

**10 SCOB [2018] HCD****HIGH COURT DIVISION**

Death Reference No.64 of 2011

**The State****Vs.****Md. Saiful Islam and another**

...Condemned -prisoners

with

Criminal Appeal No.7223 of 2011

Mr. Md. Moniruzzaman (Rubel), Deputy  
Attorney General with

Mr. Abul Kalam Azad Khan,

Syeda Sabina Ahmed and

Ms. Marufa Akhter, Assistant Attorney  
Generals

... for the State

Md. Saiful Islam and another

... Appellants

Mr. SM Shajahan with

Mr. Afil Uddin Ahmed and

Ms. Sabrina Zarin, Advocates

... for the appellants

Vs.

The State

... Respondent

Judgment on 17-18.01.2018

**Bench:****Mr. Justice Md. Ruhul Quddus****And****Mr. Justice Bishmadev Chakrabortty****Code of Criminal Procedure, 1898****Section 164:****Discrepancy between medical evidence and confessional statement:**

**In view of the above two cases of Indian jurisdiction, we can rely on the confessions of two accused, even if it gets partial support from the medical evidence. .... However, the two accused themselves confessed commission of rape and subsequent murder of the victim and if these are believed to be true and voluntary, we do not have any reason not to rely on their confessions. ... (Para 33)**

**Judgment****Md. Ruhul Quddus, J:**

1. This Death Reference under section 374 of the Code of Criminal Procedure has been made by the Judge, Nari-o-Shishu Nirjatan Daman Tribunal, Jhenaidah for confirmation of sentence of death awarded upon the condemned-prisoners Md. Saiful Islam and Md. Arif Hossain by judgment and order dated 25.06.2008 passed in Nari-o-Shishu Nirjatan Daman Tribunal Case No. 04 of 2009 arising out of Moheshpur Police Station Case No. 23 dated 26.06.2008 corresponding to G R No. 112 of 2008 under section 9(3) of the Nari-o-Shishu Nirjatan Daman Ain (Act VIII of 2000). The learned Judge also imposed fine of Taka 1, 00,000/- upon each convict. The condemned-prisoners jointly preferred a regular appeal being Criminal Appeal No. 7223 of 2011 challenging the selfsame judgment and order. Both the matters have been heard together and are disposed of by this judgment.

2. The informant Torab Ali lodged a first information report (FIR) with Moheshpur police station, Jhenaidah on 26.06.2008 at about 9:45 am alleging, *inter alia*, that his daughter Alpana Khatun, a minor girl of 7 years was missing till 1.00 pm on the previous day. On the following day at about 7.00 am Moyna Begum (PW 2) saw her dead body in a jute field owned by Moshiur Rahman at village Shibanandapur. On receipt of the news he along with some other villagers rushed the jute field and saw her dead body lying. Her neck was encircled with some jute plants and her right eyeball was extracted. It was presumed that some unknown miscreants took her to the jute field with an ill motive and killed her. It was also suspected that before death, she was raped.

3. The police investigated the case and submitted a charge sheet on 16.11.2008 against the condemned-prisoners under sections 7 and 9(3) of the Act VIII of 2000. In the meantime, the condemned-prisoners were arrested on 02.07.2008 on secret information given by a source of police. At about 10.00 am on the following day both of them were produced before the concerned Judicial Magistrate and they made separate confessions involving themselves in her murder following rape. The Judicial Magistrate accordingly recorded their confessions. Subsequently they filed applications for retraction of the confessions on the grounds that the police under duress and torture had extracted those confessions, and that they did not make it voluntarily.

4. Eventually the case was sent to the Nari-o-Shishu Nirjatan Daman Tribunal, Jhenaidah and the learned Judge thereof framed charge against both of them under sections 7 and 9(3) of the Act VIII of 2000 by order dated 09.03.2009. The charge was read over to them and they pleaded not guilty claiming justice.

5. The prosecution in order to prove its case examined twelve witnesses. Of them PW1 Md. Torab Ali, the informant stated that his daughter Alpana Khatun was a 7 year old minor girl. She went outside the home at about 12 o'clock on 25.06.2008. The occurrence took place at the jute field of Moshiur Rahman within Shibanandapur Mouza. Despite searching from 2.00 pm they could not trace her anywhere. They started searching again at the following morning. At one stage Moyna Begum communicated him that Alpana's dead body was lying in the jute field. They rushed there and saw the dead body without the right eyeball. Her neck was encircled with some jute plants. He along with the local Chairman Fakir Ahmed (PW 5) and Zahangir (PW 4) went to the police station and lodged the FIR. The police came to the spot and sent the dead body for holding autopsy. During investigation the Investigating Officer (IO) seized some jute plants, a paste coloured half pant wore by the victim, a white polythene bag with 15 berries and half portion of a blade stained with blood.

6. In cross-examination, he stated that the accused Saiful and Arif came to the spot to see the dead body. They were arrested six days after the occurrence from their respective houses at about 2.00 am. There were two groups in their village. One belonged to Jamaat-e-Islami led by the local Chairman Fakir Ahmed where he himself was involved and the accused belonged to BNP. He denied the defence suggestion that according to the instruction of the Chairman he deposed falsely.

7. PW 2 Moyna Begum, a relation to the informant stated that the occurrence took place about three years back. On a Wednesday the victim Alpana was missing. On Thursday morning her dead body was found in the jute field of Mashiur Rahman. Her eyeball was extracted and neck was encircled with jute plants. She was presumably raped before she was

killed. Her pant was put off and chest was open. On receipt of the information, the police came and held inquest on the dead body and thereafter sent it for autopsy.

8. In cross-examination she denied the defence suggestion that the accused persons belonged to her rival group or that they were falsely implicated at the instance of the local Chairman, who was also their rival.

9. PW 3 Muchhaddi Molla, a 75 year old man stated that the informant was his grand son-in-law. The occurrence took place three years back. He saw the victim's dead body in the jute field. Her eyeball was extracted. As he could not sustain the brutality, he came back home. Subsequently, the police arrested Arif and Saiful. They were taken to the house of the Chairman and he (PW 3) went there. They confessed their guilt in presence of all.

10. PW 4 Zahangir Alam, another relation to the informant stated that the occurrence took place before three years. The victim Alpana was missing from one Wednesday. At early morning on Thursday, her dead body was found in the jute field. His (PW 4's) wife Moyna Begum first saw the dead body. Her (victim's) neck was encircled with jute plants and eyeball was extracted. A poly bag with some berries was lying beside the dead body. The police came and prepared an inquest report. After arrest, the accused were brought to the house of the Chairman, where they confessed their guilt in presence of the local people. PW 4 himself was present there.

11. In cross-examination he stated that at the time of recovery of the dead body, the half pant wore by the victim was stained with blood. Police shifted the dead body to a nearby jackfruit garden. He denied the defence suggestion that because of relationship with the informant he deposed falsely.

12. PW 5 Fakir Ahmed, the local Chairman stated that the occurrence took place on 25.06.2008. He received the news that victim Alpana was missing. At the following morning he heard that the dead body was found in the jute field of Moshiur Rahman. He went there and saw many people. The victim's neck was encircled with jute plants and her right eye was extracted. The dead body was semi-naked. Her half pant was pulled down to knee. The police on suspicion arrested Saiful and Arif and brought them to his house at the time of *esha* prayer. On interrogation, they confessed their guilt in presence of the local people. In cross-examination he stated that he saw several scratch marks on the dead body. He denied the suggestions that the accused were beaten at his house or that they made the extra-judicial confessions because of beating.

13. PW 6 Md. Golam Kabir stated that at the material time on 31.07.2008 he was posted to Jhenaidah as a Magistrate of first class. He recorded the confessional statements made by Saiful Islam and Arif Hossain under section 164 of the Code complying with the provisions of the law. After recording, the confessions were read over to them and finding those to have been correctly recorded, they put signatures there. To be on the safe side, their signatures were taken on each and every page of the recorded confessions. He asserted that they had made the confessions voluntarily and without any influence or allurement. After recording the same they were sent to jail custody. He proved the confessional statements and his signatures thereon as exhibits 2 and 3 series. In cross-examination he stated that he recorded their statements separately and they were kept in his chamber, not under police. The accused persons made applications for retraction on 27.08.2008, which were kept in record.

14. PW 7 Mizanur Rahman, a local seizure list witness stated that he knew both the informant and victim. He also knew the accused Arif and Saiful. The occurrence took place on 26.06.2008. The dead body was found in the jute field of Mashiar. He went to the spot and saw the dead body. Her neck was encircled with jute fibers and right eye was uprooted. Her half pant was pulled down. A police personal seized the jute plants, half pant and ploy bag with some berries under a seizure list. He proved the said seizure list and his signature there (vide exhibits 4 and 4/ka) and also proved the articles as material exhibits I-III.

15. PW 8 Badar Uddin stated that the occurrence took place before three years. In the afternoon of a day he heard that Alpana was missing. On the following day he came to know about recovery of her dead body. He went to the place of occurrence (PO) and saw the dead body. The police came, prepared an inquest report and took his signature there. He exhibited the inquest report with his signature (vide exhibits: 5 and 5/1). He further stated that the police also seized some jute plants, half pant of the victim and a poly bag with some berries under a seizure list. He was made a witness thereto. He also proved his signature on the seizure list.

16. PW 9 Md. Hafizur Rahman stated that Alpana was missing on 25.06.2008. On the following day her dead body was found in the jute field of Mashiar. On the previous day (meaning 25.06.2008) he saw Arif and Saiful to talk with Alpana under a berry tree.

17. In cross-examination he (PW 9) stated that the police arrested and took him to the police station and released him there from. On that very day, he made a statement to the police that he saw them under the tree. He also made a statement to the Magistrate stating the same fact and denied the suggestion that the police tortured him and compelled him to make such statement. On recall he proved his statement made before the Magistrate and his signature there.

18. PW 10 Md. Abdul Hakim, the 2<sup>nd</sup> IO stated that he was assigned for investigation of the case on 09.02.2008 and conducted the investigation in part. The previous IO Sub-Inspector Shafiqur Rahman conducted the 1<sup>st</sup> part of the investigation. During investigation of his (PW 10's) part, he visited the PO, recorded statements of four witnesses under section 161 of the Code, collected the autopsy report, prepared the memo of evidence and submitted the charge sheet on 13.11.2008. On recall, he (PW 10) further stated that the previous IO Shafiqur Rahman was on a foreign mission. He (Shafiqur Rahman) had also visited the PO and prepared sketch map with the index. He proved the sketch map, index and the signatures of the previous IO as he (PW 10) knew his signature and hand writing.

19. In cross-examination he stated that before submission of the charge sheet he perused the case docket. He further stated that Saiful and Arif were produced before the Court on 03.07.2008. A half portion of blade stained with blood was recovered from a bamboo clump at the showing of the accused. He proved the seizure list under which the half blade was seized and the signature of the 1<sup>st</sup> IO there and also proved the recovered blade as a material exhibit.

20. PW 11 Dr. Md. Mostafizur Rahman stated that the dead body of the victim was brought at Jhenaidah Hospital morgue on 26.06.2008. He along with the Members of a Medical Board conducted autopsy on the dead body of the victim and prepared an autopsy report. He proved the report and his signature there. While conducting autopsy they found her right eyeball extracted from the orbital cavity. They also found clotted blood and

congestion in the surrounding tissue, multiple scratch marks at the right iliac region and multiple scratch marks of different size and shape on different parts of her body. He (PW 11) lastly opined that the death was due to hemorrhage and shock as a result of the injuries and those were antemortem and homicidal in nature. No sign of recent sexual intercourse was found, but sign of sexual violence was there.

21. In cross-examination he stated that no symptom of strangulation was found on the dead body and denied the defence suggestion that extraction of eyeball required an expert person. He further stated that the death was due to extraction of the right eyeball as well as hematoma at the parietal region of the scalp.

22. PW 12 Md. Shahidul Haque stated that he recorded the FIR, filled up the FIR form, put his signature there and assigned Sub-Inspector Shafiqur Rahman to investigate the case. After his transfer, Sub-Inspector Abdul Hakim was assigned to complete the investigation.

23. After closing the prosecution evidence, the learned Judge of the Tribunal examined the accused under section 342 of the Code bringing the abstracts of the incriminating evidence and the confessions into their notice, to which they reiterated their innocence and submitted written statements in their defence. They, however, did not examine any defence witness. In the statement of accused Saiful Islam he took the plea that after being arrested by the police he was severely tortured and threatened of cross-fire and he made the confession in order to save his life. Co-accused Arif Hossain made a similar statement in his defence.

24. After conclusion of trial the learned Judge of the Nari-o-Shishu Nirjatan Daman Tribunal, Jhenaidah found both the accused guilty of offence under section 9(3) of the Act VIII of 2000 and accordingly convicted and sentenced them to death by hanging and also imposed fine of Taka 1,00,000/- each giving rise to the instant Death Reference and the connected criminal appeal.

25. Mr. Md. Moniruzzaman, learned Deputy Attorney General appearing for the State submits that the brutal murder of an innocent child following rape has been proved by the prosecution evidence and two confessions made by the condemned-prisoners themselves. They were arrested on 02.07.2008 and on the following morning they were produced to the concerned Magistrate, where they confessed their guilt voluntarily. The learned Magistrate on proper observance of all procedural law recorded the confessions. He himself deposed on oath affirming the confessions and proved the same. Besides, a local and independent witness (PW 9) deposed supporting their presence under the berry tree and talking with the victim at the material time. After their arrest, half portion of a blade stained with blood was recovered from a bamboo clump at the showing of one of the accused. By the said blade victim's eyeball was extracted. This is an offence, degree of culpability of which cannot be expressed in words. The confessions have been affirmed on oath by the recording Judicial Magistrate and satisfactorily corroborated by the evidence of PW 9 as well as recovery of the blood stained blade. The time and place of occurrence has also been corroborated by other prosecution witnesses. This is a fit case for confirmation of death.

26. Mr. SM Shajahan, learned Advocate for the condemned-prisoners as well as the appellants in the connected criminal appeal at the very outset submits that in view of the autopsy report (exhibit-7) read with the evidence of PW 11, the allegation of offence under section 9 (3) or any other penal provision of the Act VIII of 2000 has not been proved in this

case and on that count the Nari-o-Shishu Nirjatan Daman Tribunal had no jurisdiction to try the case.

27. Mr. Shahjahan further submits that the so-called confessions of the accused disclose that they had killed the victim by throttling after committing rape on her. But the autopsy report shows no sign of recent sexual intercourse and no mark of strangulation was found on the dead body. The autopsy report was affirmed by the conducting Doctor (PW 11) himself. He also stated in cross-examination that no symptom of strangulation was found and affirmed that no sign of recent sexual intercourse was found. When the confessions are contrary to the evidence of the Doctor (PW 11) as well as the autopsy report, it cannot be relied on for conviction and sentence of death. On this point Mr. Shahjahan refers to the case of Mizazul Islam alias Dablu vs The State, 41 DLR (AD) 157 and two other cases of Indian jurisdiction, namely, Jagmal and another vs Emperor, AIR 1948 Allahabad 211 and Union Territory of Mizoram vs Vanalallawama alias Lallaoma 1977 CRLJ 1831.

28. Mr. Shahjahan then submits that the confessions were retracted by both the condemned-prisoners within a short time and at the time of their examination under section 342 of the Code they furnished two separate statements stating under what circumstances they were compelled to make the confessions. But the trial Judge without considering the statement of the accused made under section 342 of the Code and their retraction applications, passed capital sentence upon two young men having no criminal track record and thereby committed gross illegality.

29. Mr. Shahjahan lastly submits that it appears from the record as well as the cross-examination of PW 9 Hafizur Rahman that he was also arrested on 02.07.2008, but instead of producing him to the Magistrate for confession he was allured to make a statement under section 164 of the Code as a witness. It gives an indication that the present appellants were victimized and the criminal liability of one was shifted to another. The time of arrest of the accused as stated by the prosecution witnesses is also contradictory, and the story of extracting one's eyeball by half of a blade is absurd. The *challan*, by which the dead body was sent to the morgue for autopsy shows that the victim was wearing a red half pant, but the seizure list prepared on the same day and evidence of PW 1 shows that it was paste coloured. Therefore, the evidence and other prosecution materials are inconsistent and contradictory regarding colour of the half pant worn by the victim, commission of rape and her murder by throttling and extraction of eyeball by a half blade, which makes the case seriously doubtful and as such the appellants are entitled to be acquitted on benefit of doubt, and the conviction and sentence passed by the trial court would defeat justice.

30. In reply to the submission advanced by Mr. Shahjahan on the point of 'inconsistency' between the confessions and autopsy report read with the evidence of PW 11, learned Deputy Attorney General submits that sometimes in case of discrepancy between medical evidence and evidence of a witness, the court should try to find out the truth and should not throw away the prosecution case only on the ground of such discrepancy. Similarly if an accused gives a partial wrong description in his confession, it cannot be a ground of his acquittal. In support of his contention learned Deputy Attorney General refers to the cases of Mohanlal and others vs The State, AIR 1961 Rajasthan 24 and Bangaru Reddy, AIR 1940 Mad 699.

31. We have considered the submissions of the learned Advocates of both the sides, perused the evidence and other materials on record, consulted the relevant provisions of law and gone through some decisions on the points involved including the cited cases. In the case

of Mizazul Islam alias Dablu as cited by the learned Advocate for the appellants, the confessional statement made by the condemned-prisoner directly contradicted the evidence of the injured-victim (PW 4) who was also an eyewitness to the main part of occurrence and as such the Appellate Division did not rely on the confession and acquitted the condemned-prisoner who was convicted on the basis of such confession. In the present case there is no eyewitness. It is solely based on circumstantial evidence read with the confessions of the co-accused and as such distinguishable with the case cited. This is correct that there are some discrepancies in the medical evidence regarding commission of rape on the victim and mode of killing her by throttling. A medical report may not be correct in each and every autopsy. There might be hundred of reasons for not furnishing a correct autopsy report. Sometimes it happens because of negligence of conducting Doctor or his callousness, or lack of knowledge and sometimes they do it deliberately under the influence of the defence. In the case of Mohanlal and others vs The State, AIR 1961 Rajasthan 24 it has been observed:

*“It should also be borne in mind that some times, the Medical Officers also do not bestow sufficient care while performing examinations and their opinions may not be properly formed on account of inadequate or defective examinations or lack of complete knowledge. It is, therefore, hardly fair to expect a complete and perfect correspondence between the medical evidence and the eye-testimony.*

*“Naturally, therefore, the court must carefully examine the discrepancies and if it is reasonably open to arrive at a substantial and true version of the prosecution case, the courts should not adopt the easy course of throwing away the prosecution case on the alleged discrepancies between the medical evidence and the eye-testimony. Applying the above test to the present case, it can safely be assumed that the statement of Girraj to the effect that no injury was caused after the injured had fallen down cannot be deemed to be correct and is only the result of imperfect memory on his part and the prosecution case on that basis cannot at all be held unreliable.*

*“The portion of Girraj’s statement that no injury was received after Gulley fell down is not acceptable, but from this, it does not follow that his entire statement should be discarded on that ground with the help of medical evidence. The lower court was quite competent to accept the substantial part of his testimony. Gulley’s statement, ambiguous though it may be does not necessarily imply that he received no injuries after he fell down.*

*“The medical evidence cannot be, therefore, invoked to discredit his testimony. Further, I find no justification to doubt the presence of Roopsingh at the time of the incident. The lower court has explained the statements of Girraj and Gulley about the arrival of Roopsingh and for the reasons mentioned by it with which I am in agreement, I hold that Roopsingh is a reliable eye-witness. His evidence is quite consistent with medical evidence. In my opinion, the trial Judge has rightly accepted the prosecution case and I do not see any good reasons to differ from the appraisalment of the evidence by the lower court.”*

32. In a Death Reference for confirmation of death sentence awarded on a condemned-prisoner named Bangaru Reddy reported in AIR 1940 Madras 699, Burn, J observed:

*“The doctor found a continuous ecchymosed mark all round the woman’s neck below the thyroid cartilage. Such a mark would not be likely to be produced by strangulation with the fingers and thumbs. In such cases it is generally possible to distinguish marks of the thumbs and fingers separately. This however is not sufficient for acquitting the appellant. The mere fact that the accused in his confession has*

*given a wrong or an incomplete description of way in which he brought about the woman's death is not a reason for finding him not guilty. The evidence of the doctor was that there were marks of fingers and thumps on the woman's neck and to that extent his evidence does agree with the confession of the accused."*

33. In view of the above two cases of Indian jurisdiction, we can rely on the confessions of two accused, even if it gets partial support from the medical evidence. It has already been established by the evidence of PWs 2-5 and 7 that the chest of the victim was open and her half pant was pulled down to the knee. According to the autopsy report (vide exhibit-7) there were signs of sexual violence on her dead body and her hymen was ruptured. According to the inquest report (vide exhibit-5), there was sign of blood at her vagina and marks of scratches below the navel and different places of her body. PW 4 noticed blood on her half pant. All these are suggestive of commission of rape on her. It has also been settled that emission of semen or complete penetration is not necessary in all cases of rape. In the present case, the victim was a minor girl of 7 years of age. It is presumed that no sexual organ was developed on her person and complete penetration of male organ into her vagina was not possible, which could lead the Doctor to arrive at an anomalous conclusion. It further appears from the confessions that at the time of consecutive rape, the condemned-prisoners pressed her mouth and after commission of rape, she was looking like dead. So her death may have caused by asphyxia also. But it does not appear from the autopsy report read with the evidence of the Doctor (PW 11) whether he had conducted autopsy from that angle. However, the two accused themselves confessed commission of rape and subsequent murder of the victim and if these are believed to be true and voluntary, we do not have any reason not to rely on their confessions. On this point we can rely on another decision of our jurisdiction, namely, State vs Shukur Ali, 9 BLC 238. In that case the medical report did not support the prosecution case of rape followed by murder, but disclosed sexual violence on the victim. Even in the confession made by the accused, he did not confess his guilt in support of the prosecution case of rape followed by murder. Still the High Court Division held him guilty of offence of rape as well as murder. In so doing S K Sinha, J (as his lordship then was) observed:

*"Admittedly the victim girl was only 7 years old at the time of commission of the offence. Under such circumstances her genital organ was not developed and matured for penetration of the male organ. The congestion as found on the vulva and the sign of sexual violence as notified by PW 19 is sufficient to arrive at the conclusion that there has been an attempt to commit rape before the death of Sumi and therefore, the High Court Division has found that the prosecution has been able to prove charge under section 6(2) of the Nari-o-Shishu Nirjatan Damon (Bishesh Bidhan) Ain, 1995 against the condemned-prisoners."*

34. The decision passed in Shukur Ali's case (*ibid*) was subsequently upheld by the Appellate Division. In another case of State vs Shahidul Islam alias Shahid and others reported in 58 DLR 545 the High Court Division referring to 56 DLR (AD) 81 reiterated:

*"...to constitute rape complete penetration is not essential and even partial or slightest penetration with or without emission of semen and rupture of hymen or even an attempt of penetration is sufficient to prove rape. Presence of spermatozoa is also not at all necessary to prove rape if there are other evidences including injuries on private part and signs of violation and other symptoms are found." (emphasis supplied)*

35. The above mentioned two cases, one of Shukur Ali and another of Shahidul Islam alias Shahid and others clearly match the case in hand.



36. Let us examine whether the confessions made by the accused were true and voluntary. It appears that the accused were arrested on 02.07.2008 at about 8.45 pm and produced before the concerned Judicial Magistrate at about 10.00 am on 03.07.2008 i.e. within the shortest possible time. Even without going on remand, they made the confessions.

37. For better appreciation of the manner of description and contents of the confessions, that made by Saiful Islam is reproduced below:

“Avg MZ 27/06/2008 vLp ZwiL i i kg wi-vi ivi “G W e! w"# e\$%&"Z' /7 ve(v  
vg )iG W v \* "Zi v+, v. /LV , "# vL Awi01w Zt gZt A8 i i&gv v\$ "# Av+.  
v \* "Zi vK G W vGMv Av+. G - vGMv+i Z4# A5 vLVZ61w Zt gt Zviv Av4%/v7  
wi" v18vt g"&k i1 4vt v v & :e#/ 7/8 e+i; vg LUw4. ZL A5 v "L g8v# Lviv  
ewk " "M =">. G /g# Avg? Awi0 ewk "i A5 v v+!w. A5 vAvv i!v v+ @4  
Av/. ZL A5 v gL @ A'i=@ "i v "Z g9LV w"# Avg 8"g ABC wi. G /g#  
Awi0 A5 vi gL @ i"Lw4. Avgvi v kB &?#vi i Awi0 ABC "i Avi Avg A5 vi gL @  
Awi. gL @ Ai4vg, vZ vDw iZ v vi. Awi"0 i v :ABC; kB &?#vi i A5 vi gL  
+ "\$ w"# vL givi gZ & "# M"+. Zv " ewk iZL A5 v M4vw" g"i 0v. ?igZ"  
&?#vi i Avgvi & vZ 8v v e! w"# A5 vi !v @L Z6? ig8vi w" te"4 vE"giw" + "\$  
0v. Avgv i " i & vZ iF v\$ "#, #. G - iF Avgiv v "Zi Av "4i /v8 g"+ 0v. ZL  
A5 vi M4vw" gvivi i Avgiv v Mv v\$ "# v@# w"#w4vg. iw / v4 Mvgi 4v  
v "Z 4k L"Z, # ZL Avg /Avi 4v " i /v8 4k L"Z, v. 4k "L Avgvi g8v  
(iw4. gvB, vZ e9"Z v vi / "Gve 8v vi @v iw4vg. G - Avgvi v v ivF g4  
ev ewJ”

38. The confession made by another condemned-prisoner Arif Hossain is quoted below:

“... (U vMZ 2' /06/2008 vLp ZwiL eAevi. e4vK100 (W vi /g# Avg Avgv i gv>i Avgvi  
w" i v \*Z L"Z, v. v \* "Zi v+, "# /v041w7 vkg gM41/v7 wi" v18vt  
g"&k i1 4vt v v & i /v8 Lv&4. N /g# vK- Avg" i vGMv+i w"@A5 v1wZt Zviv  
Av4%/v7 wi" v18vt g"&k i1 4vt v - & vg LU"Z vL. A5 v "L Avgv i " i  
g" 0ewk vM. Avgiv " i A vg ivi "A5 vi gL @ A'i=@ "i v ev J Mvgi gk="ii  
v \* "Zi g"A" w"#, #. Avg gL @ Awi Avi /v04 8"g A vg :ABC; "i. /v04i v  
&?#vi i Avgvi? A vg ivi -P+v&#. Zv /v04 A5 vi gL @ A'i Avi Avg A vg :ABC; wi.  
v kB &?#vi i /v04 A5 vi gL + "\$ #. ZL vL g"#W #givi gZ & "# M"+. Zv Avgiv  
M4v @ A'i A5 v "g"i 0v. gZ6&?#vi i /v04 e! w"# A5 vi !v @L Z6 0"4.  
/v04 N e! e\$%Z w"# w"#w4. vi & vZ iF (v/ i /v8 g"+ 0v. gZ6&?#vi i v Mv  
w"# A5 vi M4v v@# ivL. Zvi i @@ e\$%Z @4 Aw. iw / v4 A v" 4v i /v8  
Avg? 4k L"Z, v.”

39. The above quoted two confessions are consistent with each other in material particulars. These have been corroborated by recovery of the blood stained blade from a bamboo clump at the showing of accused Saiful. According to the evidence of PW 9 Hafizur Rahman, the condemned-prisoners and victim Alpana were seen together on 25.06.2008 under a berry tree, which circumstantially corroborates the confessions. The evidence of PWs 1 and 2 and other villagers, recovery of the dead body and description of the inquest report further corroborate their confessions so far it relates to time and place of occurrence, and position and description of the dead body.

40. The condemned-prisoners are simple villagers having no political, social, financial influence in the society. They are not so highly placed that the Magistracy, Police and local Union Parisad would stand together to get them convict in a false case and for that purpose extract confessions from them. PW 6 Md. Golam Kabir, a Judicial Magistrate in his evidence proved the confessional statements. He asserted in his evidence that he did it observing the

legal and procedural formalities and further asserted that the accused made the confessions voluntarily, with full sense and without any promise or hope. After recording the same it was read over to them and they put their signatures on full understanding of the contents thereof. In cross-examination he denied the defence suggestion that they were compelled to make the confessions on physical torture by the police. There is also a hand written memorandum of the recording Magistrate to that effect. In such a position we have every reason to hold that the confessions made by the accused were true and voluntary, which can be safely relied on for awarding conviction and sentence on the accused.

41. For further satisfaction, we have also gone through the case docket, examined the time of arrest of the accused and photograph of the victim kept in record. We are satisfied that the accused persons were arrested at 8.45 pm on 02.07.2008, they were taken to the house of the local Chairman and there from to the police station. On the following day they made the confessions before a Judicial Magistrate. We are also satisfied that the half pant of the victim was actually paste coloured. Because of staining by blood it may look like red and that is why the police personal who wrote the *challan* mentioned it to be red. Even it could have been wrongly written as red out of bonafide mistake. Nevertheless when the death of the victim and recovery of her dead body from the jute field are not disputed, the question of colour of the half pant, which she wore, does not matter in determining the complicity of the appellants or to determine the facts that she was killed and her dead body was found. Many of the witnesses, namely, PWs 2-5 and 7 stated in their evidence that at the time of recovery of the dead body they saw her half pant was pulled down and the upper part of her body was open. PW 4 stated that he had noticed blood on her pant. The inquest report shows blood at her vagina and marks of scratches below navel and many other places of her body. These all are suggestive of commission of rape on her. So because of the minor discrepancy in the colour of half pant or time of arrest of the accused, the prosecution case cannot be thrown away.

42. It may be pertinent to mention that the plain thinking simple villagers sometimes misconstrue the calling of any person by the police to a police station. It happens because of the demeanor of the constable, who is assigned to call the person. But from the context of the present case and statement of PW 9 made in his cross-examination, it seems that he was taken to the police station to make statement about the occurrence. So taking advantage of his unclear/misconceived statement there is no scope to argue that the case was concocted and the appellants were falsely implicated there.

43. This is correct that the condemned-prisoners are young men and having no criminal record. But the proved facts are that the victim was a defenceless minor girl of 7 years of age, the condemned-prisoners forcefully raped her one after another, killed her for no reason and extracted her right eyeball only to mislead and camouflage the occurrence. The gravity of offence and its nature i.e inhumanity in commission of the rape and murder and brutality on a dead body by extracting eyeball of the deceased are so aggravating that cannot be outweighed by the mitigating circumstances of their youth age or a clean previous record. Under the circumstances, we think this is a fit case of death sentence. It would set an example of deterrent punishment against the heinous offence and bring confidence of the sufferer people on criminal justice system.

44. Accordingly, the Death Reference is accepted and the sentence of death awarded upon the condemned-prisoners is confirmed. The criminal appeal is dismissed and the impugned judgment and order of conviction and sentence are maintained as it is.

45. Send down the lower Court's record.