IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO.8283 OF 2005.

IN THE MATTER OF:

An application under Article 102(1)(2)(b0(i) read with Article 44 of the Constitution of the People's Republic of Bangladesh.

AND

IN THE MATTER OF:

Bangladesh Legal Aid and Services Trust (BLAST) and another .....Petitioners

-VERSUS-

Bangladesh, represented by the Secretary, Ministry of Home Affairs, Government of the People's Republic of Bangladesh, Bangladesh Secretariat, Dhaka and others ..... Respondents

Mr. M. I. Farooqui, Senior advocate with **Mr. Md. Ruhul Quddus,** Advocate, **Mr. Md. Abdul Mannan Khan,** Advocate (In person), **Ms. Farida Yeasmin,** Advocate, **Ms. Shahnaj Babli,** Advocate, **Ms. Nazneen Nahar,** Advocate, **Mr. M. Zahid Imam,** Advocate, **Md. Toufiqul Islam,** Advocate, **Ms. Bulbul Rabeya Banu,** Advocate and **Mr. Mahabub-Ul Islam,** Advocate .....For the petitioner

Mr. Mahbubey Alam, Attorney General with **Mr. Md. Motaher Hossain,** Deputy Attorney General, **Mr. Md. Nazrul Islam Talukder**, Assistant Attorney General, **Mr. Md. Soyeb Khan,** Assistant Attorney General, **Dr. Md. Bashir Ullah**, Assistant Attorney General and **Mr. Mahbub-ul Alam**, Assistant Attorney General .....For the respondents

Mr. Mahmudul Islam, Senior advocate .....Amicus curiae

Present:

Mr. Justice Md. Imman Ali

And

Mr. Justice Sheikh Abdul Awal

Heard on: 05.02.2009, 11.02.2009, 25.02.2009, 01.3.2009, 12.03.2009 28.4.2009, 24.06.2009, 15.07.2009 & 22.07.2009

Judgment on: 02.03.2010

Md. Imman Ali,J.

This Rule Nisi was issued upon an application by the petitioners under Article 102(1)(2)(b)(i) read with Article 44 of the Constitution calling upon the respondents to show cause as to why section 6(2) of the Nari-o-Shishu Nirjatan (Bishes Bidhan) Ain, 1995 (Act No.XVIII of 1995) operative under section 34 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (Act VIII of 2000) should not be declared to be void, unconstitutional and ultra vires and as to why petitioner No.2 the convicted detenu Md. Shukur Ali, son of late Hashem Mondal of Village-Shibrampur Tepra, Police Station-Shibalaya, District-Manikganj detained in the condemned cell of Dhaka Central Jail on conviction in Nari-o-Shishu Nirjatan Daman Bishesh Case No.75 of 1999 by Nari-o-Shishu Nirjatan Daman Bishesh Adalat, Manikganj purportedly under section 6(2) of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 (Act of XVIII of 1995) should not be brought before this Court so that it may satisfy itself that the petitioner is not being held in custody without lawful authority or in an unlawful manner.

Pending disposal of the Rule, the execution of the death sentence of petitioner No.2, the convict Md. Shukur Ali was stayed, initially for a period of three months, and subsequently extended from time to time and lastly by order dated 12.01.2009 it was extended till disposal of the Rule.

The matter was heard at length. The learned Attorney General was put to notice with regard to the submissions made by the learned advocate for the petitioner and since the matters raised appear to be of great public importance, adjournment was granted on a number of occasions for the learned Attorney General to take instructions and to answer the points raised by the learned advocate for the petitioner. On the prayer of the learned Attorney General delivery of judgment was deferred.

During the course of submissions, the learned advocates of both the sides referred to numerous decisions of the Subcontinent as well as from the Commonwealth and the United States of America, we also had the benefit of hearing Mr. Mahmudul Islam, learned advocate, who appeared as *amicus curiae*.

The facts of the case brought against the convicted detenu are no longer of much relevance since on the evidence adduced at the trial the guilt of the accused was accepted as proved beyond doubt and the sentence of death awarded by the learned Judge of the Nari-o-Shishu Nirjatan Daman Bishesh Adalat, Manikgonj upon conviction under section 6(2) of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 (the Ain, 1995) was confirmed by High Court Division by judgment and order dated 25.02.2004. The same was upheld by the Appellate Division by judgment dated 23.02.2005. A

subsequent review petition before the Appellate Division was also rejected by order dated 04.05.2005.

It may be mentioned that the High Court Division, while accepting that the accused was a minor at the time of the trial, observed that the question of status of the accused as a child and the jurisdiction of the tribunal was not raised before the trial Court and that the plea of jurisdiction had to be taken at the initial stage of the proceeding, so that the Bishesh Adalat would have been able to examine him to ascertain his status. In this regard it was observed as follows:

> "the age of an accused at the time of occurrence is not relevant. If it is found that at the time of trial an accused is not a child there would be no illegality in trying him in regular court. In the instant case there was nothing on record to show that at the time of the trial the petitioner was a child as contemplated in the Children Act, 1974. More so, no such grievance was made before the trial Court and as such there has not been any scope for the trial Court for holding any inquiry as to the age of the petitioner. In such view of the matter, the petitioner's this grievance falls through."

At the beginning of the hearing before us, we expressed the view that we cannot and do not sit on appeal over the decision which has already been taken by the Appellate Division so far as the conviction and sentence of the petitioner No.2 is concerned. However, we may at this juncture remind

ourselves of the decision in ***Sheela Barse and another v. Union of India and others, AIR 1986 Supreme Court 1773***, where the Supreme Court of India sent the case on remand to inquire as to the age of the accused. With respect, our view would be that if it is felt that the determination of the age of the accused may be material to the proper adjudication of the appeal, then the matter may be remanded at any time for ascertaining the age.

Mr. M.I. Farooqui, learned advocate appeared on behalf of the petitioners BLAST and the convict detenu Md. Shukur Ali and Mr. Mahbubey Alam, learned Attorney General appeared on behalf of the respondents. On our request Mr. Mahmudul Islam, learned advocate appeared as *amicus curiae*.

Submissions on behalf of the petitioners:

Mr. Farooqui at the outset candidly submitted that he will not argue that our Constitution does not at all permit the imposition of death penalty. The fundamental tenets of his argument are: "no person shall be deprived of life or personal liberty save in accordance with law" (Article 32); "no person shall be subject to torture or to cruel, inhuman or degrading punishment or treatment" (Article 35(5); "every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law" (Article 35(3). However, by reference to Article 35(6), he conceded that the punishment prescribed

under the law existing before the commencement of the Constitution are protected, although he would still argue that, in any case where the death penalty is the only penalty available under the law, that would be in violation of the provisions of the Constitution. He argued that in such a case where the death penalty is the only penalty provided by the existing law, such penalty would be void under Article 26(1) of the Constitution. By reference to Article 26(1) of the Constitution, Mr. Farooqui submitted that any law promulgated before the commencement of the Constitution, which are inconsistent with the fundamental rights shall, to the extent of such inconsistency, become void. By reference to Article 26(2), he submitted that any law promulgated after the commencement of the Constitution, which is inconsistent with the fundamental rights shall, to the extent of such inconsistency, be void. He submitted that, therefore section 6(2) of the Ain, 1995 is void. He further expounded his argument by referring to Article 5 of the Universal Declaration of Human Rights (UDHR), 1948 which is reflected in Article 35(5) of our Constitution, and Article 6 of International Covenant on Civil and Political Rights (ICCPR), 1966, which was ratified by Bangladesh on 15.10.1998, and prohibits the arbitrary deprivation of life. He submitted that any inflexible death sentence prescribed by any law is arbitrary since thereby the legislature takes away the power of decision from the judiciary. He pointed out that Article 6.5 of the ICCPR

provides that the sentence of death shall not be imposed for crimes committed by persons below 18 years of age.

With regard to the applicability of International Covenants and other instruments, Mr. Farooqui referred to ***Hussain Muhammad Ershad Vs. Bangladesh and others, 21 BLD (AD)69,*** where it was observed by ***B.B. Roy Chowdhury, J***. that the national Courts should not ignore the international obligations, which a country undertakes and that if the domestic laws are not clear enough or there is nothing therein, the national courts should draw upon the principles incorporated in the international instruments.

By further elaboration Mr. Faqooqui submitted that inhuman torture refers to the sentence of death and it is prohibited. He points out that the Indian and the Pakistani Constitutions do not have the equivalent provision as contained in Article 5 of the UDHR, 1948, which provides as follows:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Our Constitution in Article 35(5) provides as follows:

> "No person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment."

Hence, he submitted that our Constitution is entirely in line with the declaration of human rights. He further pointed out that Article 3 of UDHR is reflected in Article 32 of our Constitution. At this juncture Mr. Farooqui pointed out that the

death penalty under section 6 of the Ain, 1995 was the only punishment for the offence of causing death during or after commission of rape, whereas the subsequent law, namely Nari-o-Shishu Nirjatan Daman Ain, 2000 (amended in 2003), which replaced the earlier law, gives the court the discretion to impose the sentence of death or imprisonment for life. He submitted that, therefore, the person who committed an offence under the earlier law would be dealt with differently as compared with a person committing the same offence later. He submitted that this was discriminatory treatment and that persons who commit the same offence must be treated equally under the law as propounded in ***Dr. Nurul Islam Vs. Bangladesh, represented by the Secretary, Ministry of Health and Population Control and others, 33 DLR (AD) 201***. He further submitted that the convict petitioner, who allegedly committed the offence at a time when the 1995 law was in force was tried for that offence when the new law came into force and was convicted; therefore, he should be sentenced in accordance with the more favourable new law, otherwise there would be discrimination.

Mr. Farooqui further elaborated by submitting that since the legislature in its wisdom has thought it fit to allow the court to award a lesser punishment in respect of a particular offence, then that more lenient punishment should be applicable in the case of the petitioner who allegedly committed the offence at

the time when the harsher law was in force. By reference to Article 35(1) he submitted that the Constitution provides that a person may not be given a greater penalty than the one to which he would have been subject at the time of commission of the offence, but there is nothing in the said Article to suggest that a more lenient punishment provided by a subsequent legislation cannot be applied in the case of a person who had committed the offence under the previous law where the legislature has recognised the harshness of the earlier law and chose to repeal it.

With regard to the imposition of a penalty where there is no discretion given to the sentence, i.e. where the penalty prescribed by the law is the only penalty which may be imposed, the learned advocate submitted that that was clearly contrary to the provision of the Constitution and is violative of Part VI of the Constitution. By reference to ***Mithu v. State of Punjab, AIR 1983 (SC) 473,*** which related to the provision of mandatory death penalty in case of conviction under section 303 of the Penal Code, he submitted that it was held in that case that the mandatory death sentence was violative of Articles 14 and 21 of the Constitution of India. He pointed out that their Lordships held that all cases of murder would now fall under section 302 of the Penal Code and that there shall be no mandatory sentence of death for the offence of murder. By reference to the American concept of due process of law of

the 14th Amendment of the American Constitution, he submitted that the due process comprises the exercise of the discretion of the Judge in coming to any decision in any given case and that when the legislature prescribes a mandatory sentence and no alternative is given the power of exercising due process is minimized. By way of example he referred to ***Roberts v. Louisiana***, ***428 US 325,*** where the mandatory death penalty was declared unconstitutional. He also referred to ***Lockett v. Ohio, 438 US 586 (1978)***, where it was held that "sentencing authorities must have the discretion to consider every possible mitigating factor, rather than being limited to a specific list of factors to consider. He also referred to ***Furman v. George, 408 US 238***, where it was held that "the death penalty under current statutes is 'arbitrary and capricious' and, therefore, unconstitutional under the Eighth and Fourteenth Amendments".

Mr. Farooqui also referred us to the provision of death penalty as found in Islamic Jurisprudence. By reference to Sura-5:32 of the Holy Qur'an where it is stated as follows:

> ".....That if anyone slew a person unless it be for murder or for spreading mischief in the land it would be as if he slew the whole people: and if anyone saved a life it would be as if he saved the life of the whole people....."

He submits that in Islam life is sacred as it is in most other faiths in the world and the Qur'an itself forbids the taking of life

except by way of justice and law (reference Sura-6:151. He submits that a decision cannot be by way of justice and law, if the scope of considering all or any other relevant matters is taken away from the decision making process. By reference to Sura-2:178 he submits that the Qur'an allowed for forgiveness and encourages compassion, but in section 6(2) of the Ain, 1995 there is no scope of considering any other matters once a person is found guilty of the offence, the only sentence available is of death.

Mr. Mahmudul Islam, learned advocate appearing as amicus curiae has also referred us to certain decisions of the Indian Supreme Court namely, ***Bachan Singh v. State of Punjab, AIR 1980 (SC) 898*** and ***State of U.P. v. Dharmendra Singh and another, etc., AIR 1999 (SC) 3789.*** He also pointed out that the legislature itself has felt that the mandatory death sentence in relation to the offence concerned is no longer necessary and amended the law by repealing the existing law and introducing a new law where an alternative sentence to the death penalty is given in section 9(2) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (the Ain, 2000). He also submitted that even with regard to penalty as provided by Penal Code 1860, the law has moved on, inasmuch as previously there was need for giving reason for not inflicting the death penalty in case of murder, whereas the applicable law now is that reasons have to be given whenever imposing any sentence. He submitted that the decision in this

case was given by the trial Court by judgment and order dated 12.07.2001 and the new law came into force in February, 2000. So, when there is a more lenient punishment available under the new law, then the accused should be given the benefit of the lenient punishment and there is no bar in our Constitution to give him the benefit of the more lenient law. He also submitted that when the law is remedial in nature then it will be given retrospective effect. In support of his contention he referred to ***Mr. Boucher Pierre Andre V. Superintendent, Central Jail, Tihar, New Delhi and another, AIR 1975 SC164.*** He submitted that the Indian Supreme Court has held in numerous cases that the sentence of death is to be given in the rarest of rare cases. He also pointed out that in ***Mithu's*** case the mandatory death sentence was declared to be unconstitutional. Mr. Islam submitted that according to the provisions of the Constitution, the death sentence itself is not unconstitutional as is apparent from Article 35(6), but he submitted that taking away the discretion of the judge whether or not to impose the death penalty makes the decision unconstitutional.

Submissions on behalf of the State:

Mr. Mahbubey Alam, learned Attorney General appearing on behalf of the respondents at the outset submitted that the matter of conviction and sentence of the convict petitioner has already been settled by judgment and order of the Appellate Division and also a review of that decision on

behalf of the petitioner was unsuccessful. He submitted that it is well settled that having exhausted all the remedy under the act the matter cannot be reopened. In support he has referred to ***Kanai Lal Sethi v. Collector of Land Customs, Calcutta, 60 CWN 1042.*** He further submitted that the law in question namely, the Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 has already been repealed by the Nari-o-Shishu Nirjatan Daman Ain, 2000 and, therefore, it is fruitless even to consider declaring the law to be void, unconstitutional and ultra virus when the legislature itself has repealed the law. He further pointed out that the saving clause in the new law is such that offences committed at the time of the existence of the earlier law will be tried in accordance with that law as if the old law had not been repealed. He further submitted that the judicial discipline will breakdown if further consideration is given to the facts of the case and the punishment awarded are reconsidered by the High Court Division even after the matter has been finally settled by the Appellate Division.

With regard to the imposition of any mandatory punishment, the learned Attorney General submitted that the punishment is prescribed in the penal laws in accordance with the classification of offences. He submitted that is must be considered whether the classification of the offence is or is not unreasonable. By way of example he pointed out that in the case of an offence of rape under section 376 of the Penal

Code or under sections 6(1)/6(3) of the Ain, 1995, there is an alternative punishment available as provided by the law. But where the rape causes death or is followed by the murder of the victim, then the only punishment given is the death sentence as provided in sections 6(2) and 6(4) of the Ain. The learned Attorney General questioned the petitioner's bona fide in bringing a PIL action in challenging section 6(2) only when he has not challenged the vires of section 6(4) where the only punishment given is the death sentence. He submitted that clearly the petitioner has come before this Court only to save the neck of the offender in the guise of a PIL and he is in fact challenging yet again the conviction and sentence, which has already been decided by the appellate Court namely the High Court Division as well as by the Appellate Division. He points out that the saving provision in section 34 of the new law purposely keeps the draconian punishment as provided under section 6(2) of the old law. He submitted that had parliament wished that the petitioner and others in his position be dealt with under the relaxed penal provision of the new law then the saving clause could have been formulated otherwise. The learned Attorney General further pointed out that the law under consideration came into existence in the year, 1995 and there has been no challenge over the years, and is being challenged only now after it has been already repealed. He submitted that quite clearly the instant writ petition is another ploy to save the

neck of the petitioner since at no time during the pendency of the trial or the appeal the petitioner thought fit to challenge the vires of the law.

The learned Attorney General further submitted that the instant petition is by way of a writ of habeas corpus and cannot be used to set aside lawful custody as confirmed by the apex Court. He submitted that the Court has authority upon conviction to send the accused to custody and such custody is not in any manner unlawful and cannot be declared to be without lawful authority.

The learned Attorney General by reference to provisions of the Penal Code submitted that the death sentence may be awarded in case of conviction under sections 121, 132, 194, 302, 303, 305, 307, 326A, 364A and 396, and sections 303 and 307 prescribe a mandatory sentence of death. He justified the mandatory sentence by saying that in each case where the mandatory sentence of death is given the offender would have committed an offence over an above the substantive offence for which he had been convicted. In other words, he explained, the mandatory sentence of death follows the classification of the offence and, therefore, cannot be said to be unreasonable. He submitted that the mandatory death sentence without any alternative punishment in sections 303 and 307 of the Penal Code has been in our statute books since 1860 and for the last 150 years no question has been raised

regarding the legality of that provision in our jurisdiction. He submitted in the case of ***Mithu v. Union of India, AIR 1983 Supreme Court 473,*** the Supreme Court of India declared section 303 to be unconstitutional, but the matter under Indian jurisdiction may be distinguished from the case of Bangladesh, inasmuch as in India the requirement of law is that the normal punishment upon conviction of an offence for murder is life imprisonment and the Courts are bound to give reasons if they choose to impose the sentence of death, whereas in Bangladesh in the past the law was such that the normal punishment for murder was the death penalty and in cases where the death penalty was not given, reasons had to be stated. However, that has been subsequently amended and now reasons have to be given in any event. Section 367(5) of the Code of Criminal Procedure now provides that if the accused is convicted of an offence punishable with death or, in the alternative, with the imprisonment for life or imprisonment for a term of years, the Court shall in his judgment state the reasons for the sentence awarded.

In reply Mr. Farooqui pointed out that the concept of estoppel being an equitable principle would not apply in a case such as the present one since estoppel cannot prevent any case being filed for the purpose of interpretation of the law. He submitted that it is a fundamental right of the citizen to obtain interpretation of any law by way of writ action. In

support of his contention he referred to ***Moslemuddin Sikdar Vs. The Chief Secretary, Govt. of East Pakistan and ors, 8 DLR 526***, where it was held that even if the appeal is disposed of writ may still lie to challenge the constitutionality of any law. In the same vein he also referred to the decision in the case of ***Bangladesh Italian Marble Works Limited -Versus- Government of Bangladesh and others,*** reported in ***2006 (Special Issue) BLT (HCD).***

With regard to the Universal Declaration of Human Rights, the learned Attorney General submitted that the provisions of international instruments are not enforceable in our country unless they are incorporated in the domestic law, as provided in ***Hussain Muhammad Ershad Vs. Bangladesh and others, 21 BLD (AD) 69*** and ***Government of Bangladesh and another v. Sheikh Hasina and another, 28 BLD (AD) 163***.

The learned Attorney General submitted that in the instant case there cannot be said to have been any discrimination since none other standing on the same footing as the petitioner has been treated in a different way. The petitioner was tried under a law which perhaps was draconian, but he cannot equate himself with someone, who is charged and tried under the less harsh law, namely the Nari-o-Shishu Nirjatan Daman Ain, 2000.

The learned Attorney General finally submitted that considering the repeal of the impugned law itself and having

exhausted all the avenues through to the Appellate Division, the issue cannot be reopened for further consideration and that the Rule may be discharged.

We have considered the submissions of the learned advocates, perused the petition and the annexures thereto as well as the bundles of reference materials supplied to us by the parties concerned. From the above arguments it appears to us that essentially Mr. Farooqui on behalf of the petitioners has three main contentions:

I. That the death penalty is accepted by the Constitution to be a lawful punishment, but only so far as it relates to punishment provided by the law promulgated prior to the Constitution;

2. That where any law prescribes the death penalty as the only penalty, that law is ultra vires the Constitution; and

3. That any law promulgated subsequent to the coming into force to the Constitution could not prescribe the death penalty, it being in contravention to the provisions of the Constitution and would therefore be ultra vires.

At the outset we wish to make it clear that sitting in the writ jurisdiction we cannot adjudicate upon the facts of the case and the punishment awarded by the competent Court namely, the trial Court which awarded the death penalty and the High Court Division which confirmed the death reference and in particular since the Appellate Division had upheld the

decision of the High Court Division so far as the death penalty awarded to the convict petitioner is concerned. We shall confine our views to the construction of laws where the death penalty is the only penalty available being the mandatory punishment and also to the enactments promulgated by parliament since the coming into force of the Constitution which prescribe the death penalty as punishment.

Death sentence is a very emotive issue, which creates emotional reactions in different persons in different ways under different circumstances. The members of the public who are against the death penalty usually may change their views if in a certain case they are the victims of any occurrence which called for the death penalty. Murder is a very abhorrent act, but still there are citizens who will say that instead of giving the death penalty life imprisonment may be given. On the other hand, there will be citizens who will say that the facts and circumstances of the case dictate that the ultimate penalty must be given. There are moral and ethical considerations which are involved in awarding the sentence of death in any particular case. However, we chose to confine our views and findings to the points of law raised before us. We appreciate the views of Mr. Farooqui that the Constitution itself allows the imposition of the death penalty so far as it is prescribed by laws, which predate the Constitution. This is clearly seen if we look at Articles 26(1), 35(6) and the definition of 'existing laws' as found

in Article 152. So, we can conclude in context that the death penalty per se is not something which is barred by our Constitution. On the other hand Mr. Farooqui has argued that post-promulgation of the Constitution new laws for offences punishable with the death penalty could not be enacted within the ambits of the Constitution, since that punishment would be contrary to the provision of the Constitution as found in Article 35(5) read with Article 6 of ICCPR and Article 5 of the UDHR. We note the submission of Mr. Farooqui that Bangladesh is a signatory to the ICCPR.

A number of cases have been referred by the learned advocates, particularly of the Indian and American jurisdiction, which in essence reflect the view that the mandatory provision of death penalty is ultra vires of the Constitution. For our part, we may also refer to ***Patrick Reyes Vs. The Queen,*** (unreported, downloaded from the internet) where their Lordships of the Privy Council delivered judgment on 11.03.2002 in a case referred from the Court of Appeal of Belize. We may profitably quote certain of their Lordships observations. That case involved the question of constitutionality of the death sentence, being a mandatory penalty in case of murder, according to the laws of *Belize*. In that case it was argued that the mandatory death penalty for the offence of murder infringed both the protection against subjection to inhuman or degrading punishment and other treatment under section 7 of the Constitution of *Belize*

and the right to life protected under sections 3 and 4 of that Constitution. Their Lordships referred to the provision of the Constitution of Belize, where Article 4(1) provides, "A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted." For the sake of comparison we may quote our Article 32 which provides as follows:

> "No person shall be deprived of life or personal liberty save in accordance with law."

Section 7 of the Belize Constitution provides as follows:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

The equivalent provision in our Constitution is Article 35(5) which reflects Article 5 of the UDHR. Their Lordships of the Privy Council observed that under the common law of England there was one sentence only which could be judicially pronounced upon a defendant convicted of murder and that was the sentence of death. This simple and undiscriminating rule was introduced into many States now independent, but once Colonies of the Crown. They further observed that all killings which satisfy the definition of murder are by no means equally heinous. They quoted from the Royal Commission on Capital Punishment, 1949-1953 as follows:

> ".....The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. .....The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there may be no intelligible motive at all."

Their Lordships further observed from a report of the House of Lords Select Committee on Murder and Life Imprisonment, 1989 which observed, "The Committee consider that murders differ so greatly from each other that it is wrong that they should attract the same punishment." Then they quoted from the judgment of ***Sarkaria,J.*** in the case of ***Bachan Singh v State of Punjab, [1980] 2 SSC 475,*** where it was held as follows:

> "(a).....
>
> (b) While considering the question of sentence to be imposed for the offence of murder under section 302, Penal Code, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society

at large, the Court may impose the death sentence."

Their Lordships then quoted from the UDHR, wherein Article 3 states, "Everyone has the right of life, liberty and security of person."

Article 5. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 10. "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

The ICCPR, 1966 Article 6.1provides, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Article 7 provides protection against subjection to torture or cruel, inhuman or degrading treatment or punishment. Article 14(1) provides, inter alia ".....everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Article 14(5) provides, "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

We find from the submissions of the learned advocates that there is common ground so far as the facts of the instant case are concerned. Mr. Farooqui submitted that Bangladesh,

being a signatory to the ICCPR, its provisions should be applied in considering the death penalty vis-à-vis the provision of our Constitution. On the other hand, the learned Attorney General submitted that since the provisions of the International Instruments are not incorporated into our law, they are not applicable. We may point out at this juncture that we find Article 5 of the UDHR and Article 7 of ICCPR reproduced almost verbatim into our Constitution Article 35(5). So, the question is whether the death penalty is such that it can be termed as torture or cruel, inhuman or degrading treatment or punishment. We bear in mind also that our Constitution in Article 32 qualifies the power of any authority to impose the death penalty as follows:

> "No person shall be deprived of life or personal liberty save in accordance with law."

We also recall the submissions of Mr. Farooqui where he quoted from the holy Qur'an that life may be taken only by way of justice and law. He also reminded us that the holy Qur'an enjoined forgiveness and compassion even in the case of murder.

On the other hand, the learned Attorney General has submitted before us that the punishment prescribed in various laws are for the purpose of maintaining order in society and that the punishment reflects the classification of offences; the more heinous the offence the more severe the penalty. He

submitted that since the Constitution itself preserved the death penalty which the laws prior to the Constitution had prescribed, it cannot be said that the death penalty *per se* is prohibited by the Constitution.

We find from various sections of the Penal Code that the death penalty has been prescribed in the case of several offences, including murder and sedition. We also find that the death penalty is a mandatory provision in the case of murder committed by one who is already under sentence of imprisonment for life under section 303 and for attempted murder committed by a person who is under sentence of imprisonment for life under section 307 of the Penal Code.

We are aware that punishments are prescribed by the legislature taking into consideration the society's needs and prevalent norms and abhorrent behaviour at certain times. In most countries around the world there is an official body which seeks to assimilate the situation within the society and, after assessing the same, directs various penal sanctions which may be prescribed for particular offences. Thus, if at any time a particular crime becomes prevalent in the society, it would be the duty of the advisory board to prescribe a sentence which will act as a deterrent against such a crime. Unfortunately, in Bangladesh we do not have any advisory board to give any indication or direction as to what punishment may be given for any particular offence or offences. The judges are guided by

the broad terms of punishment prescribed in the Penal Code and other special laws. In this regard reference may be made to the Sentencing Advisory Panel in England, which recommends imposition of community sentences for less serious offences instead of imprisonment, when prisons become unbearably overcrowded.

We note that in Bangladesh the Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 and prior to that the Cruelty to Women Deterrent Punishment Ordinance, 1983 were promulgated at a time when particularly heinous offences against women were perpetrated on a regular basis. In order to protect the womenfolk these laws were enacted and very severe punishments prescribed, presumably as a way of deterrence.

Whether severe punishment, for example the death penalty, actually acts as a deterrent is a philosophical question and can never be answered. It is difficult to ascertain whether as a result of the inclusion of the death penalty in case of many of the crimes in the special laws, the incidence of such crime has decreased. It is equally difficult to gauge whether if the death penalty was not included as a sanction for those crimes, the incidence of such crimes would have increased phenomenally. In depth empirical research would be necessary to even attempt to answer such questions.

Let us consider whether or not the death penalty could be included as a punishment after 1972 when the Constitution came into force. We are of the view that since the provision of the special laws incorporating the punishment of death sentence are essentially for heinous crimes, including those leading to death of the victim, particularly, death caused either during or subsequent to rape; death caused by acid etc., they are a reaction to the perceived need of the day. We note, therefore, that the severest punishment is meted out only when the crime is perceived to be most heinous.

The crime of murder itself is a heinous offence and, hence, the prescription of the death penalty under section 302. This penalty was provided in our laws prior to the coming into force of the Constitution and is protected by the Constitution itself. The newly enacted special laws prescribe the death penalty in cases where the crime is most heinous and death of the victim has resulted. Thus the death penalty is prescribed for offences causing death under various circumstances which was previously punishable under the Penal Code by sentence of death. If the death penalty were not included as a punishment for death in the newly enacted laws then there would be discrimination in treatment of offenders under the new laws as compared with those dealt with under the Penal Code. We are, therefore, of the view that the inclusion of the

sanction of death penalty subsequent to the coming into force of Constitution cannot by itself be said to be unconstitutional.

As far as the imposition of the mandatory death penalty in certain cases is concerned, we have been referred to a number of decisions of the Commonwealth, including the decision of the Indian Supreme Court in the case of ***Bachan Singh***; the Supreme Court of Judicature of Jamaica in the case of ***Regina Vs. Ian Gordon***; the case of ***State v Makwanyane 1995(3) SA 391*** of the Constitutional Court of South Africa; and the case of ***Francis Kafantayeni and others Vs. Attorney General*** decided by the High Court of Malawi and many others, which have been discussed by the Judicial Committee of the Privy Council in the case of ***Reyes***. Their Lordships of the Privy Council observed that "the ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted (.....) the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it. However, when an enacted law is said to be incompatible with a right protected by the constitution, the court's duty remains one of interpretation and when the Constitutional provision protecting the human right of the citizen is concerned a general and purposive interpretation is to be given."

It goes without saying that, whenever a court of law is put to the duty of assessing the evidence and culpability of any offender, it is required to consider all the aspects and facts and

circumstances relating to the offence, the offender and his surroundings; their Lordships of the Privy Council observed, "the requirement of humanity has been read as incorporating the precept that consideration of the culpability of the offender and of any potentially mitigating circumstances of the offence and the individual offender should be regarded as a *sine qua non* of the humane imposition of capital punishment. It is, therefore, essential that any court take into consideration all the surrounding circumstances of any offence be it ever so heinous or less culpable in its nature."

When the legislature prescribes any punishment as a mandatory punishment the hands of the court are thereby tied. The court becomes a simple rubberstamp of the legislature. Upon finding the accused guilty, the Court can do no more than impose the mandatory punishment, which the legislature has prescribed for that offence. This certainly discriminates and prejudices the Court's ability to adjudicate properly taking into account all the facts and circumstances of the case. In the case of ***Reyes*** their Lordships considered the submission of counsel that 'a sentencing regime which imposes a mandatory sentence of death on all murderers, or all murderers within specified categories, is inhuman and degrading because it requires the sentence of death, with all the consequences such a sentence must have for the individual defendant, to be passed without any opportunity for the defendant to show why

such sentence should be mitigated, without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such a sentence might be wholly disproportionate to the defendant's criminal culpability.' With respect, we would share the same view and observe that where the appellant is not a habitual criminal or a man of violence, then it would be the duty of the court to take into account his character and antecedents in order to come to a just and proper decision. But where the law itself prescribes a mandatory punishment then the court is precluded from taking into consideration any such mitigating or extenuating facts and circumstances. Their Lordships of the Privy Council observed, "a law which denies a defendant the opportunity, after conviction, to seek to avoid imposition of the ultimate penalty, which he may not deserve, is incompatible with section 7 of the Constitution of the Belize because it fails to respect his basic humanity."

In Bangladesh there is no provision or scope to argue in mitigation or to bring to the notice of the Court any extenuating facts and circumstances in any given criminal trial. There is no provision of sentence hearing. Such a provision existed in 1982 as section 255K of the Code of Criminal Procedure, but the provision was abolished in 1983. It is our view that it is imperative that such provision should exist, particularly in view of the fact that in our country the adversarial system denies the accused

any opportunity to put forward any mitigating circumstances before the court. Even the most senior advocates will fight tooth and nail to maintain their client's innocence. As a result, in our criminal justice system, the accused from the beginning to the end of the trial will maintain a plea of 'not guilty' and since no separate date is fixed for sentencing the accused, there is thereby no opportunity to put forward any mitigating or extenuating circumstances.

In the case of ***Reyes*** reference was made to the judgment of Sir Dennis Byron CJ in the case of ***Matadeen v Pointu [1999] 1AC 98,*** wherein it was observed, "The issue here it whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the offender, whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate: whether the lawful punishment of death should only be imposed after there is a judicial consideration of mitigating factors relative to the offence itself and the offender." It was further observed, "a court must have the discretion to take into account the individual circumstances of an individual offender and offense in determining whether the death penalty can and should be imposed, if the sentence is to be considered rational, humane and rendered in accordance with the requirements of due process."

To summarise, it may be stated that their Lordships of the Privy Council held: "The Board is however satisfied that the provision requiring sentence of death to be passed on the appellant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death (.....) To deny the offender the opportunity, before sentence is passed, to seek to persuade the court in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect."

In the light of the discussions, we are of the view that any mandatory provision of law takes away the discretion of the court and precludes the court from coming to a decision which is based on the assessment of all the facts and circumstances surrounding any given offence or the offender, and that is not permissible under the Constitution. The Court must always have the discretion to determine what punishment a transgressor deserves and to fix the appropriate sentence for the crime he is alleged to have committed. The court may not be degraded to the position of simply rubberstamping the only punishment which the legislature prescribed. There is such finality and

irreversibility in the death penalty. If the discretion of the Court is taken away then the right of the citizen is denied.

We may also mention at this juncture that research has shown that in many cases it has been found many years after the death penalty was carried out that the accused was in fact not guilty of the crime alleged. Of course such finding is of little use to the accused, but it clearly exemplifies that mistakes can be made and the lives of innocent persons may be ended. This certainly was a factor taken into account in the abolition of the death penalty in UK and Europe. On the other hand, obviously the stark examples of injustice unearthed by use of scientific means have not led to the abolition of the death penalty in all the states of the USA. Whether the death penalty is to be abolished altogether cannot be decided lightly. It took the UK decades of research by various organisations and Law Commissions and also much public debate before the death penalty was finally abolished. After much debate and research by the Law Commission, India decided that abolition of the death penalty is not practicable. In the case of a developing country such as ours, it must be left to the public, parliament and researchers to debate extensively and decide after thorough and threadbare discussion whether the death penalty is to be retained.

The learned Attorney General submitted that the law itself having been repealed, the writ challenging the vires of the

provision is redundant. We cannot agree with such contention, inasmuch as the saving provision of the new law provides in section 34(2) that the trial of an offence under the repealed law shall continue as if the law had not been repealed. Hence, the sentencing provision under section 6(2) of the earlier law is very much a live issue.

However, so far as the point in issue before us, we are of the view that the mandatory provision of death penalty given in any statute cannot be in conformity with the right accruing to the citizen under the Constitution and, accordingly, we find that section 6(2) of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 is ultra vires the Constitution. We would venture further to say that, in view of our discussion above, any provision of law which provides a mandatory death penalty cannot be in accordance with the Constitution as it curtails the court's discretion to adjudicate on all issues brought before it, including imposition of an alternative sanction upon the accused found guilty of any offence under any law.

Since the convict petitioner was found guilty of the offence charged by a competent court and the sentence awarded was upheld up to the Appellate Division, we do not find that the detention can be said to unlawful. The declaration by this court that the mandatory death sentence is ultra vires the Constitution does not necessarily entirely absolve the

accused from any other sanction which may have been imposed upon finding him guilty of the particular offence.

Accordingly, with the above observations, the Rule is made absolute in part. Section 6(2) of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 is declared ultra vires the Constitution. The detention of the convict petitioner cannot be said to be unlawful.

We note from the judgment of the High Court Division and the Appellate Division that the aspect of constitutionality of section 6(2) of the said Ain was not at any time agitated or considered by the High Court Division or the Appellate Division. In our view it is open to the petitioner to take whatever action he may be advised in the light of our decision that the provision of mandatory death penalty is ultra vires the Constitution.

We wish to express our appreciation to Mr. Mahmudul Islam for his lucid exposition of the law and also to Mr. Mahbubey Alam, learned Attorney General and Mr. M.I. Farooqui for their invaluable assistance in this matter.

Upon declaration of our judgement, the learned advocate for the petitioners submits that a certificate may be granted under Article 103(2)(a) of the Constitution in the light of the decision of this Court and since the constitutional right of the convict petitioner is still in question.

In the light of our decision above, since we have held that the mandatory death penalty is ultra vires the Constitution and

since the matter was not previously agitated or adjudicated upon by the Appellate Division, we feel that it is a fit case to issue a certificate to the effect that a substantial question of law on the interpretation of the Constitution is involved in this case. Accordingly, let a certificate be so issued.

The execution of the death sentence is hereby stayed for a period of two months from date.

Let a copy of this judgment be communicated at once.

Sheikh Abdul Awal, J.

I agree.

I s m a i l