

Present:

Mr. Justice Afzal Hossain Ahmed

And

Mr. Justice Md. Emdadul Haque Azad

DEATH REFERENCE NO.152 OF 2005

The State ... Petitioner

Vs.

Most. Aklima Hossain Lipi and Abu Sayeed @ Sayeed

.....Condemned prisoners.

Mr. Md. Jahangir Alam , Deputy Attorney-General with

Mr. Md. Nurul Islam Matubbor,

Assistant Attorney-General For the State

Mr. A. M. Md. Azizul Haque For Most. Aklima Hossain @ Lipi,
Condemned prisoner- Appellant (By C.O. Dt. 23.01.2012)

Mr. S. M. Shahjahan with

Mr. Fazlul Haque Khan Farid

Ms. Sumana Rahman,

Mr.Md. Muhinur Rahman.... For Abu Sayeed @ Sayeed , condemned
prisoner- appellant

WITH

CRIMINAL APPEAL NO. 4223 OF 2005

Abu Sayeed @ Sayeed ... convict- appellant

Vs.

The State.....Respondent

Mr.S.M.Shahjahan with

Mr. Fazlul Haque Khan Farid

Ms. Sumana Rahman,

Mr.Md. Muhinur Rahman ,... For the Convict-appellant

Above named Attorneys General are also for the respondent

WITH

CRIMINAL APPEAL NO. 5094 OF 2005

Most. Aklima Hossain @ Lipi...convict- appellants

Vs.

TheState.....Respondent

Mr. A.M.Md. Azizul Haque

..... For Most. Aklima Hossain Lipi . Condemned prisoner- Appellant (By C.O. Dt. 23.01.2012)

Above named Attorneys General are also for the respondent

AND

JAIL APPEAL NO. 1178 OF 2005

Md. Abu Sayeed @ Sayeed ..Condemned prisoner-appellant

Vs.

The StateRespondent

Mrs. Khalifa Shamsunnahar Bari

... for the condemned prisoner- appellant

Above named Attorneys General are also for the respondent

AND

JAIL APPEAL NO. 1179 OF 2005

Most. Aklima Hossain @ Lipi

.... Condemned prisoner-appellant

Vs.

The State.....Respondent

Mrs. Khalifa Shamsunnahar Bari

... For the condemned prisoner-appellant

Above named Attorneys General are also for the respondent

Heard on the 22nd – 26th, 29th & 30th January, 2012.

&

Judgment on the 31st January, 2012.

AFZAL HOSSAIN AHMED,J;

This Death Reference has been made under Section 374 of the Code of Criminal Procedure by the learned Special Sessions Judge, Jamalpur for confirmation of the sentence of death dated 04.10.2005 imposed upon the Condemned prisoners (1) Aklima Hossain @ Lipi Begum, wife of late Billal

Hossain, Police Station – Melandaha , District- Jamalpur and (2) Abu Sayeed @ Sayeed, son of Jiaruddin, of village- Chakdaha, Police Station- Melandaha, District- Jamalpur in Sessions Case No. 57 of 2004 arising out of Melandaha Police Station Case No. 21/1983 dated 10.04.2003 corresponding to G.R. Case No. 521 (2) of 2003 .The condemned prisoners filed Jail Appeals being Nos. 1178 of 2005 by Abu Sayeed @ Sayeed and 1179 of 2005 by Aklima Hossain @ Lipi Begum . Besides, they have also filed separate Criminal Appeals being Nos. 5094 of 2005 by Most. Aklima Hossain @ Lipi Begum and 4223 of 2005 by Abu Sayeed @ Sayeed.

The Death Reference, Jail Appeals as well as the Criminal Appeals have been heard together and are disposed of by this Judgment.

The prosecution case, in short, is as follows:-

One Golam Kibria Azad, son of late Abdus Sobhan of village- Chakdah under Melandah Police Station, of Jamalpur District lodged an F.I.R. on 10.04.2003 with Melandah Police Station stating, inter alia, that his full brother Md. Billal Hossain was working in Social Welfare Department and posted at Netrokona and used to reside there. He used to come home during vacation. His other brothers had been residing in a separate house with their mother. His deceased brother tried to convince his wife Aklima Hossain @ Lipi Begum to stay at his working place but she did not go there and because of this reason there were quarrels in between them. On her pressure his brother gave his house in her name. Lipi Begum used to lead a fast life and the deceased made complaint against her such life style to her guardian but to no effect. Lipi Begum, the sister in law of the informant, became very reckless and disobedient and used to threaten to kill her husband, the brother of the informant. On 10.04.2003, at about 3-30 hours in the night, his sister in law Lipi Begum, along with some of her accomplices, inflicted repeated blows by “Seni Dao” on his brother Billal who remained asleep and slaughtered him to death. On hearing the hoarse screams of his brother his nephew Limon aged about 13 years and niece Smitha aged about 10 years woke up and saw the door of the house open in the electric light of the adjacent cinema hall and saw their father and mother scuffling out side the room. On looking the same they cried out when Lipi Begum asked him to remain silent then Limon rushed to his house and informed him and others whereupon he himself (informant), mother Noorjahan, sister Shajeda, brother Mijan, Mahfuz uncle Sarwar, Anwar Hossain and Suruj and cousin Shafiqul Islam Dulal and many others rushed to the place of occurrence and saw the slaughtered dead body of his brother Billal lying on the south-west corner of his dwelling house. On seeing, he at once informed of the occurrence to the Police Station whereupon Police came to the place of occurrence and took away the dead body.

The informant also stated in the F.I.R that his sister-in-law, Lipi Begum had extra-marital relation with one Abu Sayeed, son of Md. Jiaruddin Munshi of village- Chakdah for a long time and he apprehended that the said Abu Sayeed and his 3/4 other associates might have been involved in this murder.

On the basis of this First Information Report Melandah Police Station Case No. 21 dated 10.4.2003 under Section 302/34 was started.

Police took up investigation of the case and after investigation submitted charge sheet against the condemned prisoners -accused-appellants under section

302/34 of the Penal Code then the case came up for hearing before the learned Sessions Judge, Jamalpur for trial where it was registered as Sessions Case No. 57 of 2004. Charge under Section 302/34 of the Penal Code was framed against the condemned prisoners -accused-appellants and the same was read over and explained to them to which they pleaded their innocence and claimed to be tried. The learned Sessions Judge, Jamalpur then sent the case to the Special Sessions Judge, Jamalpur for disposal.

The prosecution, with a view to establish the charge levelled against the accused persons, examined as many as 14 witnesses in this case.

Amongst the prosecution witnesses P.W.1 Md. Gholam Kibria Azad is the full brother of the deceased Billal Hossain and the informant of the instant case, P.W. 2 Md. Nizamuddin Limon, aged about 13 years is a son of the deceased Billal Hossain and a eye witness of the occurrence, P.W.3 Shuhana Hossain Smitha , aged about 10 years is the daughter of the deceased Billal Hossain and also eye witness of the occurrence, P.W. 4 Md. Mahfuz is a younger brother of the deceased Billal Hossain , P.W. 5 Md. Shafiqulm Islam is an another brother of the deceased Billal Hossain , P.W. 6 Dulal Mia, a maternal cousin of the deceased Billal Hossain , P.W.7 Shan Md. Abu Sayeed is a seizure list witness, P.W. 8, Syed Ali is a neighbor , P.W. 9, Noorjahan is the mother of the deceased Billal Hossain, P.W. 10 Dr. Abdullah Al-Amin held autopsy on the dead body of the deceased Billal Hossain, P.,W. 11 constable No., 398 Md. Noab Ali carried the dead body of the deceased Billal Hossain to the morgue and identified the dead body there for post mortem examination to the Hospital, P.W. 12 Md. Saiful Islam is a Magistrate , First Class, Jamalpur who recorded the statement of the accused Lipi Begum under section 164 of the Code of Criminal Procedure on 12.4.2003 and also recorded the statements of the witnesses P.Ws. 2 and 3 under section 164 of the Code of Criminal Procedure , P.W. 13 A.K.M. Shahin Mondal, an Officer –in-charge of Melandah Police Station on 10.4.2003 started the instant case on the basis of typed F.I.R. lodged by the informant , P.W. 14 Gholam Sarwar , S.I. of Police held inquest of the dead body of the deceased Billal Hossain and held investigation of the case and ultimately submitted the charge sheet under section 302/34 of the Penal Code against the condemned prisoners- appellants.

After closure of the examination of the prosecution witnesses both the above named condemned prisoners were examined under section 342 of the Code of Criminal Procedure to which they claimed the same plea of innocence.

Besides the aforesaid 14 witnesses being examined, the prosecution has also adduced evidence which are marked as Exhibits and material exhibits . Since the learned Advocate who filed the aforesaid regular appeal on behalf of the Aklima Hosasain @ Lipi Begum did not turn up to conduct the case while taken for hearing the state defence lawyer was provided for the condemned prisoner Aklima Hossain @ Lipi Begum .

The defence case, as it transpires from the trend of cross-examination of the prosecution witnesses, is that the accused appellants are quite innocent and that the informant also implicated in this case with intend to grab the property of the deceased Billal Hossain and that so called confessional statement has been obtained from the accused appellant Aklima Hossain @ Lipi Begum by exercising threat and coercion and the same is not true and voluntary and that

the P.Ws. 2 and 3 , the minor children of the deceased. Have been tutored by their uncle, the informant to depose falsely against the appellants to sued the evil design to grab the properties of the deceased and to grab the money of condemned prisoner Abu Sayeed payable him by the informant.

The learned Special Sessions Judge, Jamalpur having heard both the parties and considered the materials on record passed the impugned judgment and order of conviction and sentence dated 4.12.2005 convicting both the above named appellants under Section 302/34 of the Penal Code and sentencing them to death by hanging by neck .The instant Death Reference being No. 152 of 2005 arising out of the judgment and order of conviction and sentence and, thereafter, being aggrieved by the aforesaid judgment and order of conviction and sentence the appellants have preferred the Jail Appeals and regular Criminal Appeals as above.

Mr. Jahangir Alam, the learned Deputy Attorney General with Mr. Md. Nurul Islam Matubbor, the learned Assistant Attorney General appearing for the State submits that the condemned- prisoner Aklima Hossain @ Lipi Begum had extramarital relations with the condemned prisoner Abu Sayeed @ Sayeed and with a view to maintain their such relations undisturbed they planned to kill Billal and accordingly, on the alleged night of occurrence, both the condemned prisoners brutally committed the murder of the deceased Billal Hossain which was witnessed by the P.Ws. 2 and 3 the own son and daughter respectively of the deceased and condemned prisoner Aklima Hossain @ Lipi Begum . The condemned prisoner Aklima Hossain @ Lipi Begum also made confessional statement recorded under Section 164 of the Code of Criminal Procedure which shows that she was concerned in the alleged murder of her husband Billal. Besides P.Ws. 2 and 3 gave a vivid picture as to the role played by the condemned prisoners in committing murder of the deceased. That the condemned prisoner Aklima Hossain @ Lipi Begum nakedly maintains extramarital relations with the other condemned prisoner Abu Sayeed @ Sayeed which was noticed not only by her own kids , the P.Ws. 2 and 3 but also by other P.Ws. and it was open secret. The learned Deputy Attorney- General further submits that the learned Special sessions Judge, Jamalpur considering all the aspects of the matter as well as the evidence on record passed the impugned judgment and order of conviction and sentence of death and there is nothing to interfere with the same and that in the case of this sort of heinous offence both the condemned prisoners should be hanged.

Mr. A.M.Md. Azizul Haque, the learned State Defence Lawyer on behalf of the condemned prisoner Aklima Hossain @ Lipi Begum submits that she has been falsely implicated in this case and she was never concerned in committing murder of her husband Billal Hossain and that the alleged murder was committed at the instance of the informant himself with intent to grab the properties of the deceased and that Aklima Hossain @ Lipi Begum has been implicated in this case by the informant defaming her character only sued his purpose and with that end in view the informant himself managed to get the P.Ws. 2 and 3 tutored and deposed against their own mother Aklima Hossain @ Lipi Begum and that the so called confessional statement recorded under Section 164 of the Code of Criminal Procedure was obtained from Aklima Hossain @ Lipi Begum by exercising threat and coercion and the same was never true and voluntary. Mr. Haque further submits that P.Ws. 2 and 3 being minors their testimony can not be safely relied upon and that the learned trial

Judge failed to appreciate all those aspects of the matter and thereby arrived at an erroneous decision convicting and sentencing as above and as such the same is not sustainable in law and the appeals preferred by Aklima Hossain @ Lipi Begum are liable to be allowed.

Mr. S.M.Shahjahan, the learned advocate with Mr. Fazlul Haque Khan Farid and Ms. Sumana Rahman, the learned Advocate appearing for the condemned prisoner Abu Sayeed @ Sayeed submits that the informant lodged the F.I.R. having heard of the occurrence from his nephew P.W. 2 and niece P.W.3 who claimed themselves to have witnessed the occurrence. But inspite of the fact the name of the condemned prisoner Abu Sayeed @ Sayeed does not find place in the First Information Report. It is simply mentioned in the F.I.R. that Abu Sayeed @ Sayeed maintained extra-marital relation with condemned prisoner Aklima Hossain @ Lipi Begum and as such it is apprehended that Abu Sayeed @ Sayeed along with his associates might have been involved in the alleged murder of his brother Billal. Mr. Shahjahan further submits that the omission to mention the name of Abu Sayeed @ Sayeed in the F.I.R. and mentioning the name of this accused Abu Sayeed @ Sayeed by the witnesses is nothing but a subsequent embellishment and that the apprehension about Abu Sayeed @ Sayeed as mentioned in the F.I.R. has been purposely done by the informant with intend to grab the money which he borrowed from Abu Sayeed @ Sayeed and that in the circumstances it is not safe to rely upon dubious evidence adduced by the prosecution and thus, the impugned judgment and order of conviction and sentence of death is not sustainable in law and the appeals preferred by the condemned prisoner Abu Sayeed @ Sayeed are liable to be allowed.

The real question that calls for determination in this case is, whether the impugned judgment and order of conviction imposing sentence of death upon the condemned-prisoners is sustainable in law.

Heard the learned Advocates on both the sides and perused the Death Reference, the judgment and order of conviction and sentence, memo of appeals, Jail appeals , evidence adduced by the prosecution and the materials on record.

Now let us see how far the prosecution has been able to prove the incident of death of the unfortunate deceased Billal Hossain and the complicity of the condemned-prisoners in the commission of the crime.

Before considering the circumstantial evidence and confession of the condemned-prisoner Aklima Hossain @ Lipi Begum, we like to discuss certain broad evidence as revealed from the evidence of the prosecution witnesses to evaluate the prosecution case.

The informant Md. Gholam Kibria Azad, a younger full brother of the deceased Billal Hossain appearing as P.W. 1 has corroborated all the material particulars regarding time, place and manner of the occurrence as made in the F.I.R. He has stated the overt act of the condemned-prisoner Aklima Hossain @ Lipi Begum as narrated to him by his nephew P.W.2 and niece P.W. 3 immediately after the occurrence. During cross-examination nothing could be elicited from him on material particulars for the benefit of the defence although he has stated that he got monetary transaction with accused Sayeed . However, he denied the defence suggestion that he has falsely implicated the condemned

prisoners in this case with intent to grab the properties of the deceased Billal Hossain and the money which he borrowed from accused Sayeed.

P.W.2 Md. Nizamuddin Limon, aged about 13 years, is the son of the deceased Billal Hossain and the condemned-prisoner Aklima Hossain @ Lipi Begum. He has stated that his mother had extra-marital relation with the condemned-prisoner Abu Sayeed @ Sayeed and on many occasions he witnessed the incidents arising out of such relation and he reported the same to his father whereby their conjugal relation became strained. He has stated that at about 3-30 hours in the night following on 09.04.2003 having heard the hoarse screams of his father he woke up and came to see that his mother, the condemned-prisoner Aklima Hossain @ Lipi Begum entered into the room holding a blood-stained "Dao" and kept the same under the showcase and went out of the room. Then P.W.2 and his younger sister (P.W.3) followed their mother and saw the condemned-prisoner Sayeed catching hold of his father at the courtyard when three other persons were standing near the gate. When his mother Aklima Hossain @ Lipi Begum caught hold of his father, Sayeed and those 3 persons fled away towards the west. He saw his father trying to go towards the gate but his mother resisted him. He saw the body of his father wet with blood and when he asked to his mother as to what happened to his father, she kept mum. On seeing this he rushed to the house of his "Dadi" (paternal grand mother) and informed of the occurrence to his uncle, "Dadi", paternal aunt and others and when he returned home saw his mother coming out from the pond taking her bath and then saw his father lying dead with cut throat and other bleeding injuries and that his father's dead body was completely naked and he placed a "Gamcha" on the dead body. Further he has stated that his mother Aklima Hossain @ Lipi Begum and Sayeed killed his father because of their extra-marital relation. He further stated that he also made statement before the Magistrate. During cross-examination by defence he has explained his full understanding what is called *Ci Kixqv tCŃ* (extra-marital relation) and that he has seen the occurrence of the illicit affairs of his mother with Sayeed in his own eyes. Further he has stated that as to why would he falsely depose against his mother. The electric light of the Cinema Hall was at a distance of 15/20 cubits from the place of occurrence and that he did not raise alarm for safety of life and that (informant) his uncle sold out a shop and kept its sale proceeds with accused Sayeed and there was monetary transaction between his uncle and accused Sayeed. He has stated that he deposed what he saw in his own eyes and that as to why would he falsely depose against his mother, if not true.

P.W.3 Shuhana Hossain Smitha aged about 10 years is the daughter of the deceased Billal Hossain and the condemned prisoner Aklima Hossain @ Lipi Begum. She has stated that at about 3-30 P.M. in the night following 9th April, 2003 on hearing the hoarse screams of her father and sound of blows on the tin she and her brother Limon (P.W.2) woke up and saw her mother entering into the room holding a blood stained "Dao" which she kept under the showcase. Her mother removed the cut out and she and her brother (P.W.2) followed her mother and saw accused Sayeed catching hold of his father when three other unknown persons were standing near the gate and on seeing her and his brother accused Sayeed and those three persons went away towards the west. Accused Sayeed caught hold of her father and then her mother fell her father down on the courtyard to the south of their house and her mother sat on the chest of her father till she confirmed the death of her father. Thereafter, her "Dadi", maternal aunt,

uncles and others came with her brother Limon who then placed a “Gamcha” on the naked dead body of her father. Mean-while, her mother took her bath from the pond. Further she has stated that her mother and accused Sayeed killed her father. During cross-examination by defence, she stated that she had witnessed the events of the extra-marital relation of her mother with accused Sayeed. She further stated she was reading in Class-IV. She has further stated that in reply to a defence suggestion that *Avghi ehev Avig t`wLwb Avcb t`LQb ? mvC` Avgi wCZvK tgiQ t`wLwQ| mZ` bq NUbv-tj H w`b H mgq mvC` wQj bv| Avcb t`LQb?* . However, she has denied all the defence suggestions on the material particulars.

P.Ws. 2 and 3 are the eye-witnesses of the occurrence and their statements regarding time, place and manner of the occurrence as well as the overt act and the role played by the condemned-prisoners in the commission of the alleged crime and the fact of having extra-marital relations between the condemned-prisoners Aklima Hossain @ Lipi Begum and Abu Sayeed are corroborative to each other which is also consistent with those of the P.W-1.

During cross-examination, the defence could not elicit anything from P.Ws- 2 and 3 on the material particulars for its benefit.

P.W. 4 Mahfuz, a younger brother of the deceased Billal Hossain, has stated that at about 3-30 hours (night on 10.4.2003) his nephew Limon came to his house and told that his mother and Sayeed killed his father whereupon he, his mother and brother rushed to his house of the deceased at Kazipara and saw the dead body of his elder brother deceased Billal Hossain in front of the of his house with cut throat bleeding injuries where his niece (P.W.3) and nephew (P.W.2) also told them that their mother and accused Sayeed killed their father Billal Hossain . During cross-examination by defence he has stated that because of Aklima Hossain @ Lipi Begum and Abu Sayeed his brother Billal Hossain made a separate house. However, he denied all the defence suggestions on material particulars. His above statements are also quite consistent with those of the foregoing witnesses on material particulars.

P.W. 5 Md. Shafiqul Islam was tendered by the prosecution and the defence declined to cross-examine him.

P.W.6 Md. Dulal Mia, a maternal cousin of the informant, has stated that at about 3-30 hours (night on 10.4.2003) informant's nephew came to his house and informed that Sayeed and Aklima Hossain @ Lipi Begum (condemned-prisoners) were inflicting assaults on his father whereupon he came to the house of Billal and saw Billal lying dead in front of his house with cut throat injuries. He heard from Limon and Shuhana (P.Ws. 2 and 3 respectively) that they saw Aklima Hossain @ Lipi Begum sitting on the chest of the deceased and at that time accused Sayeed and 2/1 others unknown persons were there. He has further stated that Limon told that Aklima Hossain @ Lipi Begum kept a knife under Almirah by which they killed the deceased and he brought out that knife from there. He has further stated that there was extra-marital relation between Aklima Hossain @ Lipi Begum and Sayeed (the condemned prisoners) although they were nephew and aunt by relation and they appeared to be like husband and wife and that one day, during the life time of deceased Billal, he informed this fact to Billal. During cross-examination by defence, he has stated that Shuhana (P.W.3) told him that Aklima Hossain @ Lipi Begum kept that knife under showcase . He made statement before the Daroga on the very date of the

occurrence and that on coming to the place of occurrence Aklima Hossain @ Lipi Begum was not found there and heard that he went to take bath in the pond besides that house. However, he denied the defence suggestions on all material particulars.

P.W. 7 Shah Mohammad Abu Sayeed is a witness to the seizure list marked as Ext. 4. He has stated that on 10.4.2003 at about one P.M. the Daroga of Melandah Police Station seized from the house of Aklima Hossain @ Lipi Begum some articles in his presence vide the seizure list marked as Ext.4 which he exhibited as under:-

- (1) One pillow of violate color with blood stained marked as material Ext. I,
- (2) One green – while and pink cotton cloth with blood stained marked as material Ext.II.
- (3) Some blood stained earth marked as material Ext. III.
- (4) One blood stained Chek Lungi marked as material Ext.IV.
- (5) A branch of a guava tree with blood stained marked as material Ext.V.
- (6) One electric cut out with blood stains marked as material Ext.VI.
- (7) One 19" long with 6" wooden handle Dao/Boti with blood stains marked as material Ext.VII.
- (8) Another 7" long Kopa Dao with 6" wooden handle with blood stains marked as material Ext. VIII.
- (9) One legal notice of Talak marked as material Ext.IX.
- (10) One photo copy of a heba-bil-ewaz deed marked as material Ext. X.
- (11) One personal diary of the deceased Billal Hossain marked as material Ext.XI.

He put his signature in the seizure list which he marked as Ext.4/1.

During cross-examination he has stated that the said blood stained two Daos were recovered, one from south and another from the place of murder beside the pond and that the blood stained earth was seized from the southern side of the inner courtyard where the dead body of the deceased was lying.

P.W.8 Syed Ali has stated that the alleged occurrence took place at about 3-30 P.M.(night on 10.4.2003) and that he got a grocery shop at Mannan Keranir Market which is about 100 yards off from the place of occurrence and that while working in the shop he often used to see accused Abu Sayeed going to the house of accused Aklima Hossain @ Lipi Begum and that people used to say that they got immoral relations amongst themselves. Further he has stated that it takes about 15 minutes to go to the place of occurrence from his house and that Limon went to the house of his grand father and told that Aklima Hossain @ Lipi Begum and Abu Sayed @ Sayeed were killing his father whereupon the grand-mother of Limon (P.W. 2) with Limon first came to the place of occurrence and then he (P.W.8) came and saw the cut throat dead body

of deceased Billal Hossain lying on the ground. He has further stated that Shuhana (P.W. 3) and Limon (P.W.2) told that they saw Sayeed and Aklima Hossain @ Lipi Begum (the condemned-prisoners) chopping his father to death. During cross-examination by defence he denied the defence suggestion that Limon and Shuhana did not see accused Aklima Hossain @ Lipi Begum and Sayeed killing the deceased.

P.W.9 Noorjahan, the mother of the deceased Billal Hossain, has stated that accused Sayeed had extra-marital relation with accused Lipi and that at the time of occurrence at about 3-30 hours (night) Billal's son Limon called her and said that Sayeed caught hold of his father and his mother Lipi was chopping him. Upon hearing this she rushed to the house of Billal and saw Billal lying slaughtered on his courtyard in front of his house. Further she has stated that Shuhana and Limon (P.Ws. 3 and 2 respectively) woke up from sleep on hearing the sound of strikes on the tin and came to see that accused Lipi and Sayeed were slaughtering Billal and also saw Lipi keeping a blood stained Dao under the showcase and another Dao throwing in the pond.

During cross-examination by defence, this P.W.9 has stated that she made statement before Daroga on the Thursday i.e. on the very date of occurrence at about 7 in the morning and that on the same date Shuhana and Limon (P.W. 3 and 2 respectively) also made their statements before the Daroga. However, she has denied the defence suggestion that there was no extra-marital relation between Sayeed and Lipi and that witness Limon and Shuhana(P.Ws. 2 and 3) did not state to her as to the overt acts of accused Sayeed and Lipi as she has stated above.

P.W.10, Abdullah Al-Amin, Medical Officer of Jamalpur General Hospital held Post Mortem examination on the dead body of the deceased Billal Hossain and found the following injuries on the dead body :-

- (i) One cut-throat wound 5"x1"x upto bone was found at the upper part of throat.
- (ii) One cut injury 2 ½ " x ½ " x ½" over left side of face with nose.
- (iii) Two incised wounds involving left side of face.
- (iv) One incised wound 2" x ¼ " x skin over back of left elbow.
- (v) One incised wound 2" x ½ " x skin over right shoulder
- (vi) One cut injury over left hand in between thumb and index finger.

On deep dissection trachea oesophagegus, carotid vessels of both sides of neck and other soft tissues were found cut. Clotted blood was found around the injury".

He opined that death was due to shock & hemorrhage as a result of the above stated injuries which were ante mortem and homicidal in nature.

He exhibited the Post Mortem report of deceased Billal Hossain as ext. 5 and his signature therein as ext. 5/1. During cross-examination by defence, he

has stated that he did not mention the age of the injuries as there was no column therefor.

P.W. 11 Constable No. 398 Md. Nobab Ali Khan, on 10.4.2003, vide C.C. No. 1/03, marked as Ext.6, carried the dead body of the deceased Billal Hossain to the morgue and identified the dead body there. He has exhibited his signature in the said C.C., as Ext. 6/1. The defence declined to cross-examine him.

P.W. 12 Md. Saiful Islam, the Upazila Nirbahi Officer, Tarail, Kishoreganj while serving as a Magistrate, First Class, Jamalpur on 12.4.2003 recorded the confessional statement of accused Aklima Hossain @ Lipi Begum under Section 164 of the Code of Criminal Procedure which he has exhibited as ext. 7 and his five signatures therein as ext. 7/series. Further he has stated that after recording that confessional statement the same was read over to the accused Aklima Hossain @ Lipi Begum and she having understood the same voluntarily put her signatures therein which he has exhibited as Ext. 7/series. This P.W. 12 has further stated that in para 6 of the confessional statement it is written that the confessing accused Aklima Hossain @ Lipi Begum reported him that the Police put pressure on her and also rebuked her. This P.W. 12 has further stated that on 19.4.2003 he recorded the statements of witness Limon according to law which he exhibited as Ext.8 and his own signatures therein as Ext.8/1 and 8/2 and the signatures of Limon therein as Ext. 8/3 and 8/4. On 19.4.2003 he also recorded the statement of witness Shuhana Hossain Smitha which he exhibited as Ext.9 and his own signatures therein exhibited as Ext., 9/1 and 9/2 and the signatures of Shuhana exhibited as Ext. 9/3 and 9/4. During cross-examination by defence he has stated that there is no confession in the statement made by the accused Aklima Hossain @ Lipi Begum to the effect that she or Sayeed had killed Billal.

P.W. 13 A.K.M. Shahin Mondal, while serving as the Officer-in-Charge of Melandah Police Station on 10.4.2003, started the instant case on the basis of a typed written F.I.R. of the informant. He exhibited the F.I.R. Form as ext.10 and his signature therein as Ext. 10/1. The defence declined to cross-examine him.

P.W. 14 Golam Sarwar, Sub-Inspector of Police of Melandah Police Station, on 10.4.2003, held inquest on the dead body of the deceased Billal Hossain and prepared the inquest report which he exhibited as Ext.3 and his signature therein as Ext. 3/2. He investigated the case and during investigation visited the place of occurrence, prepared the sketch map of the place of occurrence with index, seized alams which already stated above, arrested accused Aklima Hossain @ Lipi Begum on 10.4.2003 and produced her before the Court on the next date, examined witness Limon and Smitha son and daughter respectively of deceased Billal Hossain and accused Aklima Hossain @ Lipi Begum and also got their statements recorded under Section 164 of the Code of Criminal Procedure. He also recorded the statements under Section 161 of the Code of Criminal Procedure of other witnesses. He obtained the Post Mortem report and took two snaps of the dead body which he exhibited as Ext. X series. On completion of investigation, he submitted charge sheet under Section 302/34 of the Penal Code against the accused Aklima Hossain @ Lipi Begum and Sayeed. During cross-examination by defence, this P.W. 14 has stated that it is not mentioned in F.I.R. that accused Sayeed caught hold of the Limon's father i.e. the deceased Billal Hossain. He has stated that amongst the witnesses the son

(P.W. 2) and daughter (P.W.3) of the deceased Billal Hossain are the only eye-witnesses in this case . He recorded the statements of Limon and Smitha (P.Ws. 2 and 3 respectively) wherein they stated that there was extra-marital relation between the Lipi and Sayeed. During investigation it revealed that accused Lipi frequently used to go to the house of accused Sayeed. He denied the defence suggestion that Limon and Smitha made statements before the Magistrate after being tutored by him. Further he has stated that he got the dead body of the deceased Billal Hossain about 2 cubits off from his dwelling house where he slept and that the commission of the murder started inside and ended outside that house where the dead body was found. He denied the defence suggestion that Lipi did not kill her husband by Seni Dao, Sayeed was not present there at that time and there was no extra-marital relation between Sayeed and Lipi and that being biased he submitted the charge sheet against Lipi and Sayeed.

Accused Aklima Hossain @ Lipi Begum made confessional statement in this case which the Magistrate P.W. 12 recorded under section 164 of the Code of Criminal Procedure and the same, marked as Ext.7, is as under :-

“Avgvi 15 ermi eqtmi mgq wetq nq mlyxi mt½ tchj Kti | Avgvi klji ox I t`ei AvgvtK tgb tbq bvB | Avgvi mlyx QvT covBZ | AvgvtK wbtq cQqB SMov nZ Zte fvB I gvtqi mt½ | wetqi cUtgB evPv Avtm | evPv mlyx wbtq Kto wQj vg | cQqB Avgvi bvtg wePvi w Z | GKchq Avgvi mlyx evox Qvto | wKQy b ci PvKix nq | Avgvi Rwg wepx Kti t`ei tK t`vKvb w tq t`B | MZ epevi w b ivtT NUbv | ivT 10Uvi mgq GKmt½ fvZ LvB | ivT 11Uvi mgq itZ hvB | GLb Avgvi mlyx etj tctc I tcqvivi Pivi Zj wQj vg | ZLb 4Rb tj vK Avtm | Avgvi mlyx Zvt`i mt½ Mí Kti | Aí mgq K_v MvQ Zj tq | ZLb ivT 12D30 wgbU | ivT 3Uvi w tK `BRb wgwj Z nB | Avgvi mlyx, Awg `Sv, Dcgv GK tPŠKtZ wK | Avgvi tQtj tj gb Avj`v LvU vtK | kã nq | ktã Rb AvgvtK t`Ltz etj | Awg t`wL `B AvtQ | `iRv jvMvbtv | ZLb 3.30 wgbU Awg `iRv Lj evbtí hvI qvi Rb` evbtí tei nq | gflvk cov `BRb tj vK AvgvtK gL tPtc ati | gv_vq wKj t`q | Avgvi gL tPtc ivtL | Avgvi tQtj I tqtq Dtv | tj gb etj KvtiU tbB | Avgvi evmvi mstM wUbtiteov | wPj v-wPvj Kitz wK | ZLb tKvb tj vKRb Avtm bvB | Avgvi mlyxtK RovBqv awi tj gb t`Ltz | 3D30 wgbU iwTtZ `iRv Ltj t`B | NUbv 15D20 wgbU vqx nq | t`ei t`i mstM kT`Zv AvtQ | Kpvj w tq gvi tZ hvq | mvbt`i mt½ tKvb macktb | Awg `iRv Ltj w tqwQ GB Avgvi t`vl | Avgvi mlyx thLvfb Ngvq tmLvfb evg cvtk, `v, Kvj, nvZj GB wj wQj KvVi Dci |”

In the aforesaid statement accused Lipi did not confess her involvement in the alleged murder of her husband and her such statement outwardly appears to be exculpatory in nature.

In the instant case the prosecution examined as many as 14 witnesses of whom only P.Ws. 2 and 3 are the eye witnesses . P.W. 2 Md. Nizamuddin Limon aged about 13 years is the son of the deceased Billal Hossain and accused Lipi and P.W.3 Shuhana Hossain Smitha aged about 10 years is also their daughter and both have stated by corroborating each other that at the time of the alleged occurrence at about 3-30 hours in the night following 9.4.2003 their mother Lipi Begum, the deceased Billal Hossain, Shuhana (P.W.3) and another sister were sleeping in the same bed and Limon in another bed in the same room and on hearing the sound of hoarse screams of their father they woke up and found their mother Lipi entering into the room with a blood stained Dao and placing the same under the showcase and then again going out of the room and at that time they watched and came to see accused Sayeed in the courtyard catching hold of his father and 3 other persons standing near the gate and then their mother Lipi

Begum caught hold of their father Billal Hossain when his body was wet with blood.

P.W.2 has said that he asked his mother Lipi Begum as to what had happened to his father but his mother did not make any reply and remained silent. Then he opened the gate and informed the occurrence to his grand mother, uncle, aunt and others and on coming back he saw his father's slaughtered dead body lying on the courtyard and at that time his mother was taking bath in the pond adjacent to the courtyard. Both the P.Ws. 2 and 3 by corroborating each other have stated that their mother Lipi Begum had extra-marital relation with accused Sayeed and they themselves witnessed their many obscenities on different occasions. The aforesaid blood-stained Dao, which both the P.Ws. 2 and 3 saw their mother Lipi Begum placing under the showcase, has been recovered from there and seized vide seizure list marked as Mat. Ext. VII. P.W.3 has stated that she saw her mother, Lipi Begum removing the cut out of their room and the same with blood-stain has also been seized from that house vide marked as Mat. Ext. VI . P.W.3 has further stated that Lipi Begum, lastly, sat on the chest of the deceased Billal Hossain and caught hold of the mouth and checked by touching his legs whether Billal Hossain died and then she became confirmed that he died. P.Ws. 2 and 3 have also stated by corroborating each other that the dead body was lying naked and Limon, P.W.2 placed a cloth on the dead body of the deceased and when their uncles and others came, meanwhile, Lipi Begum finished her bath from the pond

It appears from the evidence of all the P.Ws. other than the official witnesses that there was extra-marital relations between the accused Lipi and Sayeed even the fact of having such relation between them was confirmed by the own son and daughter of accused Lipi Begum, namely, P.Ws. 2 and 3 and, admittedly, Billal Hossain at that time was attacked with Jaundice for which he took leave for 15 days and came home which might be a hindrance to the free exercise of extra-marital relation of the accused Lipi and Sayeed. Although P.W.2 was aged about 13 years and P.W. 3, 10 years, from a plain reading of their statements it would appear that they got sufficient maturity of understanding at least to say the truth what actually they had seen and that there is nothing to disbelieve their testimony. During cross-examination defence could not shake their testimony and elicit anything from them on material particulars for the benefit of the defence. There is also nothing to show as to why the P.Ws. 2 and 3, being the own son and daughter of the accused Aklima Hossain @ Lipi Begum, would falsely assign the part of killing of their father to her. P.Ws. 2 and 3 have stated corroborating each other that accused Lipi Begum and her paramour Sayeed took part in killing their father Billal and ultimately their father Billal was slaughtered to death and at the alleged time of occurrence the dead body was found lying in the inner courtyard in front of the door of their dwelling house. P.Ws. 2 and 3 have stated corroborating each other that at that time they saw the part of the occurrence, as mentioned earlier, in the light of the adjacent Cinema Hall which is about 15/20 cubits off from their courtyard which remains unchallenged . All the P.Ws. other than the official witnesses who came to the place of occurrence immediately after the occurrence also saw the slaughtered dead body of deceased Billal Hossain lying on the courtyard of the deceased's house. Their evidence are also quite consistent with those of the P.Ws. 2 and 3 regarding the time, place and manner of the occurrence. P.W. 10 Dr. Abdulllah Al-Amin holding post mortem examination on the dead body of

the deceased found the injuries, as stated above, on the dead body of the deceased including cut-throat injuries which being ante mortem and homicidal in nature resulted in his death. Medical evidence of this P.W.10 is also consistent with those of the other P.Ws. as to the manner of the occurrence.

During cross-examination of the P.Ws. 1-14 the defence failed to elicit anything from them on the material particulars for the benefit of the defence and there is nothing to disbelieve their evidence.

It appears from the confessional statement of Lipi Begum recorded by the Magistrate, marked as ext.7, that in it's column No.6 it is noted that while recording the statement Lipi Begum told the Magistrate that Police put pressure on her and also rebuked her. However, she did not confess her guilt and involvement in the alleged murder of her husband Billal Hossain and her said confessional statement appears to be exculpatory in nature. In column 6 of ext.6 she has, however, stated that she was making the statement for telling the truth and that in her said statement she stated that in the alleged night of occurrence at about 3-30 hours there was knock at the door whereupon she opened the door for coming out and that was her only fault. Knocking at the door at about 3-30 hours in the night is, undoubtedly, dreadful and at that time her husband was sleeping with her in the room and without calling her husband from sleep and also without calling her kids (including P.Ws. 2 and 3) sleeping in the said room and also without asking who was knocking at the door she, of her own accord, opened the door for going out side which is unusual. Such demeanour of condemned-prisoner Aklima Hossain @ Lilpi Begum looks askance at which inclines to us to believe that had she no the complicity in the alleged murder, surely, she would not have opened the door of her own accord without calling her husband and the kids at such a dreadful time of night at 3-30 hours.

Besides, P.W. 2 Limon and P.W.3 Shuhana being the own son and daughter respectively of the condemned prisoner Aklima Hossain @ Lilpi Begum have stated by corroborating each other that when they woke up they saw their mother entering into the room coming from out side with blood-stained dao in her hand and keeping the same under the showcase and then removing the 'cut out'. The said blood stained dao and 'cut out' were seized from those particular places of the place of occurrence vide seizure list marked as Ext.4. P.Ws. 2 and 3 have also stated corroborating each other that they saw their mother Aklima Hossain @ Lilpi Begum scuffling with their father in the courtyard and also saw other condemned prisoner Sayeed catching hold of his father Billal . This P.Ws. 2 and 3 have also stated that after confirming the death of their father deceased Billal Hossain their mother Aklima Hossain @ Lipi Begum took bath in the pond adjacent to that courtyard. These P.Ws. 2 and 3 have also stated corroborating each other that their mother Aklima Hossain @ Lipi Begum had extramarital relation with the condemned prisoner Sayeed and they themselves witnessed some events of such relations between them. There is also nothing to show as to why would the P.Ws. 2 and 3 being the own kids of the condemned prisoner Aklima Hossain @ Lipi Begum falsely assign the part of killing of their father Billal to their own mother Aklima Hossain @ Lipi Begum and there is also no reason to disbelieve their evidence. The evidence of the other P.Ws., as referred to above, are also consistent with those of the P.Ws. 2 and 3 on material particulars.

Mr. S.M. Shahjahan, the learned Advocate appearing for the condemned-prisoner, Abu Sayeed @ Sayeed has submitted that the informant lodged the First Information Report of this case having heard of the occurrence from P.Ws. 2 and 3 who claimed to have witnessed the occurrence.. Had the P.Ws. 2 and 3 seen the condemned-prisoner Sayeed in committing the murder of the deceased Billal, his name would find place in the F.I.R. but having not so done the statement of the P.Ws. 1, 2, 3 and 4 and other witnesses to the effect that P.Ws. 2 and 3 disclosed to them that at the alleged time of occurrence they also saw the condemned prisoner Sayeed catching hold of the deceased Billal can not be relied upon. This sort of endeavor on the part of the witnesses including P.Ws. 1, 2 and 3 is nothing but a subsequent embellishment and relying upon such embellished evidence no conviction can be based on the condemned prisoner Abu Sayeed @ Sayeed .

In reply to the above submission of Mr. Shahjahan, the learned Deputy Attorney General has made an endeavour to persuade us to concur with the learned Sessions Judge's view that the omission in the F.I.R. regarding the condemned prisoner Abu Sayeed and the role played by him in committing the murder of the deceased is not enough to conclude that the said part of the story is a later improvement. Omission of the said detail is there in the F.I.R, no doubt. But the Criminal Courts should not be fastidious with mere omissions in First Information Statement, since such Statements can not be expected to be a chronicle of every detail of what happened, nor to contain an exhaustive catalogue of the events which took place. The person who furnishes the First Information to authorities might be fresh with the facts but he need not necessarily have the skill or ability to reproduce details of the entire story without anything missing therefrom. Some may miss even important details in a narration. The learned Deputy Attorney-General has further submitted that in this case there is overwhelming evidence to show that the condemned prisoner Abu Sayeed being the paramour of the condemned prisoner Lipi Begum both, in furtherance of their common intention of all, committed the murder of the deceased. Thus, the aforesaid omission in the F.I.R. as to the presence and overt act of the condemned-prisoner, Abu Sayeed in committing murder of the deceased does not affect the prosecution case so far as it relates to him. It is not always expected that there must be disclosure of each and every fact in the F.I.R. which are necessary to be proved by the prosecution to establish a criminal charge.

F.I.R. is nothing but an information relating to a cognizable offence given to the Police first in point of time on the basis of which investigation commences and it is only the instrument which sets the ball in motion for the purpose of taking legal action against the offender. Neither it is a substantive piece of evidence nor it can be considered as encyclopedia of the prosecution case. F.I.R. can only be used for the purpose of contradicting and corroborating evidence of the informant under Section 145 and 155 (3) of the Evidence Act and not for the purpose of impeaching credibility of other witnesses like P.Ws. 2 and 3, of whom none was the informant in this case. So, the question of subsequent embellishment of the F.I.R. story regarding the condemned prisoner Sayeed and discarding the evidence of P.Ws. 2 and 3 coupled with those of P.Ws. 1,4,6 and 9 to that effect given before the Court for that reason, does not arise at all. This view of ours find support from the decision in the case of The State vs. Kamal Pasha @ Pasha reported in B.C.R. 2006 (HCD) 136.

The above views of ours also find support from the decision in the case of The State Vs. Abdus Sattar and others reported in 43 D.L.R. (AD) 44 wherein their Lordships have taken view in this respect in the following manner:-

“F.I.R can be used only to corroborate or contradict the maker thereof. There is neither any law nor any principle on the basis of which the testimony of another witness can be ignored or rejected because the informant had made an omission to mention about the fact which the witness stated in his deposition”.

In the instant case P.Ws. 2 and 3 are the eye witnesses of the occurrence and they, corroborating each other, have given a vivid picture of the role played by both the condemned prisoners Aklima Hossain @ Lipi Begum and Abu Sayeed @ Sayeed in committing the murder of the deceased and they also made their statements before the Magistrate recorded under section 164 of the Code of Criminal Procedure. The statements of P.Ws. 2 and 3 given in Court and their statements recorded by the Magistrate under section 164 of the Code of Criminal Procedure are quite consistent with all the material particulars regarding time, place and manner of the occurrence as well as overt acts of both the condemned prisoners in committing murder of their father Billal. Further it appears that, admittedly, the P.Ws. 2 and 3 were examined by the Investigating Officer who recorded their statements under section 161 of the Code of Criminal Procedure on the very date of occurrence but inspite of the fact attention of the P.Ws. 2 and 3 was not drawn denying the veracity of their statements as to the presence of the condemned prisoner Sayeed at the place of occurrence at the alleged time and the role played by him in committing the murder of the deceased. Even P.Ws. 1,4,6 and 9 who came to the place of occurrence immediately after the occurrence have also corroborated the P.Ws. 2 and 3 that they heard of the overt acts of both the condemned prisoners Aklima Hossain @ Lipi Begum and Abu Sayeed @ Sayeed in committing the murder of the deceased and there was nothing to disbelieve their such evidence.

First Information Report is not a piece of substantive evidence but may be used for corroborating and or contradicting the maker only. Attention of the P.Ws. 2 and 3 having not been drawn under Section 145 of the Evidence Act (Act I of 1872) to their such omission regarding the condemned-prisoner Abu Sayeed in cross-examination, the defence could take advantage of the contradiction by omission. Even otherwise we think this omission in the F.I.R. as to the condemned-prisoner Sayeed does not materially affect the prosecution case having regard to the other evidence in the point, as we have already referred to above. This view of ours finds support in the decision in the case of Dipok Kumar Sarker Vs. the State reported in 1988 B.L.D. (AD) 109.

On careful consideration of the evidence and materials on record we hold that the prosecution had satisfactorily proved by adducing sufficient legal evidence, attending circumstances and materials on record that the condemned prisoners Aklima Hossain @ Lipi Begum and Abu Sayeed had extramarital relation between them and with a view to maintain their such relation uninterruptedly they alongwith others, in furtherance of their common intention of all, committed the murder of the deceased Billal and both the condemned

prisoners have rightly been found guilty and as such convicted by the learned Special Sessions Judge under section 302/34 of the Penal Code.

As regards the sentence passed against the condemned prisoners Aklima Hossain @ Lipi Begum and Abu Sayeed @ Sayeed, the learned Advocate appearing for them prayed for commutation of their sentence on ground of long delay in disposal of the Death Reference and other attending circumstances.

Let us now consider as to whether there are extenuating circumstances for commutation of the sentence of death of the condemned prisoners. It appears that both the condemned prisoners Aklima Hossain @ Lipi Begum and Abu Sayeed @ Sayeed have been languishing in the condemned cell of the Jail custody since the date of order of conviction and sentence passed on 4.10.2005 with much agony and anxiety. More over from the date of making the Death Reference by the trial Court below on 05.10.2005, about 6 ½ years have already elapsed, not due to any laches of the condemned prisoners in making the Death Reference and the appeals ready for disposal as a result of which also the condemned prisoners have undergone the mental agony and anxieties of gallows around their neck for a long period. Thus, on giving our careful consideration to the delay of disposal of the Death Reference and Appeals along with other factors as extenuating circumstances, we think that the ends of justice would be sufficiently met if we commute the sentence of death passed upon the condemned prisoners to imprisonment for life. Considering the circumstances mentioned, we are not inclined to set aside the conviction of the condemned prisoners Aklima Hossain @ Lipi Begum and Abu Sayeed @ Sayeed and at the same time we are also not inclined to accept the Reference of death sentence while confirming the conviction and hence we hereby commute the death sentence of both the aforesaid condemned prisoners to imprisonment for life.

Both the condemned prisoners Aklima Hossain @ Lipi Begum and Abu Sayeed @ Sayeed are entitled to get the benefit as provided under sub-section (1) of section 35 A of the Code of Criminal Procedure.

In the midst of hearing of this Death Reference Mr. A.M. Md. Azizul Haque, the learned Advocate appearing as State Defence Lawyer for the condemned prisoner Aklima Hossain @ Lipi Begum filed an application under section 540 of the Code of Criminal Procedure for re-examination of P.W.2 Nizamauddin Limon and P.W. 3 Shuhana Hoassain Smitha, both being minor kids of deceased Billal Hossain and the condemned prisoner Aklima Hossain @ Lipi Begum, on the ground that they made their statement before the Court out of fear and being tutored by his uncle, the informant-P.W.1 and as such they are required to be re-examined.

The learned Deputy Attorney-General opposing the application has submitted that the P.Ws. 2 and 3, though minors, had sufficient maturity of understanding at least to narrate the facts what they had witnessed during the alleged occurrence and after they being examined and cross-examined they could not be recalled for re-examination in relation to the omission and contradiction in their evidence and as such the application filed under section 540 of the Code of Criminal Procedure is liable to be rejected.

Admittedly, P.W.2 Limon and P.W.3 Shuhana Hossain Smitha son and daughter respectively of the deceased Billal Hossain were aged about 13 and 10 years respectively at the time when they made their statements before the Court

as eye witnesses of the alleged murder of the deceased. From the reading of the statements of P.W.2 Limon we find that at the time of occurrence he was a student of class VII and had got sufficient maturity of understanding and that he correctly explained the meaning what is called “Porokia prem” (Extra-marital love affair) and correctly explained the meaning thereof. During cross-examination by defence he has said that he stated what he saw in his own eyes and also stated as to why would he falsely depose against his mother. P.W. 3 Shuhana Hossain Smitha was aged about 10 years at that time and at the time of the alleged occurrence she saw her mother, the condemned-prisoner Aklima Hossain @ Lipi Begum entering into the room with a blood- stained Dao and keeping the same under the showcase and also saw removing the ‘cut out’ of the room and, accordingly those were recovered from those places. During cross-examination by defence, in reply to the defence suggestion, she stated that “Avgvi fivB `v`vi evox t`tk Gtm Pv`i w`tq Dj ½ evertK tXtK t`q | Avgvi AveYtK hLb gvti ZLb tKD t`tLwb, mZ` bq| Avg evBti AvnZ Ae`vq evertK t`wL | Avgvi evert Avg t`wLwb, Avcwb t`tLwb ? mvC` Avgvi wczvtK tgtitQ t`wLwQ | mZ` bq NUbv`tj H w`b H mgq mvC` wQj bv, Avcwb t`tLwb ?

From the manner of giving statements by the P.Ws. 2 and 3, as above, we are inclined to hold that both the P.Ws. 2 and 3, though being child, were intellectually developed enough to comprehend what they had seen and to give an intelligent account of it to the Court. In this regard we like to refer the decision in the case of Fazlul Haq Sikder Vs. The State reported in 15 B.L.D. (1995) (HCD)365 which reads thus,

“ The law requires that before examining a child of tender age as a witness the Court should satisfy itself that the child is intellectually developed enough to comprehend what he has seen and to give an intelligent account of it to the Court. If the Court finds otherwise, it should decline to examine him as a witness . On the other hand, if the child is sufficiently intelligent to understand the questions put to him and he is capable to giving rational answers to those questions, then his capacity to give evidence is on the same footing as that of any other adult witness”.

Besides, recalling witness for re-examination in relation to omission and contradictions in the evidence of other P.Ws. is not permissible in law. The prosecution witnesses (P.Ws. 2 and 3), in the instant case, who have already been examined and cross-examined having sufficient maturity of understanding to give an intelligent account of the facts what they have seen, though they being child, can not be recalled for re-examination in relation to the omission and contradictions in the evidence of other P.Ws. as provided under Section 540 of the Code of Criminal Procedure. This view of ours finds support from the decision in the case of Rana Das Vs The State reported in 12 M.L.R. (HCD) 199 .

In view of the above, the application filed under Section 540 of the Code of Criminal Procedure, being not maintainable at this stage, is rejected.

For the reasons stated above we reject the Death Reference No. 152 of 2005 and also dismiss the Criminal Appeal Nos. 4223 of 2005 and 5094 of 2005 and the Jail Appeal Nos. 1178 of 2005 and 1179 of 2005 of the condemned-prisoners with modification of sentence of both the condemned-prisoners from death to imprisonment for life and in default to payment of fine as awarded by

the trial Court below, both the aforesaid condemned prisoners are to suffer rigorous imprisonment for two years more each.

Send down the Lower Court Records with a copy of this judgment and order to the Court below at once for information and necessary action.

MD. EMDADUL HAQUE AZAD,J:

I agree.