

District: Cumilla.

**In the Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)**

**Present:
Mr. Justice Syed Md. Ziaul Karim
And
Mr. Justice K.M. Emrul Kayesh**

Death Reference No. 14 of 2018

The State
..... Respondent.

-Versus-
Md. Saiful Islam alias Khokon
----- Condemned-Prisoner.

With

Criminal Appeal No. 4264 of 2018

Md. Saiful Islam alias Khokon
----- Condemned-Prisoner.

-vs-
The State

Mr. S.M. Shahjahan, Advocate with
Mr. Md. Antas Samiul Alim, Advocate
---- For the Condemned-appellant
with

Jail Appeal No.61 of 2018

Md. Saiful Islam alias Khokon
----- Condemned-Prisoner-appellant.
-Versus-
The State
----- Respondent.

Mr. Mohammad Monirul Islam, Deputy-Attorney-General
with
Mr. Robiul Islam, Assistant-Attorney-General,
Ms. Ayesha Flora, Assistant-Attorney-General and
Mr. Md. Jahir Ahmed, Assistant-Attorney-General
Ms. Belgish Nafisa Hoque, Assistant-Attorney-General
..... For the State-respondent.

Heard on:20.02.2024, 25.02.2024
and
Judgment on: 11.03.2024

K.M. Emrul Kayesh, J:

(1) The accused Saiful Islam Khokon was put on trial before the learned Additional Sessions Judge, 1st Court, Cumilla in Sessions Case No.95 of 2011, arising out of Kotwali Police Station Case No.03 dated 01.02.2006, corresponding to GR Case No.627 of 2006, under sections 381, 302 and 34 of the Penal Code wherein after conclusion of trial the learned trial court by its judgment and order of conviction and sentence dated 05.02.2018 convicting the appellant under section 302 of

the Penal Code and sentencing him to death with a fine of Tk.5,000/-(five thousand).

(2) Whereupon, this Death Reference under section 374 of the Code of Criminal Procedure (hereinafter referred to as Code) has been made by the learned Additional Sessions Judge, First Court, Cumilla (hereinafter referred to as Judge) for confirmation of the sentence of death of the condemned-prisoner Md. Saiful Islam Khokon passed by the learned Judge, in Sessions Case No. 95 of 2011.

(3) Against the said Judgment and order of conviction and sentence dated 05.02.2018 passed by the learned Judge, Cumilla in Sessions Case No. 95 of 2011 the condemned-prisoner Md. Saiful Islam Khokon preferred a Jail appeal being No. 61 of 2018 and a regular appeal being No.4264 of 2018 before this court.

(4) The Death reference and the above appeals having arisen out of a common judgment, dated on 05.02.2018 in Session Case No.95 of 2011, these have

been heard together and are being disposed of by a single judgment.

(5) The prosecution case as projected in the First Information Report (hereinafter referred to as FIR) and unfurled at trial is that one Badal Chandra Talapatro lodged an FIR with Kotwali Police Station, Cumilla alleging interalia, that his sister Kolpona Chokrabortee had been living in a rented house since 3/4 years at Boria Jholom under Police Station of Borura, District- Cumilla presently behind Talpukurpar Asram, as tenant of Rabindra Sarkar. One month ago the husband of the deceased was died. Since then his sister was living at a rented house alone on the 2nd floor of a building and the accused Saiful Islam Khokon had been serving at that rented house for 1-1½ year as a caretaker under the deceased, because two son's of the deceased were residing in the U.S.A. On 01.12.2006, a relative of the informant through telephone informed that his sister deceased was not found anywhere and also the flat was

under lock and key from outside. Thereafter he (informant) talked with the accused and informed the police at about 17.00 hours and he went to the place of occurrence with the assistance of the police, entered into the flat of the place of occurrence having broken the lock and saw the dead body lying with blood in her face and nose. On query as to the fate of the deceased, the accused started to talk topsy-turvy, regarding her death. On the said FIR lodged with kotwali police station Cumilla upon which kotwali Police Station Case No.03 dated 01.12.2006 under sections 381, 302 and 34 of the Penal Code was started.

(6) After lodging FIR, the police took up the investigation of the case and submitted charge sheet being No.91 dated 11.02.2007 against the condemned prisoner and another absolved accused under sections 381, 302 and 34 of the Penal Code.

(7) Ultimately the case was transmitted to the learned Sessions Judge, Cumilla for trial and disposal.

Wherein it was registered as Sessions Case No.95 of 2011.

(8) Thereupon, the learned Sessions Judge, Cumilla framed charges in presence of the accused Saiful Islam Khokon and the absconding accused Minto Chandra Shillalais Jibon under sections 381, 302 and 34 of the Penal Code. The charge was explained and read over before the present accused to which he pleaded not guilty and claimed to be tried.

(9) On 09.02.2012 the learned Sessions Judge Cumilla transferred the same to the learned Additional Sessions Judge, First Court, Cumilla for trial.

(10) In course of trial the prosecution in all examined as many as 11(eleven) witnesses.

(11) After closure of the evidence of prosecution witnesses, the condemned prisoner Md. Saiful Islam Khokon was examined under section 342 of the Code. While the court drew attention to the incriminating evidences occurring against the condemned prisoner,

upon which he further expressed his innocence and claimed to be Justice and defence examined none but on questioning him he orally alleged before the court that the police extracted confession on torturing him.

(12) The defence case as it transpires form the trend of cross-examination of prosecution witnesses one that of innocence and false implication out of suspicion.

(13) On a plenary trial the learned court below came to a conclusion and convicted the condemned prisoner under section 302 of the Penal Code holding in the following grounds:

(a) The prosecution successfully proved the charge against the condemned-prisoner beyond reasonable doubt by giving material particulars of the case.

(b) The confessional statement was true and voluntary made by the condemned prisoner.

(c) The evidence led against the condemned-prisoner was consistent, uniform and corroborative in nature.

(14) Feeling disgruntled at and dissatisfied with the impugned Judgment and order of conviction and sentence the condemned prisoner herein preferred the instant appeals.

(15) Mr. Mohammad Monirul Islam, the learned Deputy-Attorney-General assisted with Mr. Robiul Islam, Mst. Ayesha Flora, Mr. Md. Jahir Ahmed, and Ms. Belgish Nafisa Hoque, the learned Assistant-Attorney-Generals appearing on behalf of the state supports the death reference and submits that the learned court below by its judgment and order of conviction and sentence rightly convicted the condemned prisoner upon considering evidences of 11 (eleven) witnesses adduced by the prosecution. They categorically narrated the manner of occurrence as well as allegation of specific overt act against the condemned prisoner. Therefore, the

learned court below came to a specific findings that the condemned prisoner was the orchestrator of a murder of the deceased. He further adds that the condemned prisoner made a confessional statement implicating himself with murder of the deceased. Moreover the condemned prisoner did not file an application for retraction his confessional statement. The condemned prisoner as caretaker murdered the deceased contriving a plan prior to the commission of murder of the deceased. He lastly submits that prosecution successfully proved the charge levelled beyond all reasonable doubt, as such this court does not call for interference of the judgment.

On the point of confirmation of death penalty to the appellant, the learned Deputy Attorney General, relied upon the following authorities:

(1) Sohan Lal
----- appellant

- Vs-

King Emperor----- Respondent
report in 3 CrL.J at page 70 : 50 PR 1905

(2) Slim Babamiya Sutar alias
Jamadar.....appellant

-Vs-

State respondent.
reported in 2000 CrLJ 2696 (Bom) : (2000) 3 MhLJ
339.

(3) Nantu Miah alias Nandu Mea alias
Namdu Miah and other
.....appellants

-Vs-

State respondent.
reported in 59 DLR at page-30.

(4) Humayun (Md)Appellant.

-Vs-

State.....Respondent
reported in 74 DLR(AD)(2022) at page- 123.

(5) State.....Appellant

-Vs-

Babul Miah.....respondent (Supra)
reported in 63 DLR (AD) (2011) at page -10.

(6) Hazrat Ali & Abdur Rahman
.....Condemned prisoner & appellant

-Vs-

The State
..... respondent.
reported in 42 DLR (1990) at page 177.

(7) Chaco and Others

... Appellants

-Vs-

State of Kerala

... Respondent

Manu/SC/0043/2004

(16) Mr. S. M. Shahjahan the learned senior counsel appearing for the condemned-prisoner submitted culling out in the following grounds:

(I) The case is of no eye witnesses, even no circumstantial evidence was established to connect the condemned prisoner with murder of the deceased.

(II) The confessional statement was not true and voluntary, inspite of that the trial court convicted the condemned prisoner relying upon surmise and conjecture, as such the judgment in question cannot sustain in law.

(III)The allegation as depicted in the FIR, which does not come within the purview of the offence of murder because the murder was committed at the time of serving as caretaker under the deceased in the flat of the deceased. So the offence comes within the purview of definition of robbery. He further submitted

that there was no eye witness of the incident of murder, the judgment in question passed only relied upon confessional statement which was not inculpatory in nature. The judgment in question is not well founded in reasoning and as such the judgment is not countenance in law.

(IV) He has further made an alternative submission to commute the sentence from death sentence to imprisonment for life on compassionate ground. Because the condemned prisoner has been in condemned cell since the date of Judgment being first time offender.

(17) On the other hand, Mr. S. M. Shahjahan the learned senior counsel submits relying upon the following authorities

(I) Subhash

.....appellant

-Vs-

State of Haryana

.....respondent

Reported in Crl. L.J at page 693.

(II) Rajjo alias Gingin and etc.

..... Appellant

-Vs-

The State

..... Respondent.

Reported in Crl. L.J. 1999 at page 2997

(18) In order to appreciate their submissions we have gone through the record and given our anxious consideration to their submissions. Let us now weigh and sift the evidences on record as adduced by the prosecution to prove the charge.

(19) PW-1 Mihir Kumar Vodra, stated that on 01.12.2006 between 4.45 to 5.00 P.M the police of Kotwali came to the house of Robindra Chandra Sarkar and had broken the lock set up on the door of the flat of deceased Kalpona Chokrabortee. Thereafter he along with police entered into the flat on the first floor of Kalpona Chakrabortee when they found a dead body of her lying in the flat with clotted blood in her mouth and nose. He

further stated that he found valuable articles lying scattered inside of her house.

Thereafter the police prepared an inquest report over the cadaver of the deceased Kalpona Chakrabortee and collected his signature therein. He proved his signature therein marked as ext.1 and 1/1.

Then he came to know that the accused Md. Saiful Islam @ Khokon (subsequently described as Khokon) made a confessional statement to the Magistrate involving himself with murder of the deceased. Then the accused committed an offence of theft in the flat of the deceased as her two sons have been living in the U.S.A for plundering dollar, money and gold ornaments.

In cross examination he stated that he also the tenant of a five storied building in which the victim had been living in the first floor of the said building. He further stated that the victim had been living in her flat nearly about five years. After her death the kith and kin held her cremation and the informant of her brother lodged the

First Information Report. He further stated that he did not know as to how the victim had been murdered by whom.

He denied a suggestion that the accused did not confess his guilt to the police in presence of witnesses. He denied a suggestion that the police obtained his confessional statement on torturing his body. He denied a suggestion that the accused Saiful Islam Khokon did not admit in his confessional statement that he killed the deceased along with another accused Mintu Chandra Shil.

(20) PW-2 Robindra Chandra Sarkar deposed that the victim Kalpona Chakrabortee had been living in the first floor of a five storied building. On 01.12.2006 the police opened the flat of the victim by breaking lock while he was present there along with the police after opening the door he found the dead body of the victim Kalpona Chokbortee lying on the floor of her flat and further found clotted blood in her mouth and nose. He further stated that the police thereafter prepared an inquest report over the dead body of the victim and took his

signature thereon. He proved the inquest report and his signature thereon marked as ext.1, 1/2.

In cross examination he stated that the victim was about 65 years old. The place of occurrence is a five storied building in which the first floor is the place of occurrence flat. He further stated that he used to live in a separate place because of his governmental job. The victim Kalpona had been living from three to four years in the flat as tenant. The police after coming in the place of occurrence and broke the lock in presence of him. He further stated that he put his signature on the inquest report and accused Md. Saiful Islam did not disclose his guilt in the first day on interrogation.

He denied a suggestion that the police extracted his confessional statement on torturing his body. He denied a suggestion that he was deposing falsely at the instance of police. He denied a suggestion that the accused Mintu Chandra Shil did not murder the deceased along with another accused Saiful Islam Khokon.

(21) PW-3 Uttam Kumar Chokrobartee stated in his deposition that the elder son of the deceased is his friend named Hrishikesh and therefore, he would address her as aunty (মাসী). On 30.11.2006 the victim Kalpona had been killed in the place of occurrence flat thereafter, on 01.12.2006 at 5.00 P.M the police came to the place of occurrence and entered into the flat having broken lock setup on the door of the flat. Thereafter they found the dead body of Kalpona Chakrabortee lying inside of her flat with clotted blood at her nose and mouth. He further stated that the deceased was the tenant of Robindra Sarkar. He stated that he came to know after five to six days the accused Saiful murdered the deceased along with the help of Jibon Chandra. Thereafter, the police prepared an inquest report and collected his signature thereon. He proved his signature therein marked as ext.1/3. After preparation of the inquest report the police took the accused Saiful from the flat of the deceased Kalpona Chakrabortee.

In cross examination he stated that on 30.11.2006 the deceased Kalpona Chakrabortee was found missing from her flat. He further stated in his cross examination that he received an information that the deceased had been missing on 30.11.2006 from caretaker Saiful Islam. Thereafter he informed about missing of the deceased from her flat to the brother of deceased Badal Chandra Tolapatra.

He denied a suggestion that he did not put his signature on inquest report. He further denied a suggestion that the police extracted confessional statement on torturing the body of the accused. He denied a suggestion that the victim had been murdered by the skivvy or any other person. He denied a suggestion that he wrongly heard the information of murder of the deceased by the accused Saiful Islam.

In cross-examination by another accused Mintu Chandra Shil he denied a suggestion that he was falsely deposing against the truth.

(22) PW-4 Badal Chandra Tolapatro, deposed that on 01.12.2006 he received an information from his nephew at 4.00 P.M that the deceased Kalpona Chakrabortee had been missing from her flat. On reply he told him (informant) that the caretaker Saiful informed him deceased Kalpona Chakrabortee had been missing from her flat. Thereafter he asked Uttam Chakrabortee to go to the flat of the deceased and informed to close all other relatives of the deceased. Then and there he went to the place of occurrence but found the door of the flat was under lock and key while he asked the caretaker Saiful for supplying key to open the flat. He expressed his inability to supply the key of the lock setup on the door of the flat of deceased. Thereafter he went to Kotwali Police Station and made a G.D entry whereupon police came to the place of occurrence and broke the lock setup on the door of the flat of the deceased. They entered into the flat after opening the door and found the dead body of the deceased Kalpona Chakbortee lying on the floor with clotted blood

on her nose and mouth. On interrogation Saiful was talking topsy-turvy about murder of the deceased Kalpona Chakbortee. Thereafter the police took the accused Saiful to Kotwali Police Station for interrogation then he went to Kotwali Police Station and lodged a First Information Report about murder of his sister Kalpona Chakbortee. He proved the FIR and his signature thereon marked as ext. 2, 2/1. After lodging First Information Report police asked him to come for receiving the dead body of the deceased. Accordingly he went to Kotwali Police Station again and received the dead body of his sister for performing cremation. The police then came to the place of occurrence further and prepared a seizure list.

In cross examination he stated that the accused Saiful Islam was engaged in as caretaker in the flat of his sister through a known person Jibon. He admitted in his cross examination that he did not see who murdered his sister. He found the dead body with blood on her nose and mouth. He identified the dead body of his sister but her

sons did not come before performing cremation. He further stated in his cross examination that the caretaker used to stay in the flat of the deceased.

He denied a suggestion that the caretaker Saiful did not stay in the flat of the deceased at night. He denied a suggestion that he was deposing falsely in court involving the accused Saiful with murder of deceased Kalpona Chakrabortee.

(23) PW-5 Makhon Chandra Chakrabortee, stated in his deposition that on 01.12.2006 he came to know about murder of his distant relative that the deceased Kalpona Chakrabortee had been killed by somebody else on the date of occurrence on 01.12.2006. On 01.12.2006 he went to the house of deceased and found the flat under lock and key. From there he along with the informant went to Kotwali Police Station for giving information about missing of the deceased. The Kotwali Police thereafter came to the place of occurrence and broke the lock and entered into the flat of Kalpona Chakrabortee where they

found the dead body of the deceased lying on the floor in the flat with clotted blood in her nose and mouth. Thereafter the police took the dead body of the victim for holding autopsy at that time police also took the accused Saiful. On interrogation the accused Saiful made an extra confessional statement to the police about murder of the deceased Kalpona Chakrabortee. He later came to know the accused murdered the deceased by hitting the head with a “Hamman Distha” (হাম্মান দিস্তা). Then the accused took away all valuables, money and dollars from the flat of the deceased.

In cross examination he admitted that he did not see as to how the victim had been killed and who killed the deceased. He denied a suggestion that he was deposing falsely in relation to murder of the deceased Kalpona Chakrabortee.

(24) PW-6 Sonjib Kumar Tolapatro, stated that he came to know the deceased was missing from her flat and on search he could not have found her available in

Hospitals and Idol. He received information about missing of his aunty (পিসি) while he was attending his coaching from there came to his house and went to the place of occurrence with his father and found the flat under lock and key then his father lodged a G.D entry with Kotwali Police Station and police came to the place of occurrence and entered into the flat by breaking lock setup on the door of the flat of victim. After breaking door of the flat he found the dead body of the deceased lying in the Thakurghor and further found the valuables and other materials scattered in the said flat of the deceased. The police prepared a seizure list over the materials recovered from the place of occurrence and took his signature thereon. He proved the seizure list and his signature thereon marked as ext.3, 3/1.

In cross examination he stated that his aunty (পিসি) had been living in her rented flat alone and she lost her husband one month before the date of occurrence. He candidly admitted that he did not see to murder his aunty

(পিসি). He further stated that he came to know his aunty (পিসি) had been killed by the accused Saiful and Jibon.

He denied a suggestion that the accused Jibon and Saiful was not involved with murder of deceased Kalpona Chakrabortee. He denied a suggestion that the accused Jibon Chandra had not been involved with murder of Kalpona Chakrabortee. He denied a suggestion that the police extracted confessional statement from accused Saiful on physical torture and therefore, the accused Saiful made a confessional statement before the First Class, Magistrate, Cumilla. He denied a suggestion that he was not examined by the police under section 161 of the Code.

(25) PW-7 Dr. Fazlul Karim, stated in his deposition that on 02.12.2006 he was working as assistant professor of forensic medicine department in Cumilla Medical College Hospital. When he performed postmortem examination over the body of deceased Kalpona Chakrabortee through identification of constable bearing

No.949 Md. Abu Tahir on performing post mortem examination on the body of the deceased found the following injuries.

“(1) (four) bruises each measuring $\frac{1}{2}$ ” X $\frac{1}{2}$ ”
”, $\frac{1}{4}$ ” X $\frac{1}{4}$ ” And $\frac{1}{2}$ ” X $\frac{1}{2}$ ”, Placed on right side of forehead.

(2) Inner aspect of the upper lip found contused.

(3) Inner aspect of lower lip found contused.

(4) On e abrasion $\frac{1}{2}$ ” X $\frac{1}{2}$ ” on the right maxilla.

(5) One bruise 1” X $\frac{1}{2}$ ” on the left maxilla.

(6) Hair lobula of the both ear Lacerated and torn

(7) One Lacerated wound $\frac{1}{2}$ ” X $\frac{1}{2}$ ” into soft tissue found on right side of the chin.

(8) Five nail marks, (3 on right, 2 on the upper part on the front of the neck.

(9) One bruise measuring $\frac{1}{2}$ ” X $\frac{1}{2}$ ” over the left mandible.

(10) One bruise measuring 1” X $\frac{1}{2}$ ” on lateral right of the left mid arm.

(11) One bruise measuring $\frac{1}{2}$ ” X $\frac{1}{2}$ ” on lower part of the anterior lip. এ গুলো ছিলো external injury.

On dissection, heamatoma beneath the scalp on both side of the forehead. Scalp

bone intact, maninges intact and congested, Brain congested. Bruising of the sub cutaneous tissue of the both side of the front and lateral aspect of the neck. Bruising over the tracia found. In side of the tracia found congested. Higher bone found fractured on the left side and surrounded by contused area. Bruising measuring 3” X 2” over the anterior aspect of the upper part of the chest. Mentioned.

Final opinion of death was:-

“Death, in my opinion, was due to asphyxia leading to respiratory failure as a result of combined effect of smothering and manual strangulation, both of which were antemortem and homicidal in nature.”

He proved the post mortem examination report and his signature thereon marked as ext.4, 4/1.

In cross examination he denied a suggestion that he did not perform the post mortem examination on the body of the deceased properly. He denied a suggestion that he prepared the post mortem examination report on seeing the inquest report.

(26) PW-8 Md. Wahidul Islam stated that on 08.12.2006 he was working as First Class Magistrate in Cumilla. On the said date accused Saiful was produced by the investigating officer at 12.00 P.M before him and he

recorded his confessional statement after performing all legal formalities as provided under sections 164 and 364 of the Code. After recording his confessional statement it was read over to him when he being satisfied put his signature and the accused also being satisfied put his signature on his confessional statement. He proved the confessional statement and his signature thereon marked as ext.5 and 5 series and the signature of the accused Saiful on his confessional statement marked as ext.6 series.

In cross examination he stated that the accused was given reflection of time before making confessional statement. He denied a suggestion that the accused was not given reflection of time before making of his confession. He denied a suggestion that the police was present in his chamber at the time of recording confessional statement of accused Saiful Islam Khokon. He denied a suggestion that the accused did not make confessional statement voluntarily. He denied a

suggestion that he recorded his confessional statement upon wrong information. Confessional statement of Saiful Islam Khokon is reproduced as under:

“গত মে মাসের ২২ তারিখ কুমিল্লা শহরের তালপুকুর পাড়সহ ননী গোপাল চক্রবর্তীর বাড়ীতে মাসিক ৩৫০০ টাকা বেতনে কেয়ার টেকার হিসাবে চাকরিতে যোগদান করি। ননী গোপাল চক্রবর্তী তার স্ত্রী সহ পাচতলা বিল্ডিং এর ২য় তলায় ভাড়া থাকতেন। গত অক্টোবর মাসের ২৩ তারিখ ননী গোপাল মারা যান। তারপর থেকে ননী গোপালের স্ত্রী কল্পনা চক্রবর্তীকে আমিই দেখাশুনা করতাম। তার দুই ছেলে আমেরিকায় থাকে। আমার শ্বশুড় বাড়ী কুমিল্লা শহরের কালিয়াজুড়ী। আমার স্ত্রী সানজিদা বেগম গুলশানের সাথে কালিয়াজুড়ীর ডলি নামে একজনের পাতানো বোনের সম্পর্কেও সূত্র ধরে ডলির স্বামী জবীন পিতা নারায়ন যার আসে বাড়ী গাজীপুর। আমাকে ননী গোপাল চক্রবর্তীর বাড়ীতে নিয়ে গিয়ে চাকুরী দিয়ে দেয জীবনের বাবা নারায়ন (ছেড়ে) ঐ বাড়ীতে আগে চাকরী করত।

জীবন কালিয়াজুড়ীতে নিজ দোকানে মিলের কাজ করত। গত ২৭/১২/০৬ইং তারিখ জীবন খবর দিলে আমি জীবনের দোকানে গিয়ে তার সাথে বিকাল ৩.০০টা থেকে সন্ধ্যা ৬.০০টা পর্যন্ত কথা বলি। জীবন আমার মালিকের বাসার আমেরিকান ডলার ও টাকা পয়সার খোজখবর নেয় এবং কল্পনা চক্রবর্তীকে মেরে টাকা পয়সা, ডলার, স্বর্নালংকার লুট করার পরিকল্পনা করে। জীবনের পরিকল্পনায় প্রথমে আমি রাজী না হলে ও জীবন টাকা পয়সার অর্ধেক ভাগ দিবে বলায় আমি লোভ পড়ে রাজী হই। ঘটনার আগের দিন বিকাল ৪.৩০ মিনিটের সময় জীবন আমার

মালিকের বাসায় আসে। ঐদিনও কল্পনা চক্রবর্তীকে মেরে টাকা পয়সা লুট করার বিষয়ে জীবনের সাথে আমার কথা বার্তা হয়। রাত সোয়া ৭.০০টার সময় জীবন ঐ বাসা থেকে বের হয়ে যাওয়ার সময় বলে, আপনার সাথে আরও কথা আছে। আগামীকাল আমার দোকানে আসেন। ঘটনার দিন অর্থাৎ ৩০/১১/০৬ইং তারিখ সকাল ৮.৩০ মিনিটের সময় আমি মালিকের বাসায় ঘুম থেকে উঠে টি.ভি দেখি। সকাল ১১.৩০ মিনিটের সময় বাজারে যাই। পৌনে ১.০০টার সময় বাজার করে মালিকের বাসায় ফিরি। ১.০০ টার সময় কল্পনা চক্রবর্তীকে বলে নিজ বাসায় ভাত খেতে যাই। দুপুরে নিজ বাসায় খাওয়া দাওয়া করে বিকাল ৩.০০টায় সময় জীবনের সেলুনে যাই। ঐদিনই সন্ধ্যার পূর্বে পরিকল্পনা মত ঘটনা ঘটাবার চূড়ান্ত সিদ্ধান্ত হয়। তারপর আমি মালিকের বাসায় যাই। জীবন পৌনে ৫.০০টার সময় আমার মালিকের বাসায় যায়। ভিড়ানো দরজা খুলে জীবন বাসার ভিতরে ঢুকে। আমি তখন বাসার ভিতরেই ছিলাম। আমরা দুজন মিলে কল্পনা চক্রবর্তীর শয়ন কক্ষে ঢুকি। কল্পনা চক্রবর্তী তখন তার খাটের উপর পা ঝুলিয়ে বসা ছিল। জীবন তার কাছে আলমারির চাবি চায়। কল্পনা চক্রবর্তী চাবি কেন জিজ্ঞাসা করে। তখন জীবন কল্পনা চক্রবর্তীকে আঘাত করার জন্য শক্ত কোন কিছু খুজতে থাকে। কিন্তু না পেয়ে রান্নাঘর থেকে লোহার হামান দিস্তা দিয়ে জীবন কল্পনা চক্রবর্তীর ঘাড়ে সজোরে আঘাত করে। আঘাতের কারণে কল্পনা মেঝেতে পড়ে গেলে জীবন তাকে টেনে পার্শ্ববর্তী ঠাকুর ঘরে নিয়ে যায়। কল্পনা চক্রবর্তী তখন ও জীবিত ছিল কিন্তু তার চেতনা ছিল না। জীবন ঠাকুর ঘরে কল্পনার মাথা ও মুখে ২ হাত দিয়ে ধরে তার ঘাড় মটকিয়ে দেয়। আমি আলমারির চাবি কোথায় রাখা হয় জানতাম। আমি এ সময় চাবি দিয়ে আলমারি খুলে ২ হাজার ডলার আমেরিকান

ডলার, ১০ হাজার টাকা আনুমানিক ৪ লক্ষ টাকার সঞ্চয় পত্র ও কিছু স্বর্ণালংকার বের করি। টাকা সঞ্চয়পত্র, ডলার ও স্বর্ণালংকার জীবনকে দিলে জীবন সেগুলি প্যান্টের পকেটে ঢুকিয়ে বলে, আমি নীচে যাচ্ছি, তুমি দরজা জানালা লাগিয়ে নীচে আস। আমি দরজায় তালা লাগিয়ে দ্রুত নীচে নেমে জীবনকে পাইনি। আমি বাসা থেকে বের হয়ে আশে পাশে ও জীবনের দোকানে জীবন কে খুঁজি কিন্তু জীবনকে আর পাইনি। রাত ৯.০টার সময় কল্পনা চক্রবর্তী বড় ছেলের বন্ধু উত্তম চক্রবর্তী পিতা মৃত ধরনী ধর চক্রবর্তী ৩৯৫ বাদুড়তলা কুমিল্লাকে জানাই যে, কল্পনা চক্রবর্তীকে পাওয়া যাচ্ছে না। তখন উত্তম চক্রবর্তীও ভাই বাদল চন্দ্র তলা পাত্র কে খবর দেয় এবং আমাকে বাসায় পাঠিয়ে দেয়। আমি নিজ বাসায় চলে যাই। পরদিন ০১/১২/২০০৬ ইং তারিখ সকাল ৯.০ টার সময় আমি প্রথমে মালিকের বাসায় ও পরে উত্তমের বাসায় যাই। উত্তম আবার বাদলকে মোবাইল খবর দেয়। বাদল আমার সাথে মোবাইলে কথা বলে। বাদল আমাকে জীবন চক্রবর্তীর ননী গোপাল চক্রবর্তীর মামাত ভাই। টি এন্ড টির অফিসে যেতে বলে। উত্তম দা আমাকে নিয়ে মালিকের বাসায় যায়। বাসা থেকে আমি মাখন ও উত্তম কুমিল্লা কোতওয়ালী থানায় যাই। থানায় বাদল জি.ডি করে। আমরা সবাই মালিকের বাসায় যাই। কিছুক্ষন পর দারোগা রওশন সাহেব মালিকের বাসায় যায়। দারোগা সাহেবের নির্দেশে মিস্ত্রি দিয়ে তালা খুলে সবাই ভিতরে ঢুকে ঠাকুর ঘরে লাশ দেখতে পাই। দারোগা সাহেব তালা খোলার নির্দেশ দিয়ে ডিউটিতে চলে যান। লাশ দেখে তাকে আসার জন্য বাদল মোবাইল ফোনে অনুরোধ করে। সন্ধ্যা ৬.০ টার সময় পুলিশ আমাকে মালিকের বাসা থেকেই গ্রেফতার করে থানায় নিয়ে যায়।”

(27) PW-9 Md. Rawshan Ali, stated that on 01.12.2006 he was working as Sub Inspector of Kotwali Police Station under Cumilla district. While the officer in charge of Kotwali Police Station entrusted him into investigate the case. After being responsibility for holding investigation he visited the place of occurrence and prepared a sketch map and index. He proved the sketch map and his signature therein marked as ext.6, 6(1) and index and his signature therein marked as ext.7, 7(1). Then he came to the place of occurrence and prepared an inquest report over the body of the deceased. He proved his signature therein marked as ext. 1(4). Thereafter he sent the dead body of the victim deceased to Medical College Hospital, Cumilla for holding autopsy and he sent the accused Saiful Islam Khokon to the Magistrate for recording his confessional statement. Thereafter he prepared seizure list over the seized articles from the place of occurrence. He proved the seizure list and his signature thereon marked as ext.8, 8(1). During the

investigation he examined the witnesses under section 161 of the Code. After holding investigation found a prima-facie case he submitted charge sheet being No.91 dated 11.02.2007 under sections 381, 302 and 34 of the Penal Code. He identified the accused Saiful on dock.

He denied a suggestion that the deceased Kalpona Chakrabortee was fallen on the floor due to her physical weakness and thereby caused injuries on her body. He stated that the accused Md. Saiful Islam @ Khokon was engaged in looking after the deceased. He denied a suggestion that the accused Saiful was not involved with murder of the deceased. He denied a suggestion that he extracted the confessional statement on torturing his body. He denied a suggestion that the accused made a confessional statement at his instance. He denied a suggestion that the accused did not make confessional statement of his own volition. He denied a suggestion that he did not go to the place of occurrence and he submitted charge sheet sitting in his office. He denied a suggestion

that accused Saiful and accused Jibon were not involved with murder of deceased Kalpona Chakrabortee.

(28) PW-10 Anup Chakrabortee stated in his deposition that the occurrence took place 10/11 years back and the informant is the brother in law's father in law. He came to the place of occurrence on receiving an information about missing of Kalpona Chakrabortee between 8 to 8.30 P.M and he found the dead body lying inside the flat of deceased. He further stated that he found some portion of her body with contusion. The police prepared a seizure list recovering a "Hamman Distha" from the place of occurrence and took his signature therein. He proved "Hamman Distha" marked as material ext. I and a globe lock and four green bananas marked as material ext. II series. He proved his signature in the seizure list marked as ext. 3 (2). He admitted that he did not know who murdered the deceased Kalpona Chakrabortee.

In cross examination he admitted that he put his signature on the seizure list. He denied a suggestion that the alampats produced before the court which was not the alampat recovered from the place of occurrence. He candidly admitted that he did not know the name of the accused. He further admitted that he did not know who murdered her.

PW-11 Md. Mahabub Alam stated in his examination in chief that the occurrence took place on 13.12.2006 at 3.00 P.M, while he was going to his student's house for attending his tuition at that time he found police in the flat of the deceased then he went to the place of occurrence and came to know one aged woman was died in her flat. Thereafter the police recovered a "Hammam Distha" from the place of occurrence and then found it. Thereafter prepared a seizure list and took his signature therein. He proved a "Hammam Distha" marked as material ext.III and he proved his signature thereon marked as ext. 8(2).

In his cross examination he admitted that he used to live in his own residence. He candidly admitted in cross examination that he did not see who murdered the deceased and the place of occurrence flat lies some houses after his house. He further stated in his cross examination that “Hammam Distha” was produced before him by the police. He denied a suggestion that the police did not show the alamats on the date of occurrence.

(29) These are in all of the evidence on record adduced by the prosecution to prove the charge. Now, we are to examine the evidences on record and submissions of the learned advocate for both the parties.

(30) At the outset, of our discussion we have categorized the witnesses produced by the prosecution that PW-1 Mihir Kumar Vadra, the neighbour of the flat of the place of occurrence and also inquest report witness, PW-2 Robindra Chandra Sarkar, is the owner of the flat in the place of occurrence. PW-3 Uttom Kumar Chokrabortee is the friend of the deceased's son. PW-4

Badal Chandra Tolapatra is the brother of the deceased. PW-5 Makhon Chandra Chokrabortee is distant relative of the deceased. PW-6 Shonjib Kumar Tolapatra, the nephew of the deceased. PW-7 Dr. Fazlul Karim who, held post mortem examination on the body of the deceased. PW-8 Wahidul Islam, First class Magistrate who recorded the confessional statement of the condemned prisoner Md. Saiful Islam @ Khokon. PW-9 Md. Rowshan Ali, who was the investigating officer of the case. P.W-10 Anup Chokrabortee is the father-in-law brother-in-law's PW-11 Md. Bazlur Rahman is the witness of the seizure list.

(31) In the case in hand we are to resolve the crux point of the case raised by the learned Advocate for the condemned-prisoner that the offence as alleged in the FIR does not come within the terms of murder. Moreover the confessional statement was not true and voluntary. Besides that there was no eye witness and motive of this case.

(32) Let us now proceed the case on considering the evidences and materials on record coupled with submissions of the learned advocate for both the parties.

(33) PW-1 stated that on 01.12.2006 in the evening around 5 P.M. the police of Kotwali Police Station came to the place of occurrence flat and broke the lock set up on the door of the flat while he was asked to stay in the said place. Then the police of Kotwali entered into the flat of the place of occurrence along with him, at that time he found valuable articles had scattered on the floor in side of the room, and further found the dead body of the deceased lying on the said floor with clotted blood in her nose and mouth. He further stated that a black injury mark was found on her throat. Then the police prepared an inquest report over the dead body of the victim and collected his signature thereon. He proved his signature therein marked as ext 1/1. On interrogation the condemned prisoner agreed to make confessional statement before the Magistrate. Thereafter the

condemned prisoner Md. Saiful Islam @ Khokon made a confessional statement before the Magistrate.

In cross-examination he admitted that he had also the tenant of the place of occurrence building.

(34) PW-2 is the owner of the place of occurrence flat, the police came to the place of occurrence and broke the lock set up on the door in the flat of the place of occurrence while he was along with him. He further stated that after breaking the door of the flat he found the dead body of the deceased whereupon police prepared an inquest report over the dead body of the deceased and collected his signature thereon. He proved his signature therein which has been marked as ext.1/2. He has also confirmed that the deceased was tenant of his building and her dead body was recovered from there.

(35) PW-3 Uttom Kumar Chokrabortee stated that he is the friend of deceased's son. He received an information from the accused as to missing of the deceased from her flat. Thereafter he came to the place of

occurrence and police entered into the flat after breaking door and found the dead body of the deceased. He further stated that the police prepared an inquest report on the dead body of the deceased and collected his signature thereon. He proved the signature therein, marked as ext 1/3.

In cross-examination admitted that he had informed the informant Badal Chandra Tolapatra.

(36) PW-4 is the informant of this case. He deposed in court supporting the deposition of PWs-1, 2 and 3. Moreover he proved the FIR and his signature thereon marked as ext.2 and 2/1 respectively.

(37) PW-5 was present in the place of occurrence at the time of entering into the room after breaking lock and found the dead body of Kolpana Chokrabortee was lying inside of her flat. He further stated that the accused Md. Saiful Islam Khokon confessed his guilt to the police in presence of him. The accused made extra Judicial confession to police in his presence. PW-6 is the seizure

list witness stated that police recovered some alamsats from the place of occurrence and thereof prepared a seizure list and collected his signature. He proved his signature therein marked ext.3, 3(1) respectively. On a careful consideration of the evidence of PW.s-1, 2, 3, 4, 5 and 6 that they have established the deceased was tenant in the place of occurrence flat and accused Md. Saiful Islam Khokon was caretaker under the deceased which has not been denied by the accused. Besides that he did not produce any defence witness denying that he was not serving as caretaker under the deceased. So the deceased had been living in the place of occurrence flat before killing of her and her dead body was recovered from inside the flat. It is admitted that there was no eye witness of murder of Kolpana Chokrabortee. The case totally rest upon the confessional statement of the accused and the subsequent circumstances of the case. The learned additional Sessions Judge also came to a conclusion relying upon the confessional statement of the accused.

Whereupon we have meticulously examined the confessional statement of the accused. The accused made confessional statement on 08.12.2006 before the magistrate. He was arrested on 01.02.2006. Thereafter he was sent to Jail. The accused Md. Saiful Islam alias Khokon stated in his confessional statement that he was appointed as caretaker in the house of Noni Gopal Chokrabortee (husband of the deceased) for an amount of Tk.3,500/-(three thousand five hundred) per month. He admitted in his confession that he had been serving as caretaker in the flat of the deceased. He further stated in his confession that he obtained the job in the house of the deceased at the instance of another accused Minto Chandra Shil alias Jibon. It is pertinent to mention hereinafter from the confessional statement of the accused. “গত ২৭/১২/০৬ইং তারিখ জীবন খবর দিলে আমি জীবনের দোকানে গিয়ে তার সাথে বিকাল ৩.০০টা থেকে সন্ধ্যা ৬.০০টা পর্যন্ত কথা বলি। জীবন আমার মালিকের বাসার আমেরিকান ডলার ও টাকা পয়সার খোজখবর নেয় এবং কল্পনা চক্রবর্তীকে মেরে টাকা পয়সা, ডলার, স্বর্ণালংকার লুট করার পরিকল্পনা করে।

He further stated in his confessional statement that “৩০/১১/০৬ইং তারিখ দুপুরে নিজ বাসায় খাওয়া দাওয়া করে বিকাল ৩.০০টায় সময় জীবনের সেলুনে যাই। ঐদিনই সন্ধ্যার পূর্বে পরিকল্পনা মত ঘটনা ঘটাবার চূড়ান্ত সিদ্ধান্ত হয়। উহার পর আসামী জীবনকে নিয়া মালিকের ফ্লাটে প্রবেশ করে এবং মালিককে মেয়ে টাকা পয়সা স্বর্ণালংকার ও ডলার লুট করে নিয়ে যায়।

From plain reading of the confessional statement of the accused that he along with another absolved accused Jibon contrived a plan to kill the deceased first and then commit an offence of theft “thereafter they implemented their plan and murdered her in furtherance of their common intention.

(38) The accused made confessional statement involving himself with the murder of the deceased Kolpana, which is inculpatory in nature. PW-8 Wahidul Islam, First class Magistrate, Cumilla collectorate recorded confessional statement of the accused Md. Saiful Islam Khokon (shortly Khokon). He recorded his confessional statement of the confessing accused Khokon

observing all legal formalities as provided under section 164 and 364 of the Code. He proved the confessional statement and his signature therein marked as ext.5 series and signatures of accused marked as ext.6 series.

In cross-examination he clearly stated that he was given three hours time for reflection. He denied a suggestion put forward to him that the accused was not given sufficient time for reflection. He further denied a suggestion that the investigating officer was present in his room at the time of recording confessional statement of the accused. He further denied a suggestion that the confessional statement of the accused was not true and voluntary, and his confessional statement was obtained, giving false hope to exonerate him from the case. We have further perused the confessional statement form meticulously (ext.5) (Form No. (M)-84). Wherein the confessional statement recording Magistrate filled up column No.06 properly to the confessional statement recording form. It further appears from ext.5, the learned

Magistrate gave a memorandum being satisfied on questioning as provided in column 6 to the confessional statement recording form to the accused that the confession was voluntary made.

(39) In the case of

Hazrat Ali & Abdur Rahman
.....Condemned prisoner &
appellant (Supra)

-Vs-

The State..... respondent.

Wherein your Lordship observed as under:

Section 342

“Allegation of torture made in statement recorded under section 342 Cr.P.C-No reliance can be placed on the belated allegation of torture by police in obtaining confession in the absence of materials on record to substantiate the same.”

(40) In the instant case the accused made a complain at the time of examining him under section 342 of the Code that he was under threat and compulsion to make confession involving him with the offence of this case. But the accused did not produce any material in support

of his allegation of physical torture. Moreover the confessional statement recording Magistrate clearly ruled out the allegation of torture by the accused, thereof recorded his confession. It further appears from plain reading of the confessional statement that the absolved accused Jibon dealt a blow by using a “Hamman Distha” (hard substance) on the neck of the deceased Kolpana. PW-10 Anup Chokrabortee stated in his deposition that a “Hamman Distha” was recovered from the place of occurrence flat, which has been marked as material ext.I. Then Doctor P.W-7 stated that multiple injuries found on the body of the deceased.

(41) In cross examination he stated that injuries found on the body were caused by blunt weapon not sharp cutting weapon. PW-11 Md. Bazlur Rahman also supports the recovery of “Hamman Distha” from the place of occurrence. He proved the Hamman Distha material ext.III. The weapon of “Hamman Distha” with which the deceased had been killed was recovered from the place of

occurrence which supports the confessional statement of the accused. So the confessional statement has been supported by the deposition of PW.s-7, 10 and 11. In view of the evidence of PW.s-7, 10 and 11 the confessional statement was true and voluntary. The defence could not produce any witness before the court to discard the credibility of the confessional statement. Even the defence could not shake the evidence of Magistrate PW-7 in support of his defence.

In the case of

State.....Appellant

-Vs-

Babul Miah.....Respondent (Supra)

reported in 63 DLR (AD) (2011) at page 10.

Where in your Lordship observed as under:

Code of Criminal Procedure (v of 1898)

Section 164(3)

“It is a mandatory requirement that after recording a confessional statement the recording Magistrate is required to make a memorandum to the confession containing a clause to

the effect that he had warned the accused that he was no bound to make a confession, that if he makes a confession, it would be used against him, that the statement was true and voluntary, that it was recorded as per version of the maker and that it was read over to the maker after his statement was recorded which was the true and correct version and it contained a full and true account of statement made by the maker.

Section 164(2)

The act of recording confession is a very solemn act and in discharging his duties, the Magistrate must taken care to see that the requirements of sub-section (2) of Section 164 fully satisfied.

Section 164(3)

The provisions of sub section (3) of section 164 is mandatory and therefore he is required to fill up Column 7 of the form for recording confession which is a column for recording a brief statement of the Magistrate's reason for believing that the statement was voluntarily made.”

(42) PW-8 Wahidul Islam First Class Magistrate of Cumilla clearly stated in his deposition that the confessional statement was recorded observing all legal formalities as required under section 164 of the Code and he gave a memorandum in this regard. So the confessional statement recorded by the Magistrate which was recorded in accordance with law. The accused person could not establish any illegality in recording the confessional statement of the accused.

(43) The learned advocate for the condemned prisoner further contended that the averment as depicted in the FIR which does not come under the purview of section 302 of the Penal Code rather at best it comes within the purview of section 392 of the Penal Code. He draws our attention through the FIR that the accused entered into the flat in the place of occurrence to commit an offence of theft, where in an aggravated form the present accused person and another absolved accused Jibon murdered her by using "Hamman Distha". So the

fact as surfaced before us which does not come within the definition of murder.

In the case of

(I) Subhash.....appellant (Supra)

-Vs-

State of Haryana.....respondent
reported in CrI. L.J at page 693.

Wherein your Lordship observed as under:

“Penal code (45 of 1860), Ss. 392, 397, 300, 304 Part II- Robbery and murder-Proof-Accused person allegedly threw deceased and other person into canal after committing robbery of money and tractor- Nothing on record to doubt presence of said person at scene of occurrence- Circumstances of recovery of dead body of deceased, recovery of tractor from possession of accused and ‘Barma’ from possession of co-accused proved guilt- Sequence of events revealed reasons for delay in lodging F.I.R- Prosecution had established guilt of appellant beyond all reasonable doubt-However, there was no intention of causing death of deceased-Appellant is therefore liable to the convicted under Ss. 392, 397 and 304, Part II-

Sentence of 7½ years R.I already undergone, is sufficient”.

(I) Rajjo alias Gingin and etc..... Appellants

-Vs-

The State..... Respondent.
reported in CRI. L.J. at page 2996

Wherein your Lordship observed as under:

“(A) Penal Code (45 of 1860), S. 394- Robbery-Accused persons attempting to rob deceased and informant- First accused assaulting deceased with knife and causing death –Occurrence proved by statements of witnesses- No previous enmity between parties- Assault made not with motive of murder but to make the robbery successful- Offence under S. 394 made out against both persons- First accused having caused death of deceased, liable for offence under S. 304, Part II”.

(Paras 28 to 31, 34 to 37)

(44) It appears from plain reading of the decision cited above that the accused person killed the deceased at the time of committing theft. But the intention of the accused was not killed the deceased.

The fact of cited case that the accused was not employee or servant under the deceased. In the instant

case, the accused was serving as caretaker under the deceased. Which has been established by the deposition of prosecution witnesses and the accused admitted that he had been engaged as caretaker under the deceased, when an employee or servant committed an offence of theft then his act will come under the purview of section 381 of the Penal Code. So the facts involved in the cited case is distinguishable from the facts of the present case.

In the case of

(1) Sohan Lal ----- appellant(Supra)
Vs
King Emperor----- Respondent
report in 3 CrLJ at page 70 : 50 PR 1905.

Wherein your Lordship observed as under:

“The accused was charged u/s. 302, 201 and 381 and Sessions Court convicted him on all counts and awarded separate punishment for them. On appeal it was found that only circumstantial evidence was available against the accused but circumstances were not sufficient to prove the guilt of the accused. Therefore his conviction u/s. 302/201 was set aside but his

conviction u/s. 381 was maintained as gold chain and other articles of deceased were recovered at the instance of the accused”.

(2) Slim Babamiya Sutar alias Jamadar.....Appellant(Supra).

–Vs–

State of Maharashtra..... Respondent.
reported in 2000 CRI. L. J 2696 (Bom) : (2000) 3
MhLJ 339.

Wherein your Lordship observed as under:

“(A) Penal Code (45 of 1860), S. 300-
Murder- Circumstantial evidence-
Circumstance of last seen with accused-
To constitute an incriminating
circumstances- Must be in close
proximity with recovery of corpse of
deceased – Yawning gap of more than 14
months since deceased was last seen with
accused-Would not lead to inference that
it was accused who murdered deceased.”

(45) In the cited case charge was framed against the accused under sections 302, 201 and 381 of the Penal Code and the accused was acquitted from the charge levelled under sections 302 and 201 of the Penal Code because the charge under sections 302 and 201 of the Penal Code was not proved against the accused, but the charge under Section 381 of the Penal Code was proved

against the accused. In the case cited above apex court of India has enunciated a principle that a case is filed under sections 381, 302 and 201 of the Penal Code against the servant, then the case can proceed before the competent court.

In the above cited case apex court of India has taken similar view that a case can proceed under sections 381, 302 and 201 of the penal Code if the accused is servant or employee under the deceased. Moreover the facts of the cited case of the learned Deputy Attorney General are holding good with the present case.

(46) On the other hand the case cited by the learned advocate for the condemned prisoner that the condemned prisoner had no motive to kill the deceased. In the case in hand the accused Md. Saiful Islam Khokon made a confessional statement under section 164 of the Code. Wherein he clearly stated that he came to a shop of another absolved accused Jibon and contrived a plan to kill the deceased and then commit an offence of theft and

then they entered into the flat of the place of occurrence. It appears from his confessional statement that they contrived a plan first to kill the deceased then committed an offence of theft. So the accused had no motive to kill the deceased which does not support from the confessional statement of the accused. On a careful perusal of the confessional statement, that the accused clearly mentioned in his confessional statement that he entered in to the flat of the deceased and enabled another accused to enter into the place of occurrence flat by opening door, while she was sitting on a cot. Thereafter the absolved accused Jibon asked the deceased to give a key of her Almirah. When the deceased expressed her astonishment. At that time the other absolved accused brought "Hamman Distha" from the kitchen and dealt blows on the body of the deceased. While the deceased Kolpana became motionless and fell down on the floor of the flat. Thereafter they drugged her from the cot into the deity room of her flat and murdered her by smothering.

PW-11 clearly stated in his deposition that a “Hamman Distha” made of Iron was recovered from the place of occurrence flat and prepared a seizure list by the investigating officer and collected his signature thereon marked as material ext. III. So the recovery of “Hamman Distha” from the place of occurrence flat supports the confessional statement of the accused Khokon. On a careful analysis of the inquest report (Ext.1) that the left ear lobe of the deceased was torn. Which indicates that the accused took away her ear ring forcefully from the ear of the deceased for which her ear lobe was separated from her ear. It further appears from the inquest report ext.1 there was black mark on the throat of the deceased. When we have perused the postmortem report carefully (Ext.4). Wherein PW-7 Dr. Fazlul Karim clearly stated in his deposition that he found 11(eleven) injuries of various dimension on the body of the deceased. Finally PW-7 opined that “Death in my opinion, was due to asphyxia leading to respiratory failure as a result of combined

effect of smothering and manual strangulation, both of which were antemortem and homicidal in nature”. As per deposition of PW-7 the deceased was murdered by manual strangulation. Accused Saiful Islam @ Khokon mentioned that the absolved accused Jibon broke the neck of the deceased by using his hand. So inquest report and the seizure list (Ext.8) prepared by the investigation officer supports the post mortem examination report of the deceased and also the confessional statement of the accused Khokon. So the present condemned prisoner contrived a plan to murder the deceased and then committed an offence of theft for taking away valuables, money and dollar from the flat of the deceased. He first made a plan with the absolved accused Jibon to kill the deceased and then entered into the flat of the deceased. Accordingly the present condemned prisoner and Jibon killed the deceased in furtherance of their common intention. It appears from plain reading of the confessional statement that the present condemned

prisoner entered into the flat of the deceased in order to murder the deceased and then committed an offence of theft in the said flat. So the submission led by the learned Advocate for the condemned prisoner Saiful that he had no intention or motive to kill the deceased in the flat which has fallen water in view of the confessional statement of the condemned prisoner Saiful.

(47) We further peruse the confessional statement of the condemned prisoner that another absolved accused Jibon took away all valuables from the flat of the deceased and fled away before coming out of the condemned prisoners from the said flat. As a result he could not get any money or dollar or valuable goods taken away from the said flat. Which does not mean that he did not take part in the murder and commission of an offence of theft in the flat of the deceased. So the condemned prisoner stated in his confessional statement that he stood in the place of occurrence flat while another absolved accused Jibon murdered the deceased brutally on a

helpless and an old woman. The condemned prisoner made a plan to murder the deceased and thereafter entered into the flat of the deceased and murdered her brutally. The accused made a plan to kill the victim with Jibon and effected it in furtherance of their common intention by killing of the deceased. The prosecution case so established by giving evidence and inquest report, post mortem examination report confessional statement and seizure list which are incompatible with the plea of innocence of the condemned prisoner. Moreover the condemned prisoner had been serving as caretaker in the flat of the deceased peacefully. Even the condemned prisoner did not mention in his confession that he had enmity or strained relation with the deceased. So the condemned prisoner was falsely implicated of this case has got no leg to stand in view of his confessional statement. He was appointed as truthful servant in the flat of the deceased. So the defence has not established that he had no good relation with the deceased before killing her

brutally. As the submission of the learned Advocate for the condemned prisoner that the accused falsely implicated with this case has got no substance in view of the evidence on record.

(48) It further appears from the record that the condemned-prisoner did not flee away from the place of occurrence after killing of the deceased. It is admitted that the condemned-prisoner was arrested from the place of occurrence. It appears from the post mortem examination report (eleven) injuries of various dimension found by the Doctor on the body of the deceased. But the condemned-prisoner did not implicate himself for inflicting blow on the body of the deceased. The post mortem report indicates that he took part in the murder of the deceased. The condemned-prisoner did not flee away by adopting tricks inspiring confidence that he was not involved with murder of the deceased. The fact and circumstances as emerged by the deposition of the witnesses and post

mortem report that he was directly involved with the murder of the deceased.

The prosecution has been able to prove the charge beyond reasonable doubt against the condemned prisoner. More so the facts and circumstances as proved in this case upon the confession which is consistent only with the hypothesis of the guilt of the accused, that is to say, he should not be explainable on any other hypothesis except that the accused is guilty.

Summary of findings of the learned

Additional Sessions judge:

“that the confessional statement was true and voluntary and it has been supported by other evidences on record”

The learned Additional Session Judge upon considering the evidence on record found that accused Saiful is guilty of the offence punishable under section 302 of the Penal Code only and convicted thereunder for death penalty and to pay a fine of the Tk.5,000/- (five thousand). On a conspectus of the impugned judgment the

learned Additional Sessions Judge only convicted the condemned prisoner under section 302 of the Penal Code. It further appears from the plain reading of the impugned Judgment that the learned Additional Sessions Judge observed the prosecution did not prove the charge under section 34 of the Penal Code and therefore not imposed sentence under section 34 of the Penal Code separately.

(49) But on a careful perusal of the evidence of the prosecution that the present condemned prisoner not only entered into the flat of the deceased alone. He entered into the flat of the deceased with intent to kill her with preconcert and pre-meditation with another absolved accused Jibon and then looted all valuable, money and dollars from there. It further appears from the confessional statement of the condemned prisoner that they made a plan to kill the deceased and then in furtherance of their common intention to murder the deceased and also they committed an offence of theft. So the Additional Sessions Judge should have convicted the

condemned prisoner under section 302 read with section 34 of the Penal Code instead of under section 302 of the Penal Code. Therefore, the judgment is confirmed with modification. The learned Additional Sessions Judge after considering the evidences and confessional statement of the accused and other materials on record correctly arrived at a decision and convicted and sentenced the condemned prisoner as aforesaid. Over and above this condemned prisoner has not been able to establish any infirmity or illegality in the impugned Judgment and thereby call for no interference by this court. Thus the Judgment is maintained.

(50) So, on consideration of the evidence of all prosecution witnesses and the fact and circumstances of the case, there is absolutely nothing to disbelieve the evidence of the prosecution witnesses because the condemned-prisoner had no inimical relation with the prosecution witnesses of this case. The defence intensively cross-examined them but nothing could be

elicited to shake their credibility in any manner whatsoever.

(51) It appears from the impugned judgment that the learned Judge observed and death sentence has awarded upon the condemned-prisoner. So, no separate sentence has been imposed under section 381 of the Penal Code.

From the evidences and materials on record and confessional statement we find that the condemned-prisoner and the absolved accused Jibon in furtherance of their common intention committed the murder of the deceased but the accused Jibon was absolved from the present case for want of sufficient legal evidence. So, the learned Judge of the trial court ought to have convicted him under section 302 and 34 of the Penal Code instead of awarding conviction under section 302 of the Penal Code only.

(51) We further find support in Kerala's Case

Three accused persons were put on trial in a criminal case before the Sessions Judge, out of three two

were acquitted but remaining one was convicted invoking section 34 of the Penal Code.

Explaining the legal position of a Kerala case,

Chaco and others-Vs- State of Kerala
Manu/SC/0043/2004

Wherein your lordships observed that merely because some of the accused were acquitted for want of legal evidence the accused against whom there is legal evidence can be convicted invoking section 34 of the IPC and acquitted cannot be adopted by the court on the grounds that co-accused were acquitted.

(52) As death sentence has been awarded upon the condemned prisoner. So no separate sentence has been imposed under section 381 of the Penal Code. It appears from a minute reading of the confessional statement that the present condemned prisoner made a plan to kill the deceased with absolved accused Jibon but the accused Jibon was absolved for want of sufficient legal evidence. So the present condemned prisoner ought to have

convicted under section 302 read with section 34 of the Penal Code.

In a case of

Nantu Mia alias Nandu Mia alias
Namdu Miah and others.

.....appellants.

-Vs-

State Respondent.

reported in 59 DLR(2007) at page-30.

Penal Code (XLV of 1860)

Section 302/34

“Appellants Nantu and FAzar Ali and accused Farid, in furtherance of their common intention committed the murder –So the trial Court ought to have convicted them under sections 302/34 of the Code instead of section 302.”

Inspite of that the condemned prisoner was only 25 years old on the date of Judgment and has been in condemned cell with pangs of death since the Judgment and also first time offender. His sentence can be commuted considering all aspect of the case.

(53) In the case of

Humayun (Md)Appellant.

-Vs-

State.....Respondent

reported in 74 DLR(AD)(2022) at page 123.

Where in your Lordship observed as under:

Code of Criminal Procedure (v of 1898)
Sections 374 and 376

“It is found that the appellant has been in condemned cell for more than 14(fourteen) years suffering the pangs of death. Justice would be sufficiently met, if the sentence of death of the appellant be commuted to one of imprisonment for life. The sentence of death is commuted to the sentence of imprisonment for life.”

Facts involved in the cited case are holding good with the fact of the present case.

(54) Considering the fact and circumstances of this case and the discussion made above and citation referred to above by both the parties. We are of the view that the impugned judgment and order of conviction and sentence of the condemned prisoner does not suffer from legal infirmities which call for interference by this court on appeal. The judgment and order of conviction and sentence dated 05.02.2018 passed by the learned Additional Sessions Judge, First Court, Cumilla is hereby maintained with modification.

(55) On a careful consideration of fact and his age and being first time offender and the case cited above to the effect that the condemned-prisoner is convicted under section 302 and 34 of the Penal Code, we are of the view the justice would be sufficiently met if the sentence of death commuted from the death sentence one to imprisonment for life and also to pay a fine of Tk.25,000/- (twenty five thousand) in default to suffer rigorous imprisonment for 6(six) months more.

Thus, the death reference Jail Appeal and regular Criminal Appeal having no merit, thus fail.

(56) In the result:

The Death reference No.14 of 2018 is rejected with modification of the impugned judgment and order of conviction and sentence dated 05.02.2018 passed by learned Additional Sessions Judge, first court, Cumilla in Sessions Case No. 95 of 2011 is hereby maintained with modification to the effect that the condemned-prisoner Saiful Islam @ Khokon son of late S.M.M.A. Rob Ukil

convicted under section 302 and 34 of the Penal Code and his death sentence is commuted one to imprisonment for life and also to pay a fine mentioned above.

The Criminal Appeal No.4264 of 2018 and the Jail Appeal No.61 of 2018 are dismissed with modification.

(a) The Jail authority is directed to shift the condemned prisoner from condemned cell to normal cell at once.

(57) The appellant will get the benefit of section 35A of the Code in calculation of the sentence already been undergone in connection of this case.

(58) The Office is directed to send down the lower court records along with a copy of the Judgment communicate at once.

(Justice K. M. Emrul Kayesh)

Syed Md. Ziaul Karim, J:

I agree.