Magistrate (cognizance), Sherpur, narrating the above facts, which was referred to the local Police Station for inquiry. After inquiry and on perusal of the inquest report and the post mortem report, S.I. Amirul Islam of Chandrakona Investigation Centre (PW 1), as informant, lodged the FIR on 5.4.2005 which was recorded as Nakla P.S. Case No. 04 dated 05.04.2005 corresponding to G.R. Case No. 44 of 2005 under sections 11(Ka)/30 of the Nario-Shishu Nirjaton Damon Ain, 2000.

3. During investigation accused Anjuara Begum (respondent No. 2) was arrested on 11.4.2005 from Rainpura village who on 12.4.2005 made a confessional statement before the magistrate which was recorded under section 164 of the Code of Criminal Procedure. Thereafter she was enlarged on bail but since then she was absconding and never appeared before the Tribunal or any Court. On the other hand respondent No. 1, Nurul Amin Baitha is absconding from the beginning of the case till date.

4. After investigation Police submitted charge sheet against both the respondents under section 11(Ka)/30 of the said Ain of 2000. Then the case was transferred to the Nari-O-Shishu Nirjaton Damon Tribunal for trial wherein charge was framed against both the accused persons, but the same could not be read over to either of them as they were absconding. However the tribunal appointed state lawyer to defend them.

5. In course of trial, the prosecution in all examined twelve witnesses out of seventeen charge-sheeted witnesses. The defence examined none. After closure of the prosecution witnesses, the accused persons could not be examined under section 342 of the Code as they were absconding.

6. The defence case, as it appears from the trend of the cross examination of the prosecution witnesses by the learned state defence lawyer, is that of innocence and false implication. It is divulged from the defence that the accused persons did not beat the deceased to death for dowry and rather she met a natural death.

7. The learned Judge of the Tribunal after considering the materials on record found both the accused persons (respondents herein) guilty of the charge levelled against them and by judgment and order dated 19.4.2010 convicted both of them under section 11(Ka)/30 of the Ain 2000 and sentenced both of them to death by hanging.

8. Accordingly a reference, under section 374 of the Code of Criminal Procedure ("the Code"), was sent to the High Court Division for confirmation of the death sentence of the condemned prisoners, and the same was registered as Death Reference No. 22 of 2010.

9. The High Court Division upon hearing the learned Deputy Attorney General and the state defence for the absconding convict respondents and on perusal of the materials on record held that the prosecution has been successful in proving the death of the victim due to the assault inflicted by the accused persons but failed to prove that the same was caused on demand of dowry. Thus rejected the death reference and modified the conviction and sentence dated 19.4.2010 passed by the Tribunal in respect of both the condemned respondents from section 11(Ka)/30 of the Ain, 2000 to section 302/34 of the Penal Code and sentenced each one of them to suffer imprisonment for life and also

to pay fine of Tk. 10,000/- each, in default to suffer rigorous imprisonment for 6 months more, by the impugned judgment and order dated 17.5.2015.

10. Against the said judgment and order of the High Court Division the State filed this criminal petition for leave to appeal.

11. Mr. S.S. Sarker, the learned Deputy Attorney General, appearing on behalf of the leave petitioner upon taking us through the materials on record submits that the impugned judgment and order of conversion of the conviction from Section 11(ka)/30 of the Ain, 2000 to Section 302/34 of the Penal Code is not in accordance with law as the written ejahar clearly discloses that the victim was severely injured due to the assault and beating by both the convicts for realization of dowry which resulted in death of the victim at the Thana Health Complex on the next day. Moreover, subsequent actions of the convicts as to bringing the dead body from the Thana Health Complex to the accused respondents' house and fleeing away clearly indicate their involvement in the offence and as such the High Court Division committed error in converting the conviction from 11(Ka)/30 of the Ain, 2000 to section 302/34 of the Penal Code and thereby modifying the sentence from death penalty to life imprisonment is as such required to be interfered with. He next submits that the post mortem report and other evidence on record corroborated the injuries inflicted by the accused respondents on the person of the deceased and as such the trial Court rightly convicted the accused respondents under section 11 (Ka) of the aforesaid Ain. Thus conversion of conviction and modification of the sentence is erroneous which is required to be set aside and the judgment of the trial Court be affirmed.

12. None appeared for the respondents.

13. On perusal of the materials on record it appears that the respondents were convicted by the trial Court under section 11(Ka)/30 of the Ain, 2000 having found them guilty of the offence of committing murder for dowry. But the High Court Division disagreed with the said finding of the tribunal and came to the conclusion "the prosecution has been successful in proving the death of the victim due to the assault inflicted by accused persons but failed to prove that the same was caused on demand of dowry". Accordingly the High Court Division held that 'the conviction and sentence of the Tribunal under section 11(Ka)/30 of the Ain, 2000 suffers from legal infirmity. But since the murder of the victim was caused due to the assaults inflicted by the accused persons having been proved, the conviction and sentence is converted under section 302/34 of the Penal Code in place of section 11 (ka) of the Ain, 2000 for ends of justice' and accordingly passed the impugned judgment.

14. Thus commission of the offence of causing death being proved it is not at all necessary to make any comment on such findings of the High Court Division. Only point required to be looked into in this case is whether conversion of conviction by the High Court Division from section 11(Ka)/30 of the Ain, 2000 to section 302/34 of the Penal Code and sentencing them accordingly is justified.

15. Under the criminal justice system an accused is to be tried on the basis of the charge framed against him and it is the duty of the Court to frame charge upon which the accused would be tried. Framing of charge is dealt with under Chapter XIX (sections 221 to 240) of the Code. Similarly other laws also deal with the same under specific provisions of each such law. It is the duty of the prosecution to prove that the accused person is guilty of the offence, as charged, beyond reasonable doubt on the basis of which the Court is to deliver judgment holding either the accused guilty of the charge as

framed or not guilty. Under the Nari-O-Shishu Nirjatan Damon Ain, 2000, the special tribunal constituted thereunder is the trial Court who shall frame charge under some specific provision of the said law considering the allegations and prima facie case as made out and thereafter shall come to a conclusion on examining the materials on record as to whether the accused is guilty or not of the charge as leveled against him. On trial if the Court/Tribunal, as the case may be, on consideration of materials on record, finds that the offence committed does not fall under the charge framed then the trial court can alter the charge into some other section of the said law under which the offence falls. But the question is whether such conversion is permissible in a case where the charge has been framed by the tribunal under a special law to the provision under the Penal Code.

16. The power of the appellate Court in case of appeal against conviction is provided under section 423(1)(b) of the Code. Section 423(1)(b) reads as follows:

"423. Powers of Appellate Court in disposing of appeal.- (1) Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and, in case of appeal under section 417, the accused, if he appears, the Court may if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a).....

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or sent for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the

(bb).....;

(c).....;

(d).....

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement;

Provided further that the appellate Court shall not inflict greater punishment for the offence which in its opinion the accused committed than might have been inflicted for the offence by the Court passing the order of sentence under appeal. "

17. The Ain, 2000, does not specify the power of the appellate Court. But under section 25(1) of the Ain 2000 the provisions of the Code are made applicable only when any procedure is not specified in the Ain itself, and in such an event the provisions of the Code are applicable only with regard to filing complaint, investigation and trial but does not extend to the stage of appeal against conviction. Hence the power of the appellate Court is limited to decide whether the order of conviction and sentence was passed in accordance with law and whether the accused was or was not rightly convicted as

charged. Thus in the case of conviction of an offence under the Nari O. Shishu Nirjaton Daman Ain 2000 the appellate court is only to perform its functions within the purview of law under which the accused has been tried and convicted. The appellate Court cannot exercise its power in converting the charge from one provision of one particular law to another provision of another law, more particularly from a special law to general law. Conversion of charge by the appellate court is available under the Criminal Procedure Code. But under the Special Law like Nari-O-Shishu Nirjaton Damon Ain, 2000 no such power is given to the appellate Court. The offence described in the Ain, 2000 is to be tried by the Tribunal established under section 26 of the said Ain. The tribunal, while discharging its functions, is to follow the procedure laid down in the said Ain and by section 25 of the said Ain only those provisions of the Criminal Procedure Code have been made applicable which are not contrary to the said Ain. Section 3 of the said Ain provides supremacy of the said Ain, 2000 over any other law in force for the time being.

18. In the present case, tribunal framed charge against the respondents under section 11(ka)/30 of the Ain 2000, and the Tribunal having found the aforesaid charges proved against them imposed death penalty upon them under the said provisions of law by judgment and order of conviction and sentence dated 19.04.2010. But the High Court Division, upon hearing the death reference under section 374 of the Criminal Procedure Code, held that 'the finding of the tribunal was wrong as the prosecution failed to prove that murder was committed on demand of dowry'. Thus it rejected the death reference and modified the conviction and sentence upon converting the same as has been stated before.

19. When the appellate Court on scrutinizing the materials on record found that the charge as framed under the provision of one particular law like Nari-O-Shishu Nirjaton Damon Ain is not proved but offence committed is proved under another provision of general law like Penal Code, generally the case is sent back to the appropriate Court for fresh trial upon framing appropriate charge. But the appellate court cannot, under such circumstances, convert the conviction and pass sentence, accordingly, under which charge has not been framed. It has no power to do so without framing charge on that particular provision of law and the same being read over to the accused person allowing him the opportunity to defend.

20. So it is clear that the High Court Division sitting in appeal, revision or reference cannot convert or modify the conviction and sentence awarded under one provision of a special law to a different provision of general law. It can only see whether the judgment and order complained of or placed before it, has been passed properly basing on proper appreciation of fact, evidence and law and thereby the charge levelled against the accused is proved. Nothing more than this. While disposing of the case if the High Court Division/appellate Court finds that the prosecution miserably failed to prove the charge as framed under the law and rather the same should have been dealt with and disposed of under a different law, under which the offence committed appear to have been proved, the High Court Division or the appellate Court can send the case back to the appropriate Court for fresh trial upon framing appropriate charge, fixing specific time frame within which the case should be disposed of by the concerned Court.

21. In similar circumstances this Division in the case of Mehedi Hasan Vs. State reported in 66 DLR (AD) 114 : 2 CLR(AD)(2014) 171, held ".....the evidence on record show that the prosecution proved beyond reasonable doubt that the appellants committed the offence under section 7 of the Nari-O-Shishu Nirjaton Daman Ain, 2000, and they are liable to be punished for the commission of such offence. And, in order to

do complete justice in the matter, we invoke our power under Article 104 of the Constitution and dispose of the appeal finally without sending the case back on remand for trial afresh by the concerned Nari-O-Shishu Nirjatan Daman Tribunal, Gaibandha, under the Ain, 2000. Accordingly, we find the appellants guilty under section 7 of the said Ain and sentence each of them to suffer rigorous imprisonment for 14 years and also to pay a fine of Taka 2,000 each in default to suffer rigorous imprisonment for 3 (three) months more." In the aforesaid case, this Division, accordingly, set aside the judgment and order of conviction and sentence of death passed under section 302/34 of the Penal Code which was confirmed by the High Court Division and thereby acquitted them of the charges brought under the said provision of the Penal Code but convicted and sentenced them under section 7 of the Nari-O-Shishu Nirjatan Daman Ain, 2000, as from the materials on record the offence committed by the accused persons were proved beyond reasonable doubt, upon exercising the power conferred under Article 104 of the Constitution.

22. As we have discussed earlier that both, the tribunal as well as the High Court Division, found that the victim died because of the assaults inflicted by the accused persons and as such commission of the offence of murder has been proved beyond all reasonable doubt. The learned Deputy Attorney General also could not improve the case beyond that level which could bring the case within the purview of section 11(ka)/30 of the Ain 2000. This Division also on examination of the evidence adduced by PWs 1 to 7, the eye witness, and the materials on record along with the post mortem report, proved by PW. 10, and as such we are also satisfied that the case of 'committing murder' has been proved beyond reasonable doubt but the case of 'murder for dowry' has not been proved as none of the PWs could prove the same. Thus we are of the view that the Nari-O-Shishu Nirjatan Daman Tribunal, Sherpur, committed illegality in passing the judgment and order of conviction and sentence of death under section 11(Ka)/30 of the said Ain of 2000 as the prosecution miserably failed to prove the charge of committing murder for dowry, and thereby causing serious miscarriage of justice. Rather the findings of the High Court Division in this respect appear to be in accordance with law. Thus the respondents are liable to be punished for the commission of such offence under Penal Code. Accordingly the finding of the High Court Division on this score appears to be correct. But the High Court Division was not right in converting the conviction under section 302/34 of the Penal Code from those of under section 11(ka)/30 of the Ain 2000, a special law, as it does not have that authority to do so unless charge is framed under section 302/34 of the Penal Code.

23. It has already been discussed before that the trial Court is to frame charge against the accused person and read over the same to the accused person so that he/she can defend himself/herself. Side by side relying on the said charge the prosecution is to prove that the accused is guilty of offence as charged. Under section 27 of the Ain, 2000 the tribunal is not only empowered to frame charge it is also empowered to frame charge in respect of some other offences which are relevant for the purpose of proving the accused guilty in addition to the prima facie offence. Unless charge is framed and proved beyond all reasonable doubt by the prosecution, the accused cannot be convicted. In the present case admittedly no charge was framed under section 302/34 of the Penal Code considering the nature of offence committed by the accused persons which the tribunal could frame under section 27 of this Ain along with section 11(Ka)/30 of the Ain 2000. From the above discussions, it is clear that it would not be improper to send the case down to the appropriate Court for framing charge under the appropriate provision of law and allow the accused person(s) to defend against such charge framed. But in this case, an exceptional circumstance appears which is, immediately after the commission of the offence the accused No. 1 (respondent No. 1)

is absconding and accused No. 2 (respondent No. 2) after being arrested on 11.04.2005 and making statement under section 164 of the Criminal Procedure Code, was enlarged on bail from the lower Court and since then she is also absconding and she did not appear for a single day before the Court of law meaning both the accused persons are fugitive from justice. A fugitive, who has been running away from justice, without surrendering before the Court of law in last 17(seventeen) years and having not challenged the verdicts of either of the Courts passed in absentia, by preferring appeal he/she cannot take advantage of any mistake either procedural or otherwise.

24. All these aspects have not been considered by the High Court Division while passing the impugned judgment and order and without considering these aspects the High Court Division simply converted the conviction and modified the sentence from section 11(ka)/30 of the Ain, 2000 to section 302/34 of the Penal Code. The statute has not entrusted the High Court Division to exercise such power of conversion of conviction. Because conversion of conviction from special law to a different law can only be done by the Appellate Division empowered under Article 104 of the Constitution to do "complete justice" in appropriate cases pending before it under Article 103 of the Constitution. The Constitution of the People's Republic of Bangladesh is the supreme law of the land under which the Appellate Division of the Supreme Court, being the apex Court, has been bestowed with such power under Article 104. In doing complete justice this Division is required to see that substantial justice should be and can be done on the basis of undisputed facts and evidences of the parties on record and the law. This jurisdiction of doing "complete justice" is not available to any other Court including the High Court Division.

25. Thus from the facts and circumstances stated above it is clear that as the convicts did not surrender before any Court of law and rather are absconding since beginning of the trial it is a fit case where Article 104 of the Constitution can be invoked because no fruitful purpose will be served if the case is sent down to the court below for fresh trial after framing charge afresh. A fugitive has no right of protection of law as he refuses to submit to the court of law. In this case none of the convicts has surrendered before any court in last 11 (eleven) years. Accordingly, in order to do complete justice, we invoke our power under Article 104 of the Constitution and dispose of this criminal petition finally without sending the same back for fresh trial by an appropriate court upon framing charge of murder.

26. Accordingly, we convert the conviction under section 11(ka)/30 of the Ain 2000 to section 302/34 of the Penal Code and hold the respondents guilty under section 302/34 of the Penal Code and sentence each one of them to suffer imprisonment for life and to pay a fine of Tk. 10,000/- each, in default to suffer imprisonment for six months more.

27. Accordingly, this criminal petition for leave to appeal is disposed of with above observations and directions.

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