



The role of non statutory mitigating factors in capital sentencing in Bangladesh: A critical appraisal

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Abstract

This article is an evaluation of the Criminal Court's jurisdiction regarding the criteria-generally in the form of mitigating factors for selecting which defendants are received death sentences and which ones are not. In Bangladesh criminal justice system, sometimes mitigating factors approved by the individual court in a specific case creating an uncertainty due to the non-statutory mitigating factors. To fulfill the purpose of the article we tried to cover most of the death reference cases which published in the different law reports in Bangladesh within aim to show silent role of legislation regarding the sentencing guidelines to manage courts on decision-making processes and due to this how individual judges have continuously struggled with the complexities of capital sentencing system in Bangladesh.

Keywords: mitigating factors, aggravating factors, death penalty, court, life imprisonment, delay, premeditation, motive, discretion, and commutation.

1. Introduction

In the case of Bangladesh criminal justice system there is no provision in law for the offender to reduce the sentence by mitigating circumstances as of right but in practice the judges have to determine the punishment to be awarded for an offence. The sentence, with certain exceptions in capital sentencing cases, is within the sole discretion of the judges and the judges are determined by discretion to weigh the mitigating factors presented by the defence against the aggravating factors presented by the prosecution. Practice reminds precedents that the death penalty is intended only 'for the worst of the worst' crimes. *Dr. Martin Luther King Jr.* who once stated as under: "*Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless* [1]."

In Bangladesh, Mitigating factors such as the young age or old age of the accused, the weak financial position of the accused and hardship in the form of economic loss or loss of a job are cited to justify reduced sentences. However, a claim to indigence must be supported by substantiating evidence for the court to consider it. The offender's mental distress at the protracted nature of the trial has been cited as a factor deserving leniency. Sometimes non statutory extenuating factors, that is, extenuating factors approved by the individual court in a specific case but not listed in the jurisdiction's death penalty statute creating an opportunity of arbitrariness. Although at least one statutory extenuating factor also must be present before a defendant may be sentenced to death, the consideration of non-statutory extenuating factors increases the potential for arbitrariness in capital cases by allowing an unlimited number of considerations to be presented to the sentencing authority. However, capital punishment statutes typically provided judges with no guidance as to how to select which murderers should actually receive the ultimate punishment. As a result, after a finding of guilt, sometimes judges have

to face ambiguity in making the critical choice between life and death of the accused. Such a sentencing system reasonably resulted in unpredictable and inconsistent judgment, with some convicted murderers being sentenced to death while others are spared despite committing the crimes.

Overall in this paper, author is trying to give an overview on mitigating factors in imposition of capital sentencing, The Supreme Court of Bangladesh and its approaches to mitigating factors in capital sentencing, discretionary power of the Court and the role of mitigating factors, capital sentencing and the need for revisiting the non-statutory mitigating factors and some ethical considerations by analysing number of death reference cases which are published in different law reports in Bangladesh. Finally, the paper is attempt to trace out how individual judges struggled with the complexities of sentencing procedure due to the absence of sentencing guidelines to manage courts on decision making process regarding capital punishment.

2. Research Methodology

This research paper seeks to make an original contribution through analysis of judgments from Supreme Court of Bangladesh to elucidate sentencing principles which guides judges in sentencing the accused and try to review relevant judgments which are published in various law reports like Dhaka Law Reports (DLR), Bangladesh Legal Decisions (BLD), Bangladesh Law Times (BLT), Bangladesh Law Chronicles (BLC), Supreme Court Online Bulletin (SCOB) and others law reports.

3. Mitigating factors in imposition of capital sentencing

Capital Sentencing as of punishment which affords the best protection should be given preference, provided other interests and rights are sub-served as well. It is well known with what caution a court must needs proceed in a case of sufficient magnitude as to come under the head of the death

¹ Sukur Mahmood vs. State [2014] 66 DLR 169 (AD).

penalty^[2]. Naturally, they look on all sides for some factors to justify acquittal. And as the verdict in most cases must be either death or acquittal^[3]. Bangladesh allows the death penalty for offences like waging war, abetting mutiny, and false testimony in a capital case, murder, assisting suicide of a child or insane person, kidnapping of a child, and armed robbery resulting in murder^[4]. In addition, other legislation provides death sentences for sabotage, dealing on the black market, counterfeiting, smuggling, poisoning of consumables, a variety of firearms- and explosives-related offenses, and terrorism-related crimes^[5]. *The Women and Children Repression Prevention Act of 2000* and *the Acid Crime Control Act of 2002*, likewise punish as capital crimes a variety of gender-based crimes, such as sexual assault resulting in death, trafficking of women and children, or injuring or maiming with acid^[6].

In law mitigating or extenuating circumstances in criminal cases are unusual or extreme facts leading up to or attending the perpetration of the offence which, although an offence has been perpetrated without legal justification or excuse, mitigate or reduce its gravity from the point of view of punishment or moral opprobrium^[7]. Mitigation, also referred to as mitigating factors or 'mitigating evidence' is evidence the defence can present in the sentencing phase of a capital trial to provide reasons why the accused should not receive a death sentence. This evidence, which can include mental problems, remorse, youth, childhood abuse or neglect, a minor role in the homicide, or the absence of a prior criminal record, may reduce the culpability of the accused in the killing or may provide other reasons for preferring a life sentence to death^[8]. In *Oyshee Rahman v The State*^[9] case where mitigating factors to consider the lesser punishment from death sentence to life imprisonment. To consider the lesser punishment from death sentence to life imprisonment mitigating evidence or circumstances must be stronger than that of aggravating evidence produced by the prosecution^[10].

In *Oyshee Rahman* case the lower Court considering the evidence including confessions and facts and circumstances of the case, learned Judge of Druto Bichar Tribunal No. 03, Dhaka found accused *Oyshee Rahman* guilty of the offence punishable under section 302 of the Penal Code and sentenced her to death with a fine of Tk. 20,000/-[twenty thousand]^[11]. But in High Court Division was found the circumstances which outweigh the mitigating circumstances^[12]. and commuted the death penalty to life imprisonment.

² William E. Ross, *The Death Penalty: Reasons for Its Abolition*, *The Virginia Law Register*, Vol. 11, No. 8 (Dec., 1905) p.627, access at <<https://www.jstor.org/stable/1101157>> access on 04-09-2019.

³ Ibid

⁴ Penal Code Act 1860, S. 121, 132, 194, 302, 305, 396.

⁵ Special Powers Act 1974, S. 15, 25, 25A, 25B, 25C, 25 D; Arms Act 1878, S. 20A; Explosives Act 1884, S. 12; Explosive Substances Act 1908, S. 3.

⁶ Women and Children Repression Prevention Act 2000, S 4, 4(2)(ka), 5, 6, 8, 9(2), 11; Acid Crime Control Act 2002, S. 4, 5(ka).

⁷ *Oyshee Rahman v The State* [2019] 12 SCOB 251 (HCD).

⁸ Ibid

⁹ 12 SCOB [2019] HCD 238

¹⁰ Ibid

¹¹ Ibid, p. 241

¹² Ibid, 1. Condemned prisoner committed double murder without any apparent motive and was suffering from mental derailment or some sort of mental disorder and also suffering from ovarian cyst and bronchial asthma; 2. Her paternal grandmother and maternal uncle had a history of psychiatric disorders; 3. She was around 19[nineteen] year old at the relevant time and the occurrence took place just immediately after her

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1. Grave and sudden provocation
2. Where the act of commission of murder is not premeditated and pre-conspiracy and
3. The accused is not hardened criminal and
4. There is no one to look after his wife and children.

From the facts and circumstances of the above mentioned case and evidence on record and the condemned prisoner had no conspiracy, pre plane, for inflicting dao (Knife) blow in the left chest of the victim. Being instigated by insulting language used by deceased and he gave dao (Knife) blow. Thus the charge under section 302 of the Penal Code fails. The condemned prisoner is therefore liable for commission of the offence of homicide not amounting to murder punishable under section 304^[15], of the Penal Code^[16]. In another case where Court identified some factors which can be considered as mitigating factors where Court can exercise as discretion have been explained and those are: a. that the offence was committed under the influence of extreme mental or emotional disturbance; b. the age of the accused-if the accused is young or old, he shall not be sentenced to death; c. the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society; d. in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence; e. the accused acted under duress or domination of another person, and f. the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct^[17]. In *Jagmohan case*^[18], the following circumstances are considered in mitigation of punishment which should be inflicted such as

attaining the age of majority; 4. She has no such significant history of prior criminal activity [criminal cases] and; 5 She had willingly surrendered to the police station soon after two days of the occurrence.

¹³ Ibid

¹⁴ [2008]60 DLR 255.

¹⁵ Penal Code 1860, S.304 which deals with 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 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.

¹⁶ *State vs Aynul Hoque Mollah* [2008] 60 DLR 261, *Lal Miah alias Lalu vs State* 48 DLR 1(AD), *Bangladesh v Siddique Ahmed* 31 DLR 29 (AD), *Abul Kalam Azad vs State* [1994] BLD 401, *A Hakim vs Mokles* 6 BCR 324 (AD).

¹⁷ *Major Md. Bazlul Huda vs State* 62 DLR 214 (AD).

¹⁸ *Jogmohan Singh vs State of UP* [1973] AIR 947 SC.

i. absence of bad intention; ii. Provocation; iii. Self-preservation; iv. Preservation of some near friends; v. transgression of the limit of self-defence; vi. Submission to the menaces; vii. Submission to authority; viii. Drunkenness ix. Childhood. In *Nalu vs. State* ^[19], where court have mentioned the grounds for which a death may be commuted to imprisonment for life as mitigating factors ^[20].

It is evident from above discussed case laws that in Bangladesh number of circumstances considered as the mitigating factors so that court can consider those factors and apply its discretionary power to reduce a death sentence or not. These circumstances must be addressed in the penalty statute and ensure justice proportionately for all.

4. The supreme court of Bangladesh and its approaches to mitigating factors in capital sentencing

The Supreme Court of Bangladesh has firmly established the legal rule that mitigating factors including the offences and personal circumstances of the offenders must be fully considered before a death penalty can be applied and consideration of mitigating factors played a very significant role in the Supreme Court's decision to commute the death sentences. If a convict is sentenced to death, *section 374* ^[21], *of the Code of Criminal Procedure, 1898 (CrPC)* must be followed. In other sense, all death penalties are automatically appealed to the High Court Division of the Supreme Court of Bangladesh. There are significant number of cases where the Court commuted the death sentences to life imprisonment ^[22]. In number of cases, the defence had pleaded for commutation of death sentences on the grounds of age of the offender, motive and manner and delay in execution.

The Supreme Court's jurisprudence also finds age to be a mitigating factor for young adult offenders aged 18 to 35 years. Age of the offender is a relevant mitigating circumstance which should be given great weightage in the determination of sentence. The Court has repeatedly held that if the offender committed the crime at a young age, the possibility of reforming the offender cannot be ruled out. There are number of cases where Court commuted the sentences on the basis of young age of the accused appellants. In consideration of the evidence of a case named *Mojibur Rahman Gazi vs State* 46 DLR 423 ^[23], where death

sentence was commuted due to the young age of the appellants.

In another case named *State vs Rafiqul Islam* ^[24], where the convict was a young aged man where it was held that the convict is a young man of 24 years and there is nothing on record that he is a habitual dacoit. He has been suffering the agony of death sentence for last 3 years. Therefore, ends of justice would be met if the sentence is reduced and commuted to one of imprisonment for life. In *State vs Bellal Hossain* ^[25], where the sentence of death commuted to life imprisonment states as A condemned prisoner has been suffering from constant mental agony of death by hanging for more than 5 years and he is a man of 25 years having an old mother, one wife and two children to support and look after. He is not a hardened criminal and he cannot be termed as "vicious macho male" and hence the sentence of death is commuted to imprisonment for life.

Another case named *Shahjahan Manik vs. State* ^[26] where an accused is a young woman aged 24 with an infant and she confessed expressing repentance. Both the convicts suffered pangs of death sentence for about 3 and half years. There are extenuating circumstances for sparing them from the extreme punishment of death ^[27]. In *State vs Md Shamim* ^[28], where as to the question of sentence the learned advocate for the condemned prisoner submits that the sentence is too harsh as the condemned prisoner is a young man aged about 20/22 years and he is in death cell for more than 3 years and he gave only one blow to the deceased. Therefore, in the facts and circumstances of the case as stated above we are inclined to reduce the sentence of death of the condemned prisoner for the ends of justice ^[29]. While commuting the sentence of death in the case *Chowla vs State of Haryana reported in AIR 1974 (SC) 1039* it was held under:

"perhaps none of the above circumstances, taken singly and judged rigidly by the old draconian standards would be sufficient to justify the imposition of the lesser penalty nor are these circumstances adequate enough to palliate the offence of murder. But in their totality, they tilt the judicial scales in favour of life rather than putting it out".

In Bangladesh, the age of the condemned prisoner as mitigating factors found in number of cases along with delay in execution and consequent agony of death. Here we like to address that there should be the presence of uniformity among judges to decide the age of the condemned prisoner which they are considering as extenuating factor.

Additionally, in weighing culpability for capital punishment, the Supreme Court considers whether the

criminals and have been languishing in the condemned cell for five years with suffering of mental agony with death within the death cell. Taking an account of aggravating and mitigating circumstances ends of justice will be met if death sentences are altered to one of imprisonment for life.

¹⁹ [2012]17 BLC 204 (AD).

²⁰ *Nalu vs. State* [2012]17 BLC 204 (AD) where the mitigating circumstances mentioned in the above case are as follows: (a) The condemned prisoner has no significant history of prior criminal activity. (b) Youth of the condemned prisoner at the time of commission of the offence. (c) The condemned prisoner would not be likely to commit acts of violence if released. (d) Confinement of the condemned prisoner in the condemned cell from 09. 06.2005 till date for more than 7 years during which period the sword of death has been hanging on his head.

²¹ When the court of sessions passes sentence of death, the proceeding shall be submitted to the High Court Division and the sentence shall not be executed unless it is confirmed by the High Court Division.

²² *Tapan and others v State* [2014] 66 DLR 174 (AD) where as there is no conclusive evidence as regards the principal assailant, ends of justice would be met if the sentence of the petitioners is commuted to imprisonment for life. See other relevant cases also: *State v Romana Begum* [2014] 66 DLR 183 (AD); *Abul Kashem v State* 42 DLR 378.

²³ The appellant is a young man of 35 and initially he had no premeditation to murder, ends of justice would be met if he is sentenced to imprisonment for life. Accordingly, the sentence of death is commuted to imprisonment for life. Also see *State vs, Bidhan Chandra Roy* [2014] 66 DLR 513: We are of the view that the appellant should be convicted for the offence punishable under section 302/34 of the Penal Code. In respect of sentence of condemned prisoners we had hold that they are young men aged between 22-35 years. Records indicate that the condemned prisoners are not the hard

²⁴ 55 DLR 61, *State v Mainul Haque* 7BLC 586, *State v ASI Md Ayub Ali Sardar* 8 BLC 177.

²⁵ 5 BLC 290, *State v Md Shahjahan* 7 BLC 602, *State vs Khokan Mridha* 7BLC 561.

²⁶ 42 DLR 465; *Abdur Rahman Sayed v State* 44 DLR 556; *Abdul Aziz Mina v State* 48 DLR 382.

²⁷ *Ibid*

²⁸ [2001] 53 DLR 439.

²⁹ *Ibid*, p 449

accused committed the crime after previous preparation or do have any motive or not. The absence of such premeditation is treated as a strong mitigating factor as it indicates that the crime does not fall into the category of 'the worst of the worst'.

In *State vs Balal Charan Sarker* 47 DLR, 267^[30] it was held that the motive of the killing is very much clear that there was illicit connection of the deceased with the wife of the condemned prisoner and that the condemned prisoner is also a young man. This circumstances can be treated as an extenuating circumstances. In *State*, represented by the Solicitor, *Government of the People's Republic of Bangladesh v Giasuddin and others* [1999] 51 DLR 103 (AD) where motive is not a necessary ingredients of an offence under section 302 of the code. The court will see if sufficient direct evidence is there or not. If not, motive may be a matter for consideration, specially when the case is based on circumstantial evidence. In *Farid Ali vs State*^[31] where Court was held that there are circumstances in a case where motive is not necessary. In *State vs Miznul Islam*^[32] where motive is though a piece of evidence and may not be a *sine qua non* for bringing offence home to accused, yet it is relevant and important on the question of intention. The existence of motive has a great significance in a criminal trial. It is well recognised that many convicted of murder are not guilty of lengthy premeditation or pre-planning. Given that there are degrees of premeditation, it is suggested that the lack of any long pre-meditation, or pre-planning, should always count as a strong mitigating factor. It is clear that judicial findings of a deliberate and premeditated killing can play a key part in the decision to impose the death penalty on an accused.

The Supreme Court's jurisprudence over the last few years has established the principle that prisoners who spend a couple of years on death row that is "equal to or more than a term of imprisonment for life are reasonably entitled to an expectation of life. The 'plea of delay' submitted that the long delay in disposing these death reference cases by the High Court Division, after the initial convictions and sentences of death pronounced by the trial (Sessions) court, had caused the convicted prisoners "mental agony of death"^[33]. Such sufferings are equivalent to extenuating circumstances for commuting the death sentence to a lesser punishment. In *State V Romana Begum*^[34] where it was held that the sentence of death of the condemned prisoner was commuted by the judgment and order of the High Court Division dated 10-4-2000^[35]. The condemned prisoner spent about four years in the condemned cell and 13 years have elapsed since the judgment of the High Court Division which commuted her sentence of death to imprisonment for

life^[36]. In *Abul Kashem vs State*^[37] where condemned prisoners are under peril of death sentence for almost 3 years suffering agony and torments and thereby partially purged their guilt. Their life may be spread. Sentence of death commuted to one of imprisonment for life^[38]. But only delay of 7 months in disposing of the Reference cannot be held to be an extremely excessive delay^[39]. In another case Court held that death sentence can-not executed after more than four years from the date of confirmation of the sentence. In that case, Appellant suffered a prolonged agony for laches of others and death sentence commuted to one of life imprisonment^[40]. In *State vs Abdul Barek*^[41] where it was held that it is unfortunate that though leave was obtained on 12-7-1993, yet the office of the attorney general did not take any step to get the appeal heard expeditiously and it remained pending for more than eight years. Under the circumstances the quantum of punishment which we proposed to pass on the respondents must be minus that eight years^[42].

In *State vs Zakaria Kabiraj*^[43] where we are of the view that the accused is languishing in the death cell for the last 6 years. So, the attending circumstances impel us to consider his sentence as well and we are of the view that the ends of justice will be met if his sentence is commuted into the sentence of imprisonment for life from the death sentence^[44].

At the end, we can acknowledge that different judges' holds different views on this issue and due to this there might be a chance to come out with dissimilar judgments due to not address it properly or absence of statutory mitigating factors.

5. Discretionary power of the court and the role of mitigating factors

In criminal law, which requires the judge to have due regard to the presence or absence of any mitigating or aggravating circumstances calls for a different approach. A finding or findings on the presence or absence of mitigating or aggravating factors has to be made. Sometime this discretionary system created problems. When judges were given discretion, the results among different judges were inconsistent and sometime arbitrary. *Section 376 of the CrPC* deals with the Power of the High Court Division to confirm sentence or annul conviction^[45]. In *State vs Anjura Khatun*^[46] where *AK Badrul Huq J and Abu Tariq J* states that

Imposition of proper and appropriate sentence is amalgam of many factors, such as nature of offence, circumstances

³⁶ *Ibid*, p 185.

³⁷ 42 DLR 378.

³⁸ *Ibid*

³⁹ *Salauddin v State* 32 DLR 227

⁴⁰ *Wajear Rahman Moral vs State* 43 DLR 25 (AD).

⁴¹ [2002] 54 DLR 28 (AD).

⁴² *State vs Abdul Barek* [2002] 54 DLR 30 (AD).

⁴³ [2012] 64 DLR 523.

⁴⁴ *State v Zakaria Kabiraj* [2012] 64 DLR 544, *Hafez Abul Khair v State* 29 DLR 1 (AD), *Afsar Ali Moral vs State* 29 DLR 269 (AD).

⁴⁵ In any case submitted under section 374, the High Court Division-a) may confirm the sentence, or pass any other sentence warranted by law, or b) may annul conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or c) may acquit the accused person. Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

⁴⁶ [2005] 57 DLR 277.

³⁰ Absconding is not a reason to decide the conviction and sentence. In that case the murder was committed over land dispute and Supreme Court altered the death to sentence of imprisonment for life. See other case *Shihabuddin vs State* [1964] PLD177 (SC) = 16 DLR 269 (SC).

³¹ 4 BLC 27 where the wife of convict appellant died with marks of injuries where her husband and minor children were present but the husband neither informed the police nor did he give any explanation as to the cause of her death and the facts and circumstances are such that the death could not be caused by any other person except the husband and in such circumstances motive is not necessary.

³² 40 DLR 58

³³ *Shahdeen Malik, Waiting to be Executed- Delay as Death Reference Cases: A Matter of Life*, access at <<http://www.biliabd.org/article%20law/Vol-04/Shahdeen%20Malik.pdf>> access on 8/12/2019.

³⁴ [2014] 66 DLR 183 (AD).

³⁵ *Ibid*

mitigating and aggravating. A balance sheet of aggravating and mitigating circumstances has to be drawn up before subjecting a person to a sentence. Of all sentences, death sentences is the harshest sentence imposed upon an accused person. In imposing death penalty it can safely be said that extreme penalty of death need not be inflicted except in gravest cases of extreme culpability^[47].

Under *Penal Code* Court has a very wide discretion in awarding sentence. Section 302^[48] authorities the Court to punish murderer either with death or imprisonment, provided a discretion to Court to sentence the offender either with death or imprisonment for life. It is to be remembered that discretion conferred upon court shall have to be exercised in a manner and in consonance with the concept of law so as to sub-serve the ends of justice^[49]. In *Major Md. Bazlul Huda vs State*^[50] case there is no merits in the contention that uncontrolled and unguided discretion of the Judges to impose capital punishment or imprisonment for life and if the law has given to the judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime it will be impossible to say that there would be at all any discrimination since facts and circumstances of one case can hardly be the same as the facts and circumstances of another^[51]. In *Jogmohan case*^[52] it is stated that the sentencing procedure and *section 302* so far the imposition of death sentence are violative of *Article 14 and 19 of the Constitution of India*. It is argued that the law has given to the Judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime and no law can deprive the life of a citizen unless it is reasonable and in the public interest. While exercising the discretion Palekar, J. argued as follows:

“A large number of murders is undoubtedly of common type. But some at least are diabolical in conception and cruel in execution. In some others where the victim is a person of high standing in the country, society is liable to be rocked to its very foundation. Such murders cannot simply be whisked away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks, in opinion of many, for the inevitability of death penalty not only by way of deterrence, but as a token emphatic disapproval by the society.”

In *Major Md. Bazlul Huda vs State*^[53] case according to our provision the court has been left with the discretion on the facts of the given case whether or not a sentence of death should be awarded, and in case of awarding a sentence of the death the court is required to assign reasons. The court is of course keeping in mind while awarding the extreme sentence whether there is mitigating circumstances to exercise such discretion^[54]. In *Rafiqul Islam Mollah vs. State*^[55] now, the question remains, whether the learned

Additional Session Judge was legally justified in inflicting the sentence of death instead of sentence of imprisonment for life on the accused^[56]. The fact of the case does not show that the accused used any heavy or sharp cutting or lethal weapon or even acted with cruelty in committing murder of the victim^[57]. There is nothing on record that the murder was pre-planned and cold-blooded^[58]. In such view of the matter we hold that it will meet the ends of justice if the sentence of death inflicted upon the condemned accused is reduced to imprisonment for life^[59]. The accused appellant is sentenced to suffer imprisonment for life for the offence under section 302 of the Penal Code^[60].

In *Kamal alias Exol Kamal v State*^[61] The Court expressed their view that the appellant is a threat to law and order and a menace to society. He would do away with anyone, who stands for upholding law and order. In view of the way the victim was murdered, we do not find that the sentence of death is at all disproportionate to the crime alleged. We, therefore, do not find any illegality or infirmity in the judgement and order of the High Court Division confirming the sentence of death. On the question of commutation of the sentence, we are to take into consideration the heinousness of the offence committed in juxtaposition with the mitigating circumstances^[62]. It is by now established that in Bangladesh the sentence for the offence of murder is death which may be reduced to one of imprisonment of life upon giving reasons. It has been the practice of this Court to commute the sentence of death to one of imprisonment for life where certain specific circumstances exist, such as the age of the accused, the criminal history of the accused, the likelihood of the offence being repeated and the length of period spent in the death cell^[63]. There must be the presence of specific aggravating and mitigating circumstances for judges to consider and provided "clear and objective standards" and need to give adequate guidance to the sentencing authority.

6. Need for revisiting the non statutory mitigating factors

By analysing of number of case studies tries to assess the level of inconsistency, mainly in the treatment of different sentencing policy by the judges, when they punishing an offender due to the non-statutory mitigating factors and provide some recommendations. In *Nazmul Islam vs State*^[64], where it is the principle of criminal jurisprudence that an accused should be dealt in accordance with law and before awarding any punishment a judge should have considered the legal evidence and proposition of law and he will not act as a social activist, rather he should have guided by the law giving up emotion. Further, a judge is required to dispense justice in accordance with law and not according to his moral conviction^[65]. Non statutory mitigating factors, that is, mitigating factors approved by the individual court in a specific case but not listed in the jurisdiction's death

⁴⁷ Ibid, p 289.

⁴⁸ Penal Code 1860, S. 302: Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

⁴⁹ State vs Anjura Khatun [2005]57 DLR 289.

⁵⁰ Bazlul Huda (n 17) 1.

⁵¹ Ibid

⁵² Jogmohan Singh (n 18) 947

⁵³ Bazlul Huda (n 17) 216

⁵⁴ Ibid

⁵⁵ [2005]57 DLR 581

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid, p 586.

⁶¹ [2018] 10 SCOB 11 AD

⁶² Ibid

⁶³ Ibid, p 10

⁶⁴ [2011]63 DLR 460 (HCD).

⁶⁵ Nazmul Islam vs State [2011] 63 DLR 464 (HCD).

penalty statute creating an opportunity of arbitrariness. In *Abdul Bashir vs State* ^[66] where it was held that it has been submitted by the learned Counsel for the prisoner that the condemned prisoner is suffering the pangs of death for more than 5 years and that he is of age below 40 and has a family comprising old father and his wife and, as such sentence awarded on the condemned prisoner may be commuted to a sentence of imprisonment for life. This aspect of the matter has been considered by the High Court Division and upon assigning several reasons has rejected the submission so made. We are of the view that merely because certain years have passed in reaching finality to the judgment of the Court of Additional Session Judge the same cannot be the ground for commuting the sentence of death where death was caused for no reason. In the background of the facts and circumstances of the case, in our opinion, delay cannot be a ground for commutation of the sentence awarded to the prisoner and to award thereupon the sentence of imprisonment for life ^[67].

On the other hand, there are number of cases where the Court commute the death sentence on the ground of delay ^[68]. To reduce this irregularities this should be addressed in the criminal law statutes so that justice can be ensured criminal Justice for all. In *Major Md. Bazlul Huda vs State* ^[69] where Court states that where there are uniform decisions of our Superior Court that mere delay is not a legal ground for commutation of a sentence as the principles of *due process of law* ^[70] as applicable in common law jurisdiction is not applicable to our legal judicial system since we have modified laws on the subject. There are cases where court showed his disbelief to see as to why the case was not treated as a “rarest of rare cases” and death sentence was not imposed on these three rapists and on their accomplice. In *Rehana Begum and another vs State* ^[71] it was held that where in this case of gang rape committed by three fully grown up men resulting in the death of a helpless teen ager, and there by smashing her person, her dream, her modesty, her dignity, her chastity, being regarded as the invaluable and inviolable asset by any women, and when such a crime is committed by the convicts caring the least about the sanction provided for by the prevailing law and caring not at all about any social resistance, as provided by their pre-plan and conduct, we surprise to see as to why this case was not treated as a “rarest of rare cases” and death sentence was not

imposed on these three rapists and on their accomplice ^[72]. In this case the HCD also addressed that, we find from the facts and circumstances of this case i. that these gang of rapists are menace to the society, because they fear not the law, nor the society ii. That the sentence of life imprisonment is altogether inadequate compared to the gravity and heinousness of the offence of gang rape leading to death of the victim and iii. That there is no mitigating factors in this case. However, considering that substantial period has elapsed by now, we are constrained to abstain from enhancing the sentence ^[73].

Furthermore, Court sometimes deny to consider delay as an extenuating factor. In *A. Khair vs. State* ^[74] held that delay itself is not an extenuating circumstances to commute the sentence. The observations are as under:

“Delay by itself in the execution of sentence of death is by no means an extenuating circumstances for commuting the sentence of death to imprisonment for life. There must be other circumstances of a compelling nature which together with delay will merit such commutation. We find no compelling extenuating circumstances in this case and therefor,

Section 367(5) of the Code of Criminal Procedure provides that it is left to the discretion of the Court to pass a sentence of death or a lesser sentence and a death sentence is to be justified as the same way as a sentence of life imprisonment. In *Mehedi Hasan v. State* [2014] 66 DLR 111 (AD) where Court stated as follows:

“the villainy committed by convict appellant is extremely shocking and revolting and it shocks judicial conscience. In such a shocking nature of felony it is necessary to impose maximum punishment which is death under the law as means of social necessary. Mere young age of convict-appellant cannot be ground for desisting from imposing death penalty and cannot be termed as a mitigating circumstances in imposing punishment and no mercy can be shown to the culprits who pollute the society.” This statement is clearly indicative of the emotion of the author judge which where stirred by the terrible turn of events ^[75].

Rights and benefits accruing to a citizen, be he an accused or otherwise, have to be ensured and cannot be denied or disregarded due to emotional or sentimental consideration of the judge. An accused has the rights and privileges afforded by the law ^[76]. In the case of *Nalu v. The State* 32 BLD 247 (AD) Court was expressed as follows:

“But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes. We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offence, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it”.

In *State vs. Bidhan Chandra Roy* ^[77] where in with regard to the sentence imposed upon the convict- appellants we are of the view that sentencing discretion on the part of a Judge is

⁶⁶[2004] 56 DLR 207 (AD).

⁶⁷*Abdul Bashir vs State* [2004] 56 DLR 209 (AD).

⁶⁸ *Shohel Dewan and others vs. State* [2016] 6 SCOB 70 AD, the accused appellants were convicted and sentenced to death by an order of the trial Court dated 21.4.2003. The convict appellants have, therefore, suffered in the condemned cell for almost twelve years. In this connection we may refer to our earlier decision in the case of *Manik versus The State* judgment delivered on 19th January, 2015 (unreported) where the sentence of death was commuted to imprisonment for life considering, inter alia, the long period spent in the condemned cell. In view of the discussion above, we are of the opinion that ends of justice will be sufficiently met if the sentence of death is commuted to imprisonment for life.

⁶⁹ *Bazlul Huda* (n 17).

⁷⁰ The phrase *due process of law* is synonymous with *law of land* as used in the famous twenty-ninth chapter of *Magna Charta* which declared that “no freeman shall be taken, or imprisoned, or disseized or outlawed, banished, or in any way destroyed, nor will the king pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land”. This principle has been adopted in the Fifth and Fourteenth Amendments of *American Constitution*. Both these amendments prohibit deprivation of life, liberty or property ‘without due process of law’. See the reference in *Major Md. Bazlul Huda vs State* 62 DLR 212 (AD).

⁷¹ [2011] 63 DLR 558.

⁷²*Rehana Begum and another v State* [2011]63 DLR 560 (HCD).

⁷³*Ibid*.

⁷⁴ 44 DLR (AD) 255

⁷⁵*Mehedi Hasan Vs. State* [2014] 66 DLR 156 (AD).

⁷⁶ *Ibid*

⁷⁷ [2014] 66 DLR 500

The most difficult task to perform. There is no system or procedure in the criminal justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence i. Aggravating factors and ii. Mitigating factors. These factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under *section 302 of the Code*, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice^[78]. In *State vs Imdad Ali Bepari*^[79], where the order of conviction under *section 302 Penal Code* by the Session Judge on the basis of part of the evidence recorded by an Assistant Judge, who is not competent to hold trial under that section, is illegal. The death reference is rejected and the case is sent back for re-trial of condemned prisoner in accordance with law and in the light of observations made. In *State vs Ful Mia*^[80], where the learned Single Judge has failed to consider the material aspect that the First Information Report was lodged within one and half hour of the occurrence and all the four eye-witnesses proved the participation of the accused in inflicting one dagger injury on the body of deceased when the learned single judge considered some very minor and insignificant circumstances which are not at all relevant in this case as the case was well proved by as many as four eye-witnesses of the occurrence and hence the accused – respondent is found guilty under *section 302 of the Penal Code* and he is sentenced to suffer imprisonment for life. In *Md Jiaur Rahman vs State* [1995] BLD 459 where since the sentence prescribed under section 302 of the penal code is death or imprisonment for life, the court before recording a conviction must be satisfied beyond reasonable doubts about the guilt of the accused person on careful scrutiny of the evidence on record. The conviction even on grave suspicion and high probability is not tenable in law. In *State vs Jahaur Ali*^[81], where Session Judge did not take any step for proper arrangement of defending the condemned prisoners who were denied the substantive right of being defended through a lawyer at the cost of the State. The conviction not sustainable in law.

7. Concluding Remarks

Unlimited extenuating circumstances create an unlimited number of variables. Mitigating factors must be well defined in practice and should addressed statutorily in criminal laws of Bangladesh. Consideration of non-statutory mitigating factors increases the potential for arbitrariness in capital sentencing cases by allowing unlimited number of consideration to be presented to the sentencing authority. In the legal framework of sentencing in Bangladesh, judge's discretion and the decision of death sentence depends on the mood of Judge, which raise the inconsistency in sentencing practices. Furthermore, on the basis of what judges are decided to punish one criminal with the death penalty and another with the life imprisonment for the same offence in a

given jurisdiction, especially when there is no generally agreed measured stick on the sentencing policy. In *Mahir Mollah vs State* 5 BLC 386 where it was held by the Court that

It is not correct to say that the case as made out in the FIR has been given a go-bye and new case developed during the trial and the learned trial Court most illegally discarded the evidence of 8 eye-witnesses and hence the findings and decisions of the learned trial Court are not supported by the evidence on record and as such the impugned Judgment and order of acquittal are considered to be perverse and it is set aside.

In another judgment Court said that learned judge that before holding trial, she should know when sentence of death can be passed in *State vs. Anjali Debi alias Monju Debi*^[82]. We do not understand how a trial judge can summarise above, as the defence did not prove her case, which shows her knowledge on criminal law justice. When there is doubt, at least conviction in such case, cannot be passed. The aforesaid portion of the judgment belies her quality as trial judge. We caution the learned judge that before holding trial, she should know when sentence of death can be passed when the accused can be convicted, emotion or self- imagination should be thrown away while a judge holds a trial. Here the condemned prisoner is found not guilty of the charge levelled against her and she is acquitted from the charge^[83].

In *State v Azam Reza*^[84]. Where as sentence to the high court division “the accused is not a hardened criminal. The death of the deceased was caused by him in sequel of bitter matrimonial relationship. He caused the haematoma with any hard substance on the occipital region on the head of the deceased which resulted her instantaneous death. In view of the court the justice will be met if the sentence of death awarded to the accused is commuted to imprisonment for life^[85].”

Finally, in sentencing process, two important factors come out- which shall shape appropriate sentence i. Aggravating factors and ii. Mitigating factors. These factors control the sentencing process to a great extent in Bangladesh. The analysis of the case laws cited throughout this article shows that even though Bangladesh's body of legislation is silent on sentencing guidelines to guide courts on decision-making processes, individual judges have consciously grappled with the complexities of sentencing. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished at the same time the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice.

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