

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

**Present:**

**Mr. Justice Jahangir Hossain**

**And**

**Mr. Justice Md. Jahangir Hossain**

**Death Reference No. 68 of 2010**

The State

.....for the State

**-Versus-**

Zakir Hossain and another

.....**Condemned-Prisoners**

Ms. Momtaz Begum, Advocate

.....for the State Defence Lawyer

**with**

**Criminal Appeal No. 3127 of 2015**

**(arising out of Jail Appeal No. 342 of 2010)**

Anu Miah

**-Versus-**

The State

Mr. Syed Mahmudul Ahsan with

Mr. Nitya Gopal Debnath and

Mr. Pannu Khan, Advocates

.....for the appellant

**with**

**Jail Appeal No. 341 of 2010**

Zakir Hossain

**-Versus-**

The State

Mr. Zahirul Haque Zahir, D.A.G with

Mr. Abdur Rokib [Montu], A.A.G and

Mr. Md. Atiqul Haque [Selim], A.A.G

.....for the State

Heard on: 10.05.2016, 11.05.2016, 15.05.2016, 17.05.2016, 22.05.2016, 25.05.2016 and 29.05.2016

**Judgment on: 07.06.2016 and 08.06.2016**

**Jahangir Hossain, J**

This Death Reference under section 374 of the Code of Criminal Procedure [hereinafter referred to as Cr.P.C], has been made by the learned Sessions Judge, Comilla for confirmation of the death sentences imposed upon condemned prisoners namely Zakir Hossain and Md. Anu @ Onu Miah after finding them guilty of the offence punishable under sections 302/201/34 of the Penal Code. The Criminal Appeal No. 3127 of 2015 has been arisen out of Jail Appeal No. 342 of 2010 preferred by condemned prisoner Md. Anu @ Onu Miah and Jail Appeal No. 341 of 2010 presented by condemned prisoner Zakir Hossain, are

also directed against the same order of conviction and sentence dated 04.11.2010 passed in Sessions Case No. 18 of 2006 arising out of Murad Nagor Police Station Case No. 06 dated 16.09.2004 corresponding to G.R. Case No. 139 of 2004.

We have heard the aforesaid Death Reference and Criminal Appeal along with Jail Appeals together and are also being disposed of by this common judgment.

Relevant facts for disposal of this Death Reference and the Criminal Appeals may be briefly narrated as under,

One Md. Joynal Abedin being informant lodged First Information Report at Murad Nagor Police Station, Comilla on 16.09.2004 alleging, inter alia that his son Marfot Ali used to run a furniture shop at Panchkitta Bazar under Murad Nagor Police Station. His son's

shop was adjacent to the mike servicing shop of accused Abul Kashem. Marfot Ali used to deposit income of his business with accused Abul Kashem entrusting him as nearest ones.

On 08.09.2004 the victim Marfot Ali had a plan to go to his village home with Tk-30,000/- [thirty thousand] deposited earlier with accused Abul Kashem. But he did not go home on that day. Having taken sometimes in awaiting the informant contacted over mobile phone with accused Abul Kashem, the owner of a mike servicing shop, attached to his son's shop. Responding to a query regarding whereabouts of his son, Abul Kashem informed him that on 08.09.2004 Marfot Ali had left for his village home from his shop with Tk-30,000/- [thirty thousand] along with his employee accused Zakir Hossain by a boat up to Bhairab. On hearing such intimation, the informant

started searching for his son at different possible places of their relatives. Being failed to trace out Marfot Ali, he along with his relatives namely Joydur Ali, Shaidur and Dulal Miah went to the shop of Marfot Ali at Panchkitta Bazar on 16.09.2004 at 12:30 pm and informed the incident of missing of Marfot Ali to the police. Accordingly, police came to Panchkitta Bazar and apprehended accused Zakir Hossain, Abul Kashem and Anu Miah, who in presence of the local people confessed that on 08.09.2004 at 09:00 am victim Marfot Ali along with accused Zakir and Anu Miah left Panchkitta Bazar for Bhairob by a hired boat of accused Montu.

But pursuant to a pre-plan to kill Marfot Ali for taking his money away, they instead of going to Bhairob directly started roaming throughout the day at Kamaller Beel and around 05:00 pm they murdered

Marfot Ali by slaughtering taking his all money away and dumped his dead body for concealing evidence under water-hyacinth near the Kamalla graveyard under Murad Nagor Police Station. On the same day police recovered the dead body of Marfot Ali with cut throat injury from the Beel to the south-east corner of Kamaller graveyard at the showing of the aforesaid three accused persons long after nine days of his murder.

Consequently, Murad Nagor Police Station Case No. 06 dated 16.09.2004 was started against accused Abul Kashem, Zakir Hossain, Md. Anu Miah and Montu Miah under sections 302/201/34 of the Penal Code. Having received the case, sub-inspector Abdus Samad visited the place of occurrence held inquest report, seized alat and prepared sketch map with index and

sent the dead body to Comilla Medical College Hospital for an autopsy.

During investigation of the case, he recorded statements of the witnesses after examining them under section 161 of the Cr.P.C and arranged to produce two accused persons before the magistrate concerned to record their confessional statements under section 164 of the Cr.P.C as they agreed to confess voluntarily. He also arranged to place two witnesses for recording their statements by the magistrate under section 164 of the Cr.P.C and recovered some of the plundered money amounting to Tk-15,350/- out of Tk-21,300/- taken away by the accused persons from the victim Marfot Ali at the time of killing him and held seizure lists on it separately and collected post-mortem examination report.

After conclusion of investigation, he submitted police report being charge sheet No. 136 dated 11.11.2004 against four accused persons under sections 302/201/109 of the Penal Code. On receiving the records of the case learned Sessions Judge, Comilla appointed a State Defence Lawyer for absconding accused Montu by order dated 09.03.2006 and indicted four accused persons under sections 302/201/34 of the Penal Code and the same was read over and explained to them present on dock but they present on dock, pleaded not guilty thereto and claimed to be tried as per law of the land.

On closure of the prosecution evidence, the accused persons present in the court, were examined under section 342 of the Cr.P.C placing incriminating evidence to their notices and consequences thereto were explained to them. The accused persons present



in the court pleaded their innocence, non-complicity once again and declined to adduce any evidence in their favour through defence witness. But accused Zakir Hossain defended him by a written statement depicting that he took part in the death of the victim under compelling circumstances. He had no willingness in the commission of the offence. He was involved in it just to save his life, nothing more.

The defence plea as it could be gathered from the trend of cross-examination that the dead body of the victim was not recovered at the showing of the accused persons and they did not admit the incident rather they are quite innocent, having been implicated in this case out of oblique motives by false evidence. Having considered the facts and circumstances and the evidence on record, the learned Sessions Judge of Comilla found the accused Zakir Hossain and Anu Miah

guilty of the offence and sentenced them to death while acquitted two other accused namely Abul Kashem and Montu Miah.

Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence dated 04.11.2010 passed by the learned Sessions Judge, the two condemned prisoners preferred jail appeals as stated above. But neither the prosecution nor the informant party took any steps to file appeal against the order of acquittal.

From the evidence adduced by the 12 [twelve] prosecution live witnesses it has revealed that pw-01 Md. Joynal Abedin is the father of deceased Marfot Ali and also the informant of the case. Pw-02 Joydur Ali and pw-03 Shahidullah both are relatives of the informant and the victim as well. Pw-04 Dulal Miah, pw-07 Khitish and pw-10 Abdur Rouf have been

tendered by the prosecution. Pw-05 Mohorom Ali, pw-06 Abdur Rahman, pw-08 Tamiz Uddin and pw-09 Md. Mongal Miah, who have been examined, are inhabitants of locality of the accused persons while pw-11, sub-inspector Md. Abdus Samad is the investigating officer of the case and pw-12 Shafiqul Azim is a magistrate who recorded confessions of both the condemned prisoners.

Upon a careful scrutiny of the entire evidence, it is found first to the effect that victim Marfot Ali, a man of Narshingdi district, used to run a furniture shop at Panchkitta Bazar under Muradnagar Police Station, Comilla. Pw-01 stated in his deposition and also FIR that his son used to run a furniture shop rented from pw-08 at Panchkitta Bazar. Pw-02 also corroborated about the business of the victim by saying that he was victim's partner. He used to purchase wood from the

locality and send the same to Marfot Ali at Panchkitta Bazar. So, it is proved by evidence that the victim was at Panchkitta Bazar with his business before his killing incident took place. Even then, defence did not raise voice on cross-examination against such evidence that victim Marfot Ali was not doing any business like furniture shop at Panchkitta Bazar. During his business at the Bazar he got acquainted with accused Abul Kashem, a man of Comilla district, who had a mike servicing beside the shop of the victim [by the side of victim's shop]. Having entrusted he used to deposit the income money of his business with accused Abul Kashem. In course of cross-examination pw-01 responded that when his son used to go to village home, he took money from accused Abul Kashem deposited earlier by him. Before incident took place Abul Kashem did not misappropriate any money of his

son but he hired the boat on the day of occurrence. Such evidence as disclosed by pw-01 has emerged that the victim had a connection with accused Abul Kashem for the purpose of financial transaction and entrustment.

From the FIR and evidence of pw-01 it is found that victim Marfot Ali was supposed to go home on 08.09.2004. As he did not go to his village home under Narsingdi district by the expected day, pw-01 having waited for him till 12.09.2004 contacted over mobile phone with Kashem who informed regarding whereabouts of his son Marfot Ali that he left the shop for his village home on 08.09.2004 taking deposited money Tk-30,000/- [thirty thousand] from him, with his employee accused Zakir Hossain who went with Marfot Ali by a boat up to Bhairab. Upon hearing such information from accused Abul Kashem, pw-01 along

with his other relatives started searching but could not trace him out. Thereafter, on 16.09.2004 he along with pws-2-4 having rushed to Panchkitta Bazar held Zakir, an employee of accused Abul Kashem, and saw Zakir responding abnormally on query regarding whereabouts of his son Marfot Ali. Then they informed the missing incident of Marfot Ali to the police who arrested accused Abul Kashem, Zakir Hossain and Anu Miah on the same day.

In presence of pws-1-4 and many others apprehending accused made confessions to the effect that on 08.09.2004 at 09:00 am Kashem hired a boat from Montu for Marfot Ali towards Naogaon and Zakir was sent with him. On their way Anu was picked up. According to their plan, they roamed in the Kamaller Beel with the boat throughout the day and around 05:00 pm they tied the hands and legs of

Marfot Ali by his shirt and killed him by throttling and in order to conceal the evidence they dumped the dead body of Marfot Ali under water-hyacinth of the Beel near the Kamalla graveyard. Marfot Ali's dead body was recovered by pw-11 along with his team from the Beel to the south-east corner of Kamalla graveyard at the showing of the apprehending accused persons. Pw-11 instantly held the inquest report [exhibit-03] of the dead body on the spot around 16:15 hours on 16.09.2004 where none defied that it was not the dead body of Marfot Ali.

Even so, it is evident by pw-11 that dead body was decomposed due to eight days long stay in the water-hyacinth and wearing apparels of the victim were also seized. Seizure list of wearing apparels and inquest report are being also proved by public witnesses, particularly pws-03 and 05. During

investigation of the case, pw.11 recovered some plundered money of victim Marfot amounting to Tk-15,300/- in total, of which Tk. 4500 from accused Zakir Hossain, Tk. 1,150/ from Anu Miah and Tk-9,700/ from accused Abul Kashem.

Pw-02 is not only a relative of the victim but also a business partner who testified by corroborating the evidence of pw-01 that he along with pw-01, the father of victim Marfot Ali, and pw-03 went to Panchkitta Bazar in order to find Marfot Ali on 16.09.2004 after Marfot being untraced. On query Zakir was seen giving imbalance information. Getting information from the informant, police came and arrested Kashem, Zakir and Montu who told them during interrogation that Marfot Ali was killed by slitting throat and threw his dead body in the water-hyacinth at the southern-side of Kamalla graveyard. They also



disclosed that they did it as per plan of Abul Kashem. In their presence dead body of Marfot Ali was recovered from beneath water-hyacinth attached to the south-east corner of Kamalla graveyard at the showing of the accused persons.

On cross-examination this witness confirmed in reply that Zakir and Anu informed that they concealed slit throat dead body of Marfot Ali under water-hyacinth and the same was recovered as pointed out by accused Anu, Zakir and Kashem. This witness denied the defence suggestions that dead body was not recovered as pointed out by the accused. It appears from the evidence of pw-03 that he testified by narrating similar scenario as given by pw-2. Nothing is found present in the evidence to differentiate with the evidence of pws-01, 02, 03 and 11. Even then, it is not found in the given evidence that there was ongoing

dispute between the parties concerned, and that brought the outcome of implication and falsification against them being perpetrators in this case. Pws-05-06 and 08-09 who hailed from the same locality of the accused persons, corroborated the evidence of pws-01-03 deposing that on interrogation Zakir and Anu confessed on 16.09.2004 before them and many others that they along with Montu slaughtered Marfot Ali on 08.09.2004 at 05:00 pm taking money from him away and dumped his dead body under water-hyacinth at Kamallar Beel near the Kamaller graveyard, where from the dead body was recovered in their presence as pointed out by accused persons. The evidence of those pws appears to be unimpeachable and the defence declined to cross-examine them on their given evidence. From the evidence referred to above, after being scrutinized it is proved that extra judicial

confession given by accused Zakir and Anu implicating themselves along with accused Montu in the murder of victim Marfot Ali are being uncontroverted and hence, it seems to be trustworthy.

Mr. Syed Mahmudul Ashan, learned Advocate referring to PLD 1962 Dhaka, 261 pointed out that joint statements of more than one person in police custody leading to recovery is not indicated who made first discovery. Such pointing is not useable against either of the accused. On perusal of the said decision referred by the learned Advocate, it finds that in that case subject matter was stolen article, recovered at the showing of two accused being arrested by police, not likewise a human body. In the present case the dead body of Marfot Ali was recovered at the showing of the apprehending accused persons in presence of the witnesses who deposed that apprehending accused

confessed before them, where the dead body of Marfot Ali was kept after murder. This evidence was not denied by the defence in course of cross-examination. Even so, it was not denied by defence that victim Marfot Ali's dead body was not at all recovered, it might have been unknown person's dead body. So the argument advanced by the learned Advocate on this point is not considered in this manner. According to section 27 of the Evidence Act, the information, received by the witnesses from the accused persons during police custody as it relates distinctly to the fact for discovery of the dead body has been found to be proved.

In this case it is evident that on 17.09.2004 doctor Dilroba Hasan, Lecturer, Forensic Medicine, Comilla Medical College performed autopsy on the dead body of deceased Marfot Ali the following day of its

recovery. She found cut throat injury and two stab wounds in the right knee and penis of the dead body. Both hands liquated on his back with a shirt. In findings she opined that death of the victim Marfot Ali was due to shock and hemorrhage only to above mentioned injuries which were anti-mortem and homicidal in nature. It is also evident that each and every prosecution witness narrated that the victim was killed by slaughtering [cut] throat. Confessing accused also admitted this guilt before the witnesses including pw-12 that they killed the victim by slitting throat, so the post-mortem examination report being corroborative evidence supported by all other evidence of prosecution witnesses. But autopsy performing doctor has not been examined in this case. At this stage we are to see whether this report is being admissible as corroborative evidence without examining the doctor. It appears from

documents on record that Trial Judge repeatedly issued summons, warrant of arrest even then non-bail able warrant of arrest to the autopsy performing doctor. Lastly it was reported that she went abroad. Section 509A of the Cr.P.C stipulates that “when in any inquiry, trial or other proceeding under this code the report of a post-mortem examination is required to be used as evidence, and the civil surgeon or other medical officer who made the report is dead or is incapable of giving evidence or is beyond the limits of Bangladesh and his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such report may be used as evidence.”

As per this provision of law, there has been no barrier to accept autopsy report as corroborative evidence as stated above in this case.

Let us examine the confessional statements of two accused Anu Miah and Zakir Hossain as to whether both the statements were recorded in accordance with law and whether those were seemed to be true, voluntary and inculpatory in nature. It appears from documents on record that police apprehended both the accused persons on 16.09.2004 from Pauchkitta Bazar and immediately after arrest they felt to confess about their commission of offence. Accordingly, they were produced before the magistrate concerned on 18.09.2004.

Accused Anu Miah made a confessional statement before the magistrate stating that Zakir and Montu knew about the money of Tk-30,000/- deposited by Marfot Ali with Kashem. He along with Montu, Zakir and Marfot roamed throughout the day in the Beel by a boat despite towards Noagoan and he tied legs and

Zakir hands of Marfot Ali at the evening hour. Montu Miah killed Marfot Ali by cutting throat with knife. Prior to killing him, Montu took away money amounting to Tk-21,300/- from half-pant under lungi of Marfot Ali. From that amount of money, Zakir received Tk-6,300/-, Montu Tk-8000/- while he got a share of Tk-7000/-. He made an attempt to slit the throat of Marfot Ali but it was cut little. Thereafter, Montu taking knife from his hand, killed Marfot Ali holding hair by cutting throat and threw him in the water. Then he came back home with the boat.

From the said vivid description of the occurrence according to confession, Zakir and Montu knew about the money amounting to Tk-30,000/- deposited by Marfot Ali with Kashem. According to their plan, they spent throughout the day by roaming the boat in the Beel despite towards Noagoan. He tied legs of the



victim while Zakir hands. Montu killed Marfot Ali by cutting throat with knife. Prior to killing, Montu took money away from the victim at Tk-21,300/- of which he received a share of Tk-7000/-. A little cut was made by him in the throat of Marfot Ali but final execution was made by Montu with the knife taking from him.

Accused Zakir Hossain narrated in his confessional statement that his sister phoned him from Kishoregonj on Monday. He informed Dakat Kashem that he had to go to Kishoregonj as his sister phoned him. Kashem used to keep money deposited by Marfot Ali who also decided to go with him up to Bhoirab. He told that he had to go today on an emergency basis. Then Kashem told them to go together. He came back to Bazar from home in order to go to Kishoregonj on Wednesday. Kashem helped them to ride on the boat and oarsman

took another person named Anu Miah in the boat after going little far on their way. The boat roamed throughout the day in the Beel by them.

Responding to a query by him about roaming the boat, Anu Miah threatened him with abusive language not to make sound. Evening came while boat was roaming. Anu and oarsman-Montu set in front of the boat telling him to hold oar. Anu then took seat beside Marfot Ali. Anu Miah pressed his both hands around the neck of Marfot Ali while Montu laid down him by giving pressure on his foot. Anu tied his both legs with gamcha [napkin]. He asked them not to kill Marfot, and then Anu held knife on his throat using filthy language to stop talking and asked him to hold hands of Marfot by giving pressure on him, if he wanted to survive. Then he held Marfot hands on pressure. Montu plunged Marfot into the water from boat after being tied

his hands with rope. Anu dealt a knife blow in the throat holding hair of Marfot, taking knife promptly from the hand of Anu, Montu slaughtered Marfot.

Prior to this, Anu took money away from half-pant under lungi of Marfot after being tied hands and legs and he told Montu that he got Tk-21,000/-. Anu and Montu gave him death threat not to tell anybody in this regard. They gave him Tk-6,200/- for not disclosing the same. They would throw him into the water if not wanted to take money they offered. In fear he received the money and for eight days he could not eat anything after returning home at night. He said the incident to the men of Marfot Ali after eight days. He mentioned names of Kashem, Anu and Montu before the locals after arrest. They [accused] were taken to police station after being apprehended by

police. Anu used to deposit everything with Kashem after stealing and heist.

It appears from his confession that he tried to make a plea stating that he was not in the plan or premeditation for the killing of the victim. He just accompanied the victim as advised by his employer Abul Kashem. When he could realize that the boat was not going to towards its destination rather roaming in the Kamallar Beel he came under life threat as he asked Anu and Montu about the boat roaming in the Beel unnecessarily. But subsequently, he had to play a role in holding the hands of the victim at a point of death threat. He also received a share of Tk-6,200/- under threat, he could not even eat anything for eight days.

It appears from his confession that he tried to prevent him from the commission of offence as if he

did nothing with the co-perpetrators but it is found in evidence that the money he received of which Tk-1700/- was deposited with accused Abul Kashem and the remaining money he gave someone as loan. If he had no previous knowledge or was not in the plan to kill the victim taking away his money he could have sufficient scope to disclose such heinous incident to the police or to the locals immediately after the incident. But he did not do so. Rather he joined his work-place at the shop of accused Abul Kashem soon after the incident. So his involvement in the killing of the victim is found present clearly. He cannot escape himself from the commission of offence because he himself took part by holding hands of the victim. His defensive plea can be taken into consideration if he took any step to disclose the matter even then to his nearest ones or local persons. There has been no threat to be used

on him by mobs or locals as the victim was not an inhabitant of his locality.

Even then, when the incident came out on 16.09.2004 before the locals and the informant party, he [accused] could have scope to disclose that he under compelling circumstances took part in the killing of the victim. Rather he made extra-judicial confession saying that he along with Montu and Anu killed the victim by cutting throat with a knife and he is one of them who pointed out the dead body of Marfot Ali at the place where they dumped the same. He has also narrated in his confession how the victim was killed by them. Exactly, similar version has been given by confessing accused Anu Miah. So, the nature of killing by them is not contradictory to each other and he made such confession involving himself in the killing of the victim. Therefore, there is no scope to disbelieve

his confession that he did not willingly participate in the killing of the victim.

From both the confessional statements it transpires that there has been no different information or conduct made by them in the murder of the victim. Both of them have given similar statements as to the commission of offence involving them there under. In that view of the fact, it can be envisaged that these two confessional statements are found to be true, voluntary and inculpatory in nature as the condemned prisoners made the confessional statements soon after their apprehension. It can be safely said that there was no pressure on them to make such confessions before the magistrate and they made those confessions at their own will. Pw-12 is a First Class Magistrate who recorded the confessional statements of both the condemned prisoners on 18.09.2004. He has testified

that he recorded their confessions complying with all provisions of law under sections 164/364 of the Cr.P.C and the condemned prisoners willingly confessed before him. The confession of Anu Miah is marked as exhibit-07 on which he has four signatures, marked as exhibits-07/01 series and confession of Zakir is marked as exhibit-08 on which he has also four signatures, marked as exhibit- 08/01 series.

In course of cross-examination he replied that he did not see the face of both the condemned prisoners cloudy of fearing any threat after recording their statements. Rather they willingly made confessions feeling their guilty conduct. It appears from both the confessional statements that pw-12 had given 03:00 hour reflection time before recording their confessional statements and he also alerted both of them by saying that they were not bound to confess and if they did



so, it might be used in evidence against them. The confessions given by them do not show any kind of irregularities made by the recording magistrate. Both the accused did not place any kind of complaint of police torture before him and they came under any threat to confess beyond their will. Even then, recording magistrate gave them sufficient reflection time to think that if they confess it would go against them as evidence.

Therefore, it can be firmly said that the confessional statements given by them are absolutely voluntary and true. It finds support from the decision in the case of Islam Uddin-Vs- State, reported in 13 BLC [AD] 81 which is run as follows:

***“It is now the settled principle of law that judicial confession if it is found to be true and voluntary can form the***

*sole basis of conviction as against the maker of the same. The High Court Division has rightly found the judicial confession of the condemned prisoner true and voluntary and considering the same, the extra judicial confession and, circumstances of the case, found the condemned prisoner guilty and accordingly imposed the sentence of death upon him.”*

It has revealed from the evidence on record that at the time of examination under section 342 of the Cr.P.C condemned-prisoner Zakir Hossain placed a written statement stating that he took part in the killing of the victim under compelling circumstances and he was not aware of the pre-plan or premeditation taken by other co-perpetrators to kill the victim. It appears

from documents on record that the condemned prisoner Zakir Hossain did not make any complaints of threat or pressure given by his cohorts to the recording Magistrate. But after a long while he made complaint before the trial court that he had no any intention or pre-plan or premeditation to kill the victim. We have given our anxious thought over the matter having discussed earlier. It is our considered view that he made an attempt only to save him from the persistent of the offence committed by him. At the same time it is constrained to hold that both the confessional statements made by the condemned prisoners are found true, voluntary and inculpatory. In that case there is no alternative but to find them guilty of the offence.

It also finds support from the decision in the case of Bokul Chandra Sarker-Vs- the State, reported in 45 DLR, 260 where it has been held that,

***“If a statement recorded under this section is true and voluntary, the same alone is sufficient for convicting the confessing accused.”***

It is also supported relying upon the decision in the case of Joygun Bibi Vs. State 12 DLR (SC) 151 and the case of Moqbul Hossain Vs. The State 12 DLR (SC) 217 as under,

***“The retraction of a confession was a circumstance which had no bearing whatsoever upon the question whether in the first instance it was voluntarily made, and whether it was true. The fact that the maker of the confession later does not adhere to it cannot by itself have any effect upon the findings reached as to whether the***

*confession was voluntary, and if so, whether it was true. The retraction of a confession was wholly immaterial once it was found that it was voluntary as well as true.”*

In a number of cases, motive or object behind the killing is not being detected directly. In the case in hand it is found that the victim was killed only because of some money deposited with accused Abul Kashem. It appears from evidence of the witnesses that the money the accused took away from the victim at the time of killing, of which some had been recovered from accused Abul Kashem, Zakir Hossain and Anu Miah. So, it is crystal clear in this case that in order to snatch money away from the victim and to conceal evidence they killed him and dumped his dead body in the water hyacinth. So, we find clear object and motive

for the killing of the victim. Though the prosecution is not always bound to offer or prove the motive of the crime. But if it is proved, it makes the prosecution case stronger.

It may rely upon the decision in the case of Abdur Rashed -Vs- The State, reported in 27 DLR (AD) 1 where it was opined that,

***“.....The motive for the murder was not at all substantiated. It may, however, be said that the prosecution is not bound to offer any motive. If, however, any motive, is offered, the court may consider it but failure to prove motive does not necessarily affect the prosecution case if it is proved on evidence.....”***

The contention of learned Advocate for the condemned prisoner Anu Miah is that none of the persons of Panchkitta Bazar was examined by the prosecution in this case. In reply to this contention, it can be said that pws-05, 06 and 08 all of them are the inhabitants of the locality of accused persons. They were produced by the prosecution and they gave evidence implicating both the condemned prisoners in the killing of the victim. So, in that view of the fact, we do not agree with the contention of learned defence lawyer. The contention of Ms. Momtaz Begum, learned Advocate for the condemned prisoner Zakir Hossain is that there is no ocular evidence against Zakir Hossain that he took part in the killing mission. We have already earlier discussed about the participation of condemned prisoner Zakir Hossain. As per evidence of pws-01, 02, 03, 05, 06 and 08, it has emerged that

he [Zakir Hossain] was apprehended first as suspect and he disclosed the incident how it had happened. Nevertheless, he is one of the accused persons who pointed out the dead body of the victim recovered by police from the Kamaller Beel under water-hyacinth on 16.08.2004. More so, he made a confessional statement before pw-12 in which he admitted that he took part in holding the hands of the victim at the time of killing. So, there is no need to get the evidence directly through the ocular witness to prove the case. Apart from true, voluntary and inculpatory confessions, circumstantial evidence is enough to form a basis of conviction on the perpetrators who killed the victim. Because, a human being can tell a lie but circumstance can't.

In the case in hand, we find that both the condemned prisoners gave extra-judicial confession



before the witnesses including pws-01, 02, 03, 05 and 11 directly at Panchkitta Bazar that they along with absconding accused Montu killed the victim by cutting throat with knife. At their pointing the money snatched by them from the victim and his dead body had been recovered from the Kamaller Beel under the water-hyacinth attached to Kamalla graveyard. At the same time, we find true and voluntary and inculpatory confessional statements of both the condemned prisoners. Having analyzed and assessed both the evidence and confessional statements it finds concrete corroboration by each other without any iota of doubt on it. We also find chain of circumstances in the given evidence of the prosecution witnesses and confessional statements made by both the condemned prisoners in the case. Relying upon those material particulars it can form a basis of conviction. In this regard, the case of

Islam Uddin –Vs– The State, reported in 13 BLC [AD] 81 can also be relied upon saying that an extra judicial confession along with circumstantial evidence find the condemned prisoners guilty of the offence committed by them.

It has also been held in the case of Nausher Ali Sarder –Vs– State, reported in 39 DLR [AD] (1987) 194 which is run as follows,

***“The attending circumstances are heavily against the accused Nausher. He had no enmity with Elias; he hailed from a different village and had no business to have been present near the scene of the crime when he was caught by persons who also did not know him before. He ran through water after being chased, as deposed by P.W.03 Ayub Ali.***

*His shirt and lungi were wet when he was caught and these two items were seized by the Investigating Officer, P.W.25; he could not explain why he was there at such an hour on his behalf a suggestion was put to Toyeb Ali that he was known to Toyeb Ali and opposed Toyeb's attempt to abduct the daughter of one Mazer Sheikh and thereby incurred his enmity. He denied the suggestion. These facts and circumstances provide strong support to the confessional statements. These confessions have been rightly considered as against the co-accused also, under section 30, Evidence Act. We therefore find that the conviction of*

***these three appellants has been based on strong evidence and that the High Court Division rightly confirmed their conviction for murder.”***

It appears from evidence of pws-01, 02, 03, 05, 06 and 08 that accused Abul Kashem was apprehended along with two confessing accused and all of them pointed out the dead body of the victim recovered by police and the confessing accused in their confessions mentioned the names of accused Abul Kashem and Montu. Accused Abul Kashem was involved in the plan for killing of the victim. They further disclosed that accused Montu finally executed the victim with the knife taking from the hand of condemned prisoner Anu. The same information they disclosed before the aforesaid examined witnesses in the same manner as stated in their confessional

statements but the learned Trial Judge failed to consider the same in holding decision to find them guilty of the offence and accordingly, passed an order of acquittal favoring accused Abul Kashem and Montu Miah by citing some decisions of the Higher Courts.

We do not find any reason why they have been acquitted. It also appears from documents on record that against such order of acquittal, no appeal was preferred by the prosecution, whereas it has been proved by the evidence that the accused Montu played a significant role in the killing of the victim. On query we have come to know from the learned Deputy Attorney General that no appeal was presented against such acquittal order. We have gone through the contents of sections 423 and 439 of the Cr.P.C, wherefrom it reveals that there is no scope to take any step against such order of acquittal unless the petition

of appeal is preferred by the prosecution or the informant party and the order of retrial or remand will not be justified at this stage because in the meantime, many years have elapsed. In that view of the fact, we are undone to make any justice in favour of the victim with regard to the acquittal order.

However, we have carefully scrutinized the evidence on record and confessional statements of condemned prisoners wherefrom it finds that the accused persons killed the victim by cutting throat with knife in a pre-planned manner which has also been supported by post-mortem report [exhibit-09] and inquest report [exhibit-03]. Having considered all the facts and circumstances and evidence of live witnesses and other materials on records, we are constrained to hold that the prosecution has been able to prove the case

beyond all reasonable doubt under sections 302/34 of the Penal Code.

On the part of a judge it is most difficult assignment to impose sentence upon the persons concerned if the allegation is proved beyond reasonable doubt. Two types of factor may assist forming the sentence upon the perpetrators depending on the gravity of the offence and mitigating circumstances but it is to be borne in mind that the object of the legislature should not be frustrated in doing so. So that crime does not go unpunished and the society as the satisfaction that proper justice has been done and court has responded to the crime and expectation of the society but it must be done within the ambit of law as described in the section itself.

It has emerged from the evidence on record that accused Montu played a vital role in the killing of the

victim but he has been acquitted from the charge leveled against him by the trial court. It appears further from record that these two condemned prisoners were apprehended on 16.09.2004 since then they were in Jail custody in the normal cell till delivery of the verdict dated 04.11.2010 and they are now in condemned cell from 04.11.2010.

It also appears from record that at the time of examination of accused Anu under section 342 of the Cr.P.C, his age was shown as 58 years and the age of the accused Zakir was shown as 24 years. Apparently it is found that Zakir is too younger than accused Anu. At the same time, Anu is found to be older one. It is also found that both the condemned prisoners have suffered long pangs of the death in the condemned cell for about six years. Long suffering in the condemned cell may sometimes considers the



punishment to be commuted depending on the facts and circumstances of a particular case as our Apex Court opined giving emphasis on it. It finds support from the decision in the case of Manik -Vs- the State, reported in 35 BLD [AD] 63.

Having considered the long suffering in normal cell before concluding trial and around six years' suffering in condemned cell, and the age of the condemned prisoners and the gravity of the offence meant their roles at the time of committing the offence and the facts and circumstances of the case, we find substance in the contentions of learned Advocate that leads to exonerate them from the painful event like hanging. Considering all the aspects and gravity of the crime committed by the condemned prisoners, justice will be met if they are sentenced to one of imprisonment for life. Accordingly, they stands sentence to imprisonment

for life with a fine of Tk-10,000/- each, in default of payment of fine, they have to undergo rigorous imprisonment for 1[one] year more.

It appears from impugned judgment that the trial court also found the condemned prisoners guilty of the offence under section 201 of the Penal Code but did not impose sentence separately upon them for proving section 201 of the Penal Code as death sentence has been given to them. It is our considered view that it was not the way of solution in restraining from awarding sentence upon them since the allegation of disappearance of evidence was proved by the prosecution beyond reasonable doubt. The trial court ought to have imposed penalty upon the perpetrators if they were found to be guilty of the offence under section 201 of the Penal Code. In the instant case it is proved by the prosecution evidence that the

condemned prisoners after killing the victim dumped his dead body under the water-hyacinth of the Beel nearby Kamaller graveyard.

As the condemned prisoners are also found guilty under section 201 of the Penal Code, they are sentenced to suffer rigorous imprisonment for a period of 03[Three] years and to pay a fine of Tk-5000/- each, in default, to suffer 03 months more.

However, both the sentences imposed by this court upon them, will run concurrently. And the sentences they have already suffered before and after trial will be deducted from the sentences imposed by this Court upon application of section 35A of the Cr.P.C.

In the result, the Death Reference is hereby rejected. The Criminal Appeal No. 3127 of 2015 arising out of Jail Appeal No. 342 of 2010 and Jail appeal

No.341 of 2010 are also dismissed with the aforesaid modification in the sentences.

At the end we intend to express our sincere appreciation to Mr. Zahirul Haque Zahir, learned Deputy Attorney General along with Mr. Md. Atiqul Haque, learned Assistant Attorney General and Mr. Syed Mahmudul Ahsan, the learned defence lawyer, for their lucid expression of law and also invaluable assistance to this Court.

Let a copy of this judgment and order along with lower court records be sent to the court concerned for information and necessary action at once.

The Jail Superintendent of Comilla is directed to shift the condemned prisoners from death cell to the common accommodation at once.

**Md. Jahangir Hossain, J**

I agree

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

**Present:**

**Mr. Justice Jahangir Hossain**

**And**

**Mr. Justice Md. Jahangir Hossain**

**Death Reference No. 68 of 2010**

The State

.....for the State

**-Versus-**

Zakir Hossain and another

.....**Condemned-Prisoners**

Ms. Momtaz Begum, Advocate

.....for the State Defence Lawyer

**with**

**Criminal Appeal No. 3127 of 2015**

**(arising out of Jail Appeal No. 342 of 2010)**

Anu Miah

**-Versus-**

The State

Mr. Syed Mahmudul Ahsan with

Mr. Nitya Gopal Debnath and

Mr. Pannu Khan, Advocates

.....for the appellant

**with**

**Jail Appeal No. 341 of 2010**

Zakir Hossain

**-Versus-**

The State

Mr. Zahirul Haque Zahir, D.A.G with

Mr. Abdur Rokib [Montu], A.A.G and

Mr. Md. Atiqul Haque [Selim], A.A.G

.....for the State

Heard on: 10.05.2016, 11.05.2016, 15.05.2016, 17.05.2016, 22.05.2016, 25.05.2016 and 29.05.2016

**Judgment on: 07.06.2016 and 08.06.2016**

**Jahangir Hossain, J**

This Death Reference under section 374 of the Code of Criminal Procedure [hereinafter referred to as Cr.P.C], has been made by the learned Sessions Judge, Comilla for confirmation of the death sentences imposed upon condemned prisoners namely Zakir Hossain and Md. Anu @ Onu Miah after finding them guilty of the offence punishable under sections 302/201/34 of the Penal Code. The Criminal Appeal No. 3127 of 2015 has been arisen out of Jail Appeal No. 342 of 2010 preferred by condemned prisoner Md. Anu @ Onu Miah and Jail Appeal No. 341 of 2010 presented by condemned prisoner Zakir Hossain, are

also directed against the same order of conviction and sentence dated 04.11.2010 passed in Sessions Case No. 18 of 2006 arising out of Murad Nagor Police Station Case No. 06 dated 16.09.2004 corresponding to G.R. Case No. 139 of 2004.

We have heard the aforesaid Death Reference and Criminal Appeal along with Jail Appeals together and are also being disposed of by this common judgment.

Relevant facts for disposal of this Death Reference and the Criminal Appeals may be briefly narrated as under,

One Md. Joynal Abedin being informant lodged First Information Report at Murad Nagor Police Station, Comilla on 16.09.2004 alleging, inter alia that his son Marfot Ali used to run a furniture shop at Panchkitta Bazar under Murad Nagor Police Station. His son's

shop was adjacent to the mike servicing shop of accused Abul Kashem. Marfot Ali used to deposit income of his business with accused Abul Kashem entrusting him as nearest ones.

On 08.09.2004 the victim Marfot Ali had a plan to go to his village home with Tk-30,000/- [thirty thousand] deposited earlier with accused Abul Kashem. But he did not go home on that day. Having taken sometimes in awaiting the informant contacted over mobile phone with accused Abul Kashem, the owner of a mike servicing shop, attached to his son's shop. Responding to a query regarding whereabouts of his son, Abul Kashem informed him that on 08.09.2004 Marfot Ali had left for his village home from his shop with Tk-30,000/- [thirty thousand] along with his employee accused Zakir Hossain by a boat up to Bhairab. On hearing such intimation, the informant



started searching for his son at different possible places of their relatives. Being failed to trace out Marfot Ali, he along with his relatives namely Joydur Ali, Shaidur and Dulal Miah went to the shop of Marfot Ali at Panchkitta Bazar on 16.09.2004 at 12:30 pm and informed the incident of missing of Marfot Ali to the police. Accordingly, police came to Panchkitta Bazar and apprehended accused Zakir Hossain, Abul Kashem and Anu Miah, who in presence of the local people confessed that on 08.09.2004 at 09:00 am victim Marfot Ali along with accused Zakir and Anu Miah left Panchkitta Bazar for Bhairob by a hired boat of accused Montu.

But pursuant to a pre-plan to kill Marfot Ali for taking his money away, they instead of going to Bhairob directly started roaming throughout the day at Kamaller Beel and around 05:00 pm they murdered

Marfot Ali by slaughtering taking his all money away and dumped his dead body for concealing evidence under water-hyacinth near the Kamalla graveyard under Murad Nagor Police Station. On the same day police recovered the dead body of Marfot Ali with cut throat injury from the Beel to the south-east corner of Kamaller graveyard at the showing of the aforesaid three accused persons long after nine days of his murder.

Consequently, Murad Nagor Police Station Case No. 06 dated 16.09.2004 was started against accused Abul Kashem, Zakir Hossain, Md. Anu Miah and Montu Miah under sections 302/201/34 of the Penal Code. Having received the case, sub-inspector Abdus Samad visited the place of occurrence held inquest report, seized alat and prepared sketch map with index and

sent the dead body to Comilla Medical College Hospital for an autopsy.

During investigation of the case, he recorded statements of the witnesses after examining them under section 161 of the Cr.P.C and arranged to produce two accused persons before the magistrate concerned to record their confessional statements under section 164 of the Cr.P.C as they agreed to confess voluntarily. He also arranged to place two witnesses for recording their statements by the magistrate under section 164 of the Cr.P.C and recovered some of the plundered money amounting to Tk-15,350/- out of Tk-21,300/- taken away by the accused persons from the victim Marfot Ali at the time of killing him and held seizure lists on it separately and collected post-mortem examination report.

After conclusion of investigation, he submitted police report being charge sheet No. 136 dated 11.11.2004 against four accused persons under sections 302/201/109 of the Penal Code. On receiving the records of the case learned Sessions Judge, Comilla appointed a State Defence Lawyer for absconding accused Montu by order dated 09.03.2006 and indicted four accused persons under sections 302/201/34 of the Penal Code and the same was read over and explained to them present on dock but they present on dock, pleaded not guilty thereto and claimed to be tried as per law of the land.

On closure of the prosecution evidence, the accused persons present in the court, were examined under section 342 of the Cr.P.C placing incriminating evidence to their notices and consequences thereto were explained to them. The accused persons present

in the court pleaded their innocence, non-complicity once again and declined to adduce any evidence in their favour through defence witness. But accused Zakir Hossain defended him by a written statement depicting that he took part in the death of the victim under compelling circumstances. He had no willingness in the commission of the offence. He was involved in it just to save his life, nothing more.

The defence plea as it could be gathered from the trend of cross-examination that the dead body of the victim was not recovered at the showing of the accused persons and they did not admit the incident rather they are quite innocent, having been implicated in this case out of oblique motives by false evidence. Having considered the facts and circumstances and the evidence on record, the learned Sessions Judge of Comilla found the accused Zakir Hossain and Anu Miah

guilty of the offence and sentenced them to death while acquitted two other accused namely Abul Kashem and Montu Miah.

Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence dated 04.11.2010 passed by the learned Sessions Judge, the two condemned prisoners preferred jail appeals as stated above. But neither the prosecution nor the informant party took any steps to file appeal against the order of acquittal.

From the evidence adduced by the 12 [twelve] prosecution live witnesses it has revealed that pw-01 Md. Joynal Abedin is the father of deceased Marfot Ali and also the informant of the case. Pw-02 Joydur Ali and pw-03 Shahidullah both are relatives of the informant and the victim as well. Pw-04 Dulal Miah, pw-07 Khitish and pw-10 Abdur Rouf have been

tendered by the prosecution. Pw-05 Mohorom Ali, pw-06 Abdur Rahman, pw-08 Tamiz Uddin and pw-09 Md. Mongal Miah, who have been examined, are inhabitants of locality of the accused persons while pw-11, sub-inspector Md. Abdus Samad is the investigating officer of the case and pw-12 Shafiqul Azim is a magistrate who recorded confessions of both the condemned prisoners.

Upon a careful scrutiny of the entire evidence, it is found first to the effect that victim Marfot Ali, a man of Narshingdi district, used to run a furniture shop at Panchkitta Bazar under Muradnagar Police Station, Comilla. Pw-01 stated in his deposition and also FIR that his son used to run a furniture shop rented from pw-08 at Panchkitta Bazar. Pw-02 also corroborated about the business of the victim by saying that he was victim's partner. He used to purchase wood from the

locality and send the same to Marfot Ali at Panchkitta Bazar. So, it is proved by evidence that the victim was at Panchkitta Bazar with his business before his killing incident took place. Even then, defence did not raise voice on cross-examination against such evidence that victim Marfot Ali was not doing any business like furniture shop at Panchkitta Bazar. During his business at the Bazar he got acquainted with accused Abul Kashem, a man of Comilla district, who had a mike servicing beside the shop of the victim [by the side of victim's shop]. Having entrusted he used to deposit the income money of his business with accused Abul Kashem. In course of cross-examination pw-01 responded that when his son used to go to village home, he took money from accused Abul Kashem deposited earlier by him. Before incident took place Abul Kashem did not misappropriate any money of his



son but he hired the boat on the day of occurrence. Such evidence as disclosed by pw-01 has emerged that the victim had a connection with accused Abul Kashem for the purpose of financial transaction and entrustment.

From the FIR and evidence of pw-01 it is found that victim Marfot Ali was supposed to go home on 08.09.2004. As he did not go to his village home under Narsingdi district by the expected day, pw-01 having waited for him till 12.09.2004 contacted over mobile phone with Kashem who informed regarding whereabouts of his son Marfot Ali that he left the shop for his village home on 08.09.2004 taking deposited money Tk-30,000/- [thirty thousand] from him, with his employee accused Zakir Hossain who went with Marfot Ali by a boat up to Bhairab. Upon hearing such information from accused Abul Kashem, pw-01 along

with his other relatives started searching but could not trace him out. Thereafter, on 16.09.2004 he along with pws-2-4 having rushed to Panchkitta Bazar held Zakir, an employee of accused Abul Kashem, and saw Zakir responding abnormally on query regarding whereabouts of his son Marfot Ali. Then they informed the missing incident of Marfot Ali to the police who arrested accused Abul Kashem, Zakir Hossain and Anu Miah on the same day.

In presence of pws-1-4 and many others apprehending accused made confessions to the effect that on 08.09.2004 at 09:00 am Kashem hired a boat from Montu for Marfot Ali towards Naogaon and Zakir was sent with him. On their way Anu was picked up. According to their plan, they roamed in the Kamaller Beel with the boat throughout the day and around 05:00 pm they tied the hands and legs of

Marfot Ali by his shirt and killed him by throttling and in order to conceal the evidence they dumped the dead body of Marfot Ali under water-hyacinth of the Beel near the Kamalla graveyard. Marfot Ali's dead body was recovered by pw-11 along with his team from the Beel to the south-east corner of Kamalla graveyard at the showing of the apprehending accused persons. Pw-11 instantly held the inquest report [exhibit-03] of the dead body on the spot around 16:15 hours on 16.09.2004 where none defied that it was not the dead body of Marfot Ali.

Even so, it is evident by pw-11 that dead body was decomposed due to eight days long stay in the water-hyacinth and wearing apparels of the victim were also seized. Seizure list of wearing apparels and inquest report are being also proved by public witnesses, particularly pws-03 and 05. During

investigation of the case, pw.11 recovered some plundered money of victim Marfot amounting to Tk-15,300/- in total, of which Tk. 4500 from accused Zakir Hossain, Tk. 1,150/ from Anu Miah and Tk-9,700/ from accused Abul Kashem.

Pw-02 is not only a relative of the victim but also a business partner who testified by corroborating the evidence of pw-01 that he along with pw-01, the father of victim Marfot Ali, and pw-03 went to Panchkitta Bazar in order to find Marfot Ali on 16.09.2004 after Marfot being untraced. On query Zakir was seen giving imbalance information. Getting information from the informant, police came and arrested Kashem, Zakir and Montu who told them during interrogation that Marfot Ali was killed by slitting throat and threw his dead body in the water-hyacinth at the southern-side of Kamalla graveyard. They also

disclosed that they did it as per plan of Abul Kashem. In their presence dead body of Marfot Ali was recovered from beneath water-hyacinth attached to the south-east corner of Kamalla graveyard at the showing of the accused persons.

On cross-examination this witness confirmed in reply that Zakir and Anu informed that they concealed slit throat dead body of Marfot Ali under water-hyacinth and the same was recovered as pointed out by accused Anu, Zakir and Kashem. This witness denied the defence suggestions that dead body was not recovered as pointed out by the accused. It appears from the evidence of pw-03 that he testified by narrating similar scenario as given by pw-2. Nothing is found present in the evidence to differentiate with the evidence of pws-01, 02, 03 and 11. Even then, it is not found in the given evidence that there was ongoing

dispute between the parties concerned, and that brought the outcome of implication and falsification against them being perpetrators in this case. Pws-05-06 and 08-09 who hailed from the same locality of the accused persons, corroborated the evidence of pws-01-03 deposing that on interrogation Zakir and Anu confessed on 16.09.2004 before them and many others that they along with Montu slaughtered Marfot Ali on 08.09.2004 at 05:00 pm taking money from him away and dumped his dead body under water-hyacinth at Kamallar Beel near the Kamaller graveyard, where from the dead body was recovered in their presence as pointed out by accused persons. The evidence of those pws appears to be unimpeachable and the defence declined to cross-examine them on their given evidence. From the evidence referred to above, after being scrutinized it is proved that extra judicial

confession given by accused Zakir and Anu implicating themselves along with accused Montu in the murder of victim Marfot Ali are being uncontroverted and hence, it seems to be trustworthy.

Mr. Syed Mahmudul Ashan, learned Advocate referring to PLD 1962 Dhaka, 261 pointed out that joint statements of more than one person in police custody leading to recovery is not indicated who made first discovery. Such pointing is not useable against either of the accused. On perusal of the said decision referred by the learned Advocate, it finds that in that case subject matter was stolen article, recovered at the showing of two accused being arrested by police, not likewise a human body. In the present case the dead body of Marfot Ali was recovered at the showing of the apprehending accused persons in presence of the witnesses who deposed that apprehending accused

confessed before them, where the dead body of Marfot Ali was kept after murder. This evidence was not denied by the defence in course of cross-examination. Even so, it was not denied by defence that victim Marfot Ali's dead body was not at all recovered, it might have been unknown person's dead body. So the argument advanced by the learned Advocate on this point is not considered in this manner. According to section 27 of the Evidence Act, the information, received by the witnesses from the accused persons during police custody as it relates distinctly to the fact for discovery of the dead body has been found to be proved.

In this case it is evident that on 17.09.2004 doctor Dilroba Hasan, Lecturer, Forensic Medicine, Comilla Medical College performed autopsy on the dead body of deceased Marfot Ali the following day of its



recovery. She found cut throat injury and two stab wounds in the right knee and penis of the dead body. Both hands liquated on his back with a shirt. In findings she opined that death of the victim Marfot Ali was due to shock and hemorrhage only to above mentioned injuries which were anti-mortem and homicidal in nature. It is also evident that each and every prosecution witness narrated that the victim was killed by slaughtering [cut] throat. Confessing accused also admitted this guilt before the witnesses including pw-12 that they killed the victim by slitting throat, so the post-mortem examination report being corroborative evidence supported by all other evidence of prosecution witnesses. But autopsy performing doctor has not been examined in this case. At this stage we are to see whether this report is being admissible as corroborative evidence without examining the doctor. It appears from

documents on record that Trial Judge repeatedly issued summons, warrant of arrest even then non-bail able warrant of arrest to the autopsy performing doctor. Lastly it was reported that she went abroad. Section 509A of the Cr.P.C stipulates that “when in any inquiry, trial or other proceeding under this code the report of a post-mortem examination is required to be used as evidence, and the civil surgeon or other medical officer who made the report is dead or is incapable of giving evidence or is beyond the limits of Bangladesh and his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such report may be used as evidence.”

As per this provision of law, there has been no barrier to accept autopsy report as corroborative evidence as stated above in this case.

Let us examine the confessional statements of two accused Anu Miah and Zakir Hossain as to whether both the statements were recorded in accordance with law and whether those were seemed to be true, voluntary and inculpatory in nature. It appears from documents on record that police apprehended both the accused persons on 16.09.2004 from Pauchkitta Bazar and immediately after arrest they felt to confess about their commission of offence. Accordingly, they were produced before the magistrate concerned on 18.09.2004.

Accused Anu Miah made a confessional statement before the magistrate stating that Zakir and Montu knew about the money of Tk-30,000/- deposited by Marfot Ali with Kashem. He along with Montu, Zakir and Marfot roamed throughout the day in the Beel by a boat despite towards Noagoan and he tied legs and

Zakir hands of Marfot Ali at the evening hour. Montu Miah killed Marfot Ali by cutting throat with knife. Prior to killing him, Montu took away money amounting to Tk-21,300/- from half-pant under lungi of Marfot Ali. From that amount of money, Zakir received Tk-6,300/-, Montu Tk-8000/- while he got a share of Tk-7000/-. He made an attempt to slit the throat of Marfot Ali but it was cut little. Thereafter, Montu taking knife from his hand, killed Marfot Ali holding hair by cutting throat and threw him in the water. Then he came back home with the boat.

From the said vivid description of the occurrence according to confession, Zakir and Montu knew about the money amounting to Tk-30,000/- deposited by Marfot Ali with Kashem. According to their plan, they spent throughout the day by roaming the boat in the Beel despite towards Noagoan. He tied legs of the

victim while Zakir hands. Montu killed Marfot Ali by cutting throat with knife. Prior to killing, Montu took money away from the victim at Tk-21,300/- of which he received a share of Tk-7000/-. A little cut was made by him in the throat of Marfot Ali but final execution was made by Montu with the knife taking from him.

Accused Zakir Hossain narrated in his confessional statement that his sister phoned him from Kishoregonj on Monday. He informed Dakat Kashem that he had to go to Kishoregonj as his sister phoned him. Kashem used to keep money deposited by Marfot Ali who also decided to go with him up to Bhoirab. He told that he had to go today on an emergency basis. Then Kashem told them to go together. He came back to Bazar from home in order to go to Kishoregonj on Wednesday. Kashem helped them to ride on the boat and oarsman

took another person named Anu Miah in the boat after going little far on their way. The boat roamed throughout the day in the Beel by them.

Responding to a query by him about roaming the boat, Anu Miah threatened him with abusive language not to make sound. Evening came while boat was roaming. Anu and oarsman-Montu set in front of the boat telling him to hold oar. Anu then took seat beside Marfot Ali. Anu Miah pressed his both hands around the neck of Marfot Ali while Montu laid down him by giving pressure on his foot. Anu tied his both legs with gamcha [napkin]. He asked them not to kill Marfot, and then Anu held knife on his throat using filthy language to stop talking and asked him to hold hands of Marfot by giving pressure on him, if he wanted to survive. Then he held Marfot hands on pressure. Montu plunged Marfot into the water from boat after being tied

his hands with rope. Anu dealt a knife blow in the throat holding hair of Marfot, taking knife promptly from the hand of Anu, Montu slaughtered Marfot.

Prior to this, Anu took money away from half-pant under lungi of Marfot after being tied hands and legs and he told Montu that he got Tk-21,000/-. Anu and Montu gave him death threat not to tell anybody in this regard. They gave him Tk-6,200/- for not disclosing the same. They would throw him into the water if not wanted to take money they offered. In fear he received the money and for eight days he could not eat anything after returning home at night. He said the incident to the men of Marfot Ali after eight days. He mentioned names of Kashem, Anu and Montu before the locals after arrest. They [accused] were taken to police station after being apprehended by

police. Anu used to deposit everything with Kashem after stealing and heist.

It appears from his confession that he tried to make a plea stating that he was not in the plan or premeditation for the killing of the victim. He just accompanied the victim as advised by his employer Abul Kashem. When he could realize that the boat was not going to towards its destination rather roaming in the Kamallar Beel he came under life threat as he asked Anu and Montu about the boat roaming in the Beel unnecessarily. But subsequently, he had to play a role in holding the hands of the victim at a point of death threat. He also received a share of Tk-6,200/- under threat, he could not even eat anything for eight days.

It appears from his confession that he tried to prevent him from the commission of offence as if he



did nothing with the co-perpetrators but it is found in evidence that the money he received of which Tk-1700/- was deposited with accused Abul Kashem and the remaining money he gave someone as loan. If he had no previous knowledge or was not in the plan to kill the victim taking away his money he could have sufficient scope to disclose such heinous incident to the police or to the locals immediately after the incident. But he did not do so. Rather he joined his work-place at the shop of accused Abul Kashem soon after the incident. So his involvement in the killing of the victim is found present clearly. He cannot escape himself from the commission of offence because he himself took part by holding hands of the victim. His defensive plea can be taken into consideration if he took any step to disclose the matter even then to his nearest ones or local persons. There has been no threat to be used

on him by mobs or locals as the victim was not an inhabitant of his locality.

Even then, when the incident came out on 16.09.2004 before the locals and the informant party, he [accused] could have scope to disclose that he under compelling circumstances took part in the killing of the victim. Rather he made extra-judicial confession saying that he along with Montu and Anu killed the victim by cutting throat with a knife and he is one of them who pointed out the dead body of Marfot Ali at the place where they dumped the same. He has also narrated in his confession how the victim was killed by them. Exactly, similar version has been given by confessing accused Anu Miah. So, the nature of killing by them is not contradictory to each other and he made such confession involving himself in the killing of the victim. Therefore, there is no scope to disbelieve

his confession that he did not willingly participate in the killing of the victim.

From both the confessional statements it transpires that there has been no different information or conduct made by them in the murder of the victim. Both of them have given similar statements as to the commission of offence involving them there under. In that view of the fact, it can be envisaged that these two confessional statements are found to be true, voluntary and inculpatory in nature as the condemned prisoners made the confessional statements soon after their apprehension. It can be safely said that there was no pressure on them to make such confessions before the magistrate and they made those confessions at their own will. Pw-12 is a First Class Magistrate who recorded the confessional statements of both the condemned prisoners on 18.09.2004. He has testified

that he recorded their confessions complying with all provisions of law under sections 164/364 of the Cr.P.C and the condemned prisoners willingly confessed before him. The confession of Anu Miah is marked as exhibit-07 on which he has four signatures, marked as exhibits-07/01 series and confession of Zakir is marked as exhibit-08 on which he has also four signatures, marked as exhibit- 08/01 series.

In course of cross-examination he replied that he did not see the face of both the condemned prisoners cloudy of fearing any threat after recording their statements. Rather they willingly made confessions feeling their guilty conduct. It appears from both the confessional statements that pw-12 had given 03:00 hour reflection time before recording their confessional statements and he also alerted both of them by saying that they were not bound to confess and if they did

so, it might be used in evidence against them. The confessions given by them do not show any kind of irregularities made by the recording magistrate. Both the accused did not place any kind of complaint of police torture before him and they came under any threat to confess beyond their will. Even then, recording magistrate gave them sufficient reflection time to think that if they confess it would go against them as evidence.

Therefore, it can be firmly said that the confessional statements given by them are absolutely voluntary and true. It finds support from the decision in the case of Islam Uddin-Vs- State, reported in 13 BLC [AD] 81 which is run as follows:

***“It is now the settled principle of law that judicial confession if it is found to be true and voluntary can form the***

*sole basis of conviction as against the maker of the same. The High Court Division has rightly found the judicial confession of the condemned prisoner true and voluntary and considering the same, the extra judicial confession and, circumstances of the case, found the condemned prisoner guilty and accordingly imposed the sentence of death upon him.”*

It has revealed from the evidence on record that at the time of examination under section 342 of the Cr.P.C condemned-prisoner Zakir Hossain placed a written statement stating that he took part in the killing of the victim under compelling circumstances and he was not aware of the pre-plan or premeditation taken by other co-perpetrators to kill the victim. It appears

from documents on record that the condemned prisoner Zakir Hossain did not make any complaints of threat or pressure given by his cohorts to the recording Magistrate. But after a long while he made complaint before the trial court that he had no any intention or pre-plan or premeditation to kill the victim. We have given our anxious thought over the matter having discussed earlier. It is our considered view that he made an attempt only to save him from the persistent of the offence committed by him. At the same time it is constrained to hold that both the confessional statements made by the condemned prisoners are found true, voluntary and inculpatory. In that case there is no alternative but to find them guilty of the offence.

It also finds support from the decision in the case of Bokul Chandra Sarker-Vs- the State, reported in 45 DLR, 260 where it has been held that,

***“If a statement recorded under this section is true and voluntary, the same alone is sufficient for convicting the confessing accused.”***

It is also supported relying upon the decision in the case of Joygun Bibi Vs. State 12 DLR (SC) 151 and the case of Moqbul Hossain Vs. The State 12 DLR (SC) 217 as under,

***“The retraction of a confession was a circumstance which had no bearing whatsoever upon the question whether in the first instance it was voluntarily made, and whether it was true. The fact that the maker of the confession later does not adhere to it cannot by itself have any effect upon the findings reached as to whether the***



*confession was voluntary, and if so, whether it was true. The retraction of a confession was wholly immaterial once it was found that it was voluntary as well as true.”*

In a number of cases, motive or object behind the killing is not being detected directly. In the case in hand it is found that the victim was killed only because of some money deposited with accused Abul Kashem. It appears from evidence of the witnesses that the money the accused took away from the victim at the time of killing, of which some had been recovered from accused Abul Kashem, Zakir Hossain and Anu Miah. So, it is crystal clear in this case that in order to snatch money away from the victim and to conceal evidence they killed him and dumped his dead body in the water hyacinth. So, we find clear object and motive

for the killing of the victim. Though the prosecution is not always bound to offer or prove the motive of the crime. But if it is proved, it makes the prosecution case stronger.

It may rely upon the decision in the case of Abdur Rashed -Vs- The State, reported in 27 DLR (AD) 1 where it was opined that,

***“.....The motive for the murder was not at all substantiated. It may, however, be said that the prosecution is not bound to offer any motive. If, however, any motive, is offered, the court may consider it but failure to prove motive does not necessarily affect the prosecution case if it is proved on evidence.....”***

The contention of learned Advocate for the condemned prisoner Anu Miah is that none of the persons of Panchkitta Bazar was examined by the prosecution in this case. In reply to this contention, it can be said that pws-05, 06 and 08 all of them are the inhabitants of the locality of accused persons. They were produced by the prosecution and they gave evidence implicating both the condemned prisoners in the killing of the victim. So, in that view of the fact, we do not agree with the contention of learned defence lawyer. The contention of Ms. Momtaz Begum, learned Advocate for the condemned prisoner Zakir Hossain is that there is no ocular evidence against Zakir Hossain that he took part in the killing mission. We have already earlier discussed about the participation of condemned prisoner Zakir Hossain. As per evidence of pws-01, 02, 03, 05, 06 and 08, it has emerged that

he [Zakir Hossain] was apprehended first as suspect and he disclosed the incident how it had happened. Nevertheless, he is one of the accused persons who pointed out the dead body of the victim recovered by police from the Kamaller Beel under water-hyacinth on 16.08.2004. More so, he made a confessional statement before pw-12 in which he admitted that he took part in holding the hands of the victim at the time of killing. So, there is no need to get the evidence directly through the ocular witness to prove the case. Apart from true, voluntary and inculpatory confessions, circumstantial evidence is enough to form a basis of conviction on the perpetrators who killed the victim. Because, a human being can tell a lie but circumstance can't.

In the case in hand, we find that both the condemned prisoners gave extra-judicial confession

before the witnesses including pws-01, 02, 03, 05 and 11 directly at Panchkitta Bazar that they along with absconding accused Montu killed the victim by cutting throat with knife. At their pointing the money snatched by them from the victim and his dead body had been recovered from the Kamaller Beel under the water-hyacinth attached to Kamalla graveyard. At the same time, we find true and voluntary and inculpatory confessional statements of both the condemned prisoners. Having analyzed and assessed both the evidence and confessional statements it finds concrete corroboration by each other without any iota of doubt on it. We also find chain of circumstances in the given evidence of the prosecution witnesses and confessional statements made by both the condemned prisoners in the case. Relying upon those material particulars it can form a basis of conviction. In this regard, the case of

Islam Uddin –Vs– The State, reported in 13 BLC [AD] 81 can also be relied upon saying that an extra judicial confession along with circumstantial evidence find the condemned prisoners guilty of the offence committed by them.

It has also been held in the case of Nausher Ali Sarder –Vs– State, reported in 39 DLR [AD] (1987) 194 which is run as follows,

***“The attending circumstances are heavily against the accused Nausher. He had no enmity with Elias; he hailed from a different village and had no business to have been present near the scene of the crime when he was caught by persons who also did not know him before. He ran through water after being chased, as deposed by P.W.03 Ayub Ali.***

*His shirt and lungi were wet when he was caught and these two items were seized by the Investigating Officer, P.W.25; he could not explain why he was there at such an hour on his behalf a suggestion was put to Toyeb Ali that he was known to Toyeb Ali and opposed Toyeb's attempt to abduct the daughter of one Mazer Sheikh and thereby incurred his enmity. He denied the suggestion. These facts and circumstances provide strong support to the confessional statements. These confessions have been rightly considered as against the co-accused also, under section 30, Evidence Act. We therefore find that the conviction of*

***these three appellants has been based on strong evidence and that the High Court Division rightly confirmed their conviction for murder.”***

It appears from evidence of pws-01, 02, 03, 05, 06 and 08 that accused Abul Kashem was apprehended along with two confessing accused and all of them pointed out the dead body of the victim recovered by police and the confessing accused in their confessions mentioned the names of accused Abul Kashem and Montu. Accused Abul Kashem was involved in the plan for killing of the victim. They further disclosed that accused Montu finally executed the victim with the knife taking from the hand of condemned prisoner Anu. The same information they disclosed before the aforesaid examined witnesses in the same manner as stated in their confessional



statements but the learned Trial Judge failed to consider the same in holding decision to find them guilty of the offence and accordingly, passed an order of acquittal favoring accused Abul Kashem and Montu Miah by citing some decisions of the Higher Courts.

We do not find any reason why they have been acquitted. It also appears from documents on record that against such order of acquittal, no appeal was preferred by the prosecution, whereas it has been proved by the evidence that the accused Montu played a significant role in the killing of the victim. On query we have come to know from the learned Deputy Attorney General that no appeal was presented against such acquittal order. We have gone through the contents of sections 423 and 439 of the Cr.P.C, wherefrom it reveals that there is no scope to take any step against such order of acquittal unless the petition

of appeal is preferred by the prosecution or the informant party and the order of retrial or remand will not be justified at this stage because in the meantime, many years have elapsed. In that view of the fact, we are undone to make any justice in favour of the victim with regard to the acquittal order.

However, we have carefully scrutinized the evidence on record and confessional statements of condemned prisoners wherefrom it finds that the accused persons killed the victim by cutting throat with knife in a pre-planned manner which has also been supported by post-mortem report [exhibit-09] and inquest report [exhibit-03]. Having considered all the facts and circumstances and evidence of live witnesses and other materials on records, we are constrained to hold that the prosecution has been able to prove the case

beyond all reasonable doubt under sections 302/34 of the Penal Code.

On the part of a judge it is most difficult assignment to impose sentence upon the persons concerned if the allegation is proved beyond reasonable doubt. Two types of factor may assist forming the sentence upon the perpetrators depending on the gravity of the offence and mitigating circumstances but it is to be borne in mind that the object of the legislature should not be frustrated in doing so. So that crime does not go unpunished and the society as the satisfaction that proper justice has been done and court has responded to the crime and expectation of the society but it must be done within the ambit of law as described in the section itself.

It has emerged from the evidence on record that accused Montu played a vital role in the killing of the

victim but he has been acquitted from the charge leveled against him by the trial court. It appears further from record that these two condemned prisoners were apprehended on 16.09.2004 since then they were in Jail custody in the normal cell till delivery of the verdict dated 04.11.2010 and they are now in condemned cell from 04.11.2010.

It also appears from record that at the time of examination of accused Anu under section 342 of the Cr.P.C, his age was shown as 58 years and the age of the accused Zakir was shown as 24 years. Apparently it is found that Zakir is too younger than accused Anu. At the same time, Anu is found to be older one. It is also found that both the condemned prisoners have suffered long pangs of the death in the condemned cell for about six years. Long suffering in the condemned cell may sometimes considers the

punishment to be commuted depending on the facts and circumstances of a particular case as our Apex Court opined giving emphasis on it. It finds support from the decision in the case of Manik -Vs- the State, reported in 35 BLD [AD] 63.

Having considered the long suffering in normal cell before concluding trial and around six years' suffering in condemned cell, and the age of the condemned prisoners and the gravity of the offence meant their roles at the time of committing the offence and the facts and circumstances of the case, we find substance in the contentions of learned Advocate that leads to exonerate them from the painful event like hanging. Considering all the aspects and gravity of the crime committed by the condemned prisoners, justice will be met if they are sentenced to one of imprisonment for life. Accordingly, they stands sentence to imprisonment

for life with a fine of Tk-10,000/- each, in default of payment of fine, they have to undergo rigorous imprisonment for 1[one] year more.

It appears from impugned judgment that the trial court also found the condemned prisoners guilty of the offence under section 201 of the Penal Code but did not impose sentence separately upon them for proving section 201 of the Penal Code as death sentence has been given to them. It is our considered view that it was not the way of solution in restraining from awarding sentence upon them since the allegation of disappearance of evidence was proved by the prosecution beyond reasonable doubt. The trial court ought to have imposed penalty upon the perpetrators if they were found to be guilty of the offence under section 201 of the Penal Code. In the instant case it is proved by the prosecution evidence that the

condemned prisoners after killing the victim dumped his dead body under the water-hyacinth of the Beel nearby Kamaller graveyard.

As the condemned prisoners are also found guilty under section 201 of the Penal Code, they are sentenced to suffer rigorous imprisonment for a period of 03[Three] years and to pay a fine of Tk-5000/- each, in default, to suffer 03 months more.

However, both the sentences imposed by this court upon them, will run concurrently. And the sentences they have already suffered before and after trial will be deducted from the sentences imposed by this Court upon application of section 35A of the Cr.P.C.

In the result, the Death Reference is hereby rejected. The Criminal Appeal No. 3127 of 2015 arising out of Jail Appeal No. 342 of 2010 and Jail appeal

No.341 of 2010 are also dismissed with the aforesaid modification in the sentences.

At the end we intend to express our sincere appreciation to Mr. Zahirul Haque Zahir, learned Deputy Attorney General along with Mr. Md. Atiqul Haque, learned Assistant Attorney General and Mr. Syed Mahmudul Ahsan, the learned defence lawyer, for their lucid expression of law and also invaluable assistance to this Court.

Let a copy of this judgment and order along with lower court records be sent to the court concerned for information and necessary action at once.

The Jail Superintendent of Comilla is directed to shift the condemned prisoners from death cell to the common accommodation at once.

**Md. Jahangir Hossain, J**

I agree