

**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. 70 of 2010

The State

-Versus-

1. Md. Ramjan Sheikh and
2. Md. Shafiqul Islam Nikari @ shafiq Nikari
.....**Condemned prisoners**
with

Jail Appeal No. 361 of 2010

Md. Ramjan Sheikh

-Versus-

The State

And

Jail Appeal No. 362 of 2010

Shafiqul Islam Nikari

-Versus-

The State

Mr. Zahirul Haque Zahir, D.A.G with
Mr. Abdur Rokib [Montu] with
Mr. Md. Atiqul Haque [Salim], A.A.Gs

.....**for the State**

Ms. Momtaz Begum

.....**for the State defence**

Heard on 07.02.2016, 08.02.2016 and 09.02.2016

Judgment on 14.02.2016, 15.02.2016 and 16.02.2016

Jahangir Hossain, J

This Death Reference No. 70 of 2010 has been
made by the Additional Sessions Judge, 2nd Court,

Bagerhat under section 374 of the Code of Criminal Procedure [briefly-Cr.P.C] for confirmation of his order of conviction passed under section 302 of the penal code sentencing accused Ramjan Sheikh and Shafiqul Islam Nikari to death.

The Jail Appeal Nos. 361 of 2010 and 362 of 2010 preferred by condemned prisoners Ramjan Sheikh and Shafiqul Islam Nikari alias Shafiq Nikari are also directed against the same order of conviction and sentence dated 15.11.2010. We have heard the Death Reference along with the said Jail Appeals together and all are also being disposed of by this single judgment. The prosecution case, in brief, is that Md. Hafiz Sheikh, brother of the deceased, made an allegation on 25.09.2008 with Chitolmari Police Station stating, inter-alia that his brother Shahid Sheikh ran a motorbike of neighbor Gaus Sheikh bearing registration No. Khulna Metro.Ha-11-8030 on a rental basis. Apprehending accused Ramjan Sheikh and absconding accused Monir

Talukder having hired the motorbike went to Barogania along with his brother from Soildah Bazaar at 03:30 pm on 23.09.2008. Gaus Sheikh, owner of the motorcycle, lodged a GDE bearing No. 912 dated 24.09.2008 with Chitolmari police station as his brother along with motorcycle did not return home. Witness Gaus Sheikh and Rokan Sarder went to Kathi Bazar under Gopalganj district after knowing from people about the involvement of Ramjan Sheikh in taking his brother with the said motorbike. As Ramjan Sheikh confessed the fact on query, they were taking him towards Chitolmari police station. On their way to police station while they reached Shildha Bazaar, accomplice-accused Rafiq Sikder and Lebu Sheikh stopped motorbike of the witnesses and made an attempt to take Ramjan away. Then local men having gathered there chased them and caught Rafiq and Lebu. All apprehending accused admitted in presence of the local respectable persons that they abducted his brother Shahid along with

motorcycle and confined in an unknown place and he might be murdered later on. On getting such allegation a case being Chitolmari police station case No. 16 dated 25.09.2008 was started against the accused persons under sections 379/364/109 of the Penal Code.

During investigation of the case, the dead body of the deceased was recovered on 30.09.2008 at about 22:30 hours from a Mehegoni garden of one Shawpon Mondal recognized by the informant, brother of the deceased. One Sub-inspector Md. Lokman Hossain, the investigating officer of the case, visited the place of occurrence, prepared sketch map with index and recorded statements of the witnesses after examining them under section 161 of the Cr.P.C. He further arranged to record the confessional statements of the accused by the Judicial Magistrates. After completion of investigation Sub-inspector Sheikh Abu Bakar submitted police report being charge sheet No. 127 dated 01.09.2009 against 6[six] accused persons including

condemned prisoners while 3 [three] others were left out of the report. But the Trial Judge, after hearing both the parties, framed charge against all of the 9[nine] accused persons under sections 302/201/34 of the Penal Code by order dated 13.04.2010 and the charge was read over to them who pleaded not guilty of the offence and demanded to be innocent in the trial.

In the trial, the prosecution has examined 11 witnesses to prove its case while defence examined none. Defence case as it appears from the trend of cross-examination that the accused persons are quite innocent, not involved in the commission of murder and they did not take away motorcycle of the deceased. They have been falsely implicated in this case.

During examination under section 342 of the Cr. P.C, learned trial judge placed the incriminating pieces of evidence to the accused persons who reiterated their innocence stating that accused Ramjan Sheikh was taken on police remand for 4[four] days and police threatened

him by pouring hot water in his nose and mouth and in the name of cross-fire to confess, he was compelled to make confessional statements on being tutored by police and accused Shafiqul claimed that DB police demanded money from him, failing which he would be tortured and taken out for cross-fire. Thereafter, he made confessional statement under such compelling circumstances.

Upon assessment of the evidence, the trial judge found both the condemned prisoners guilty under section 302 of the Penal Code and sentenced them to death with a fine of Tk. 10,000/- [ten thousand] each while 7[seven] other accused persons were found not guilty of the offence and thereby they were acquitted.

Being aggrieved by and dissatisfied with the impugned judgment and order passed by the trial judge, the condemned prisoners preferred Jail Appeal Nos. 361 of 2010 and 362 of 2010 respectively on the grounds that they did not know anything about the killing of the

deceased and they have been falsely implicated in the murder case.

In a nutshell the evidence of prosecution witnesses is that pw-01 Md. Yearab Hossain, judicial magistrate of the Chief Judicial Magistrate Court, has stated that on 29.09.2008 accused Arif Sheikh was produced before him to confess but he declined to do so. On 06.10.2008 he was again produced before him who recorded confession of accused Arif Sheikh which is marked as exhibit-1 and his signature as exhibit-01/01.

In cross-examination, he has replied that accused Arif told him on 29.09.2008 that he was not involved. He has denied the defence suggestion that he did not follow the provisions of Cr.P.C in recording the confession of accused Arif.

Pw-02 Md. Rakhibul Islam has stated in his deposition that accused Ramjan Sheikh was produced before him on 04.10.2008 at about 01:00 pm in order to

record his confessional statement. Accordingly, he recorded his confession following all formalities and provisions of law. And the same was read over to him who found correct and put his thumb impression [TI] on it, marked as exhibit-02 and his signature as exhibit-02/02.

In cross-examination, he has replied that he asked the accused whether he was confessing under any threat but answer was in the negative. Before recording confessional statement, he expressed consequence of the confession to the accused and gave assurance that he would not be taken on police remand any more if he declined to confess. Accused informed him that he received simple beating. No separate certificate or note issued by him regarding confessional statement is seemed to be true and voluntary.

Pw-03 Md. Nur Nobil has testified that on 04.05.2009, accused Shafiqul had been produced before him at 01:00 pm in order to record his confessional

statement and he recorded the same following the respective provisions and rules, which is marked as exhibit-03 and his signature as exhibit- 03/02.

In cross-examination, he has replied that the accused was under custody of his office staff from 01:00 pm to 04:00 pm. He asked the accused whether he was making confessional statement under any threat. He has denied the defence suggestion that he did not follow the respective provisions of law in recording confessional statement of the accused.

Pw-04 Dr. Biddyut Kanti Paul has stated that he was on duty as radiologist in Bagerhat Sadar Hospital on 01.10.2008. As per Chitolmari Police Station GDE No. 1149 dated 30.09.2008 and case No.16 dated 25.09.2008 constable, Sumanto Kabiraj brought dead body of deceased Md. Shahid Sheikh aged about 26 years to the hospital for an autopsy. Dead body was examined through members of the board and found the following injuries beneath,

“Continuous circular ligature mark around the neck below the thyroid cartilage by a rope which was with the neck, breath ½”. Left foot absent below the left ankle joint.

On dissection: Pearch mentisation absent in the skin under the ligature mark. Ante mortem clotted blood on muscle around the trachea in neck. Ante mortem clotted blood in the scalp in the both hemisphere of the brain as described above.

Opinion is that the death was due to asphyxia and haemorrhage resulting from strangulation and head injury which were ante mortem and homicidal in nature.” Post Mortem examination report is marked as exhibit-04 and his signature as exhibit-04/01.”

In cross-examination, he has replied that he did not know the deceased personally. The killing was done by strangulation. He has denied the defence suggestion that they did not examine the dead body of the deceased and give the report properly.

Pw-05 Md. Hafizur Rahman Sheikh has stated in his deposition that his younger brother Shahid used to run a motorcycle of Gaus Sheikh bearing Khulna

Metro.Ha-11-8030 on a rental basis. Accused Ramjan and Monir took his brother along with motorcycle on hire to Baroguni from Soildah Bazaar on 23.09.2008 around 03:00 pm. On that day, his brother did not return home at night. Next day they went to Baroguni in order to find him. They went to the house of Ramjan's aunt after knowing from sources. Gaus lodged a GDE with Chitolmari Police Station. Gaus Sheikh and Rokan Sarder brought accused Ramjan to Chitolmari Police Station on 25.09.2008. Accused Ramjan told them that his brother was kept behind Monihar Cinema Hall at Jessore. At that time Milu Sikder, Tuhin Sikder, Rokan Sarder and Gaus Sheikh were present who went to Jessore Monihar Cinema Hall but found none. Thereafter, Ramjan admitted that Arif and Haruza Begum are involved in the occurrence. He lodged the FIR on 25.09.2008, marked as exhibit-05 and his signature as exhibit-05/01.

On 13.09.2008 his brother's dead body was found in Mehegoni garden of Shawpan Mondal beside eastern side of Asad Sehikh's house. Getting such information he along with others went to the place from where the dead body was recovered at 10:30 pm. Dead body was dumped covering by earth. One leg of the dead body was outside the mud and half of it was found eaten.

In presence of the police, dead body was taken out of the mud. He identified his brother's dead body by seeing his wearing gengi and lungi. Police held inquest report, marked as exhibit- 06 and his signature as exhibit-06/01 and the dead body was taken for an autopsy. There was a rope tied around his neck and he has identified the accused in the dock.

In cross-examination, he has responded that deceased is his younger brother whose dead body was recovered on 30.09.2008. At first one female person saw the dead body. Gaus Sheikh received information of the dead body over telephone. Dead body was decomposed.

He has no relations in Barogunia village. Those who took up the dead body have been made witnesses. Ramjan hired the motorcycle and he himself told him about it. He has denied the defence suggestions that Ramjan did not hire the motorcycle or confess about the killing of his brother and he handed over Ramjan to the Police Station after beating him up.

Pw-06 Constable Sumanto Kabiraj has stated that he along with others rescued the dead body of the deceased from Mehegoni garden of one Shawpon Mondal and Sub-inspector Md. Humayun Kabir held inquest report after withdrawing dead body of the deceased. Thereafter, he took the dead body to Bagerhat Sadar Hospital for autopsy. After examination he handed over the dead body to his relatives and he deposited some wearing apparels of the deceased including a old lungi, gengi and a rope with the police station, which were seized on 01.10.2008 and the seizure list prepared by police, marked as exhibit-08 and his

signature as exhibit-08/01. In cross-examination, he has responded that the dead body was decomposed and he did not know deceased Shahid personally and his brother recognized the dead body.

Pw-07 Milu Sikder has testified that he ran a motorcycle on hire basis from Soildah to Chitolmari and Soildah to Nazirpur route. Shahid is also a driver of motorcycle who used to run a motorcycle of Gaus Sheikh on a rental basis. On 23.09.2008, we were sitting at Soildah motorcycle stand. At about 03:30 pm two people came looking for a motorcycle on hire to Barogunia. Shahid agreed to go by Tk. 300/-for up-down. Shahid started towards Barogunia riding those two people on it. Gaus Sheikh, owner of the motorcycle, having arrived at Soildah Bazaar returned home after getting no trace of Shahid at 08:00 pm. Next morning Gaus Sheikh and uncle of Shahid started towards Barogunia as he did not return home until next morning. During search, a person standing at the bazaar

told that two passengers took Shahid along with motorcycle yesterday which he saw and one of them has been identified by him as Ramjan. Next morning Gaus Sheikh brought Ramjan to the police station from Gopalganj.

On 30.09.2008 he heard that the dead body of Shahid was recovered from Barogunia in the evening. On hearing such information, he along with others went to the Mehegoni garden of Shawpon Mondal at Barogunia bazaar and saw the dead body of Shahid wearing stripe lungi, half black gengi and the neck was tied with rope. Police prepared the inquest report on which he put his signature.

In cross-examination he replied that at the time of hiring the motorcycle of Shahid he was at the stand. He does not recognize those two passengers who hired the motorcycle and Ramjan Sheikh was not beaten by Gaus Sheikh. It is not true that Ramjan did not hire motorcycle of Shahid and take him to Barogunia.

Pw-08 Gaus Sheikh has testified that Shahid took his motorcycle on a rental basis two months before the incident took place. On 23.09.2008 at 08:00 pm he went to motorcycle stand in order to find his motorcycle. As Shahid did not return he had gone home after waiting for about 02/01 hours. It was a month of Ramadan. After having Sehri and said prayers, he went to motorcycle stand and relatives of Shahid also reached there. All of them waited there for 01/02 hours. Lastly, he and Ripon started towards Barogunia by Ripon's motorcycle. Hossain of Barogunia bazaar told them that he had seen driver [Shahid] who along with two other persons known to him as Ramjan and Arif, going before yesterday evening. Then he went to aunt of Ramjan who admitted that Ramjan came and left there. Having no trace of Ramjan and Shahid along with his motorcycle he came back home. Next morning he along with Roka Sarder went to Kathi bazaar near Gopalganj town taking motorcycle of Ripon and found Ramjan. He and Roka

Sarder took Ramjan on motorcycle and brought him to Soildah bazaar. On query he informed that he along with Shafiq hired motorcycle along with Shahid as driver who was now in Jessore. Thereafter, they along with police went to Jessore but no trace of him was found there. Two or three days later, mother of Ramjan admitted that Arif was with her son. Then police of Tungi para police station caught Arif and brought him to police station.

Thereafter, on 30.09.2008 at about 10:00 pm he came to know that the dead body of Shahid was found at Barogunia. The dead body was dumped near the house of aunt of Ramjan. Police recovered the dead body after going there and prepared inquest report where he put his signature.

In course of cross-examination, he has replied that it was last seen when Shahid took the motorcycle from his place on 23.09.2008. He lodged GDE on 24.09.2008 following no trace of his motorcycle. He heard from

Ripon about the hiring of motorbike to Barogonia on 23rd at night. On the date of 25th he found Ramjan at Kathi Bari. Ramjan was not beaten by him. Ramjan told that Shahid was alive along with motorcycle in Jessore. They went there but found neither Shahid nor his motorcycle. They came to know about the dead body of Shahid after recovery. Brother and parents identified his dead body of Shahid.

On 30.09.2008 before evening, he came to know about the dead body. It is not true that Ramjan did not hire the motorcycle and he was caught following a false allegation and made confessional statement in fear of cross-fire threatened by police and he has given false evidence against him.

Pw-09 Sub-inspector Lokman Hossain has stated in his deposition that on 25.09.2008 accused Ramjan, Rafiq Sikder and Lebu Sikder were produced before the police station and informant lodged a case against them. He took over the charge of the case to

investigate and interrogated accused Ramjan Sheikh and he took him to Jessore to find out victim Shahid along with stolen motorcycle but in vain. He visited the place of occurrence, prepared two sketch maps both marked as exhibits-09 and 10 his signatures as exhibits-09/01 and 10/01, two indexes, marked as exhibit-11 and 12, his signature as exhibits-11/01 and 12/01. He recorded statements of witnesses after examining them under section 161 of the Cr.P.C. On 30.09.2008, he was on leave in order to perform Eid-ul-fitr. Dead body of Shahid was recovered at night of that day from the area near the house of Ramjan's aunt. Sub-inspector Md. Humayun Kabir prepared inquest report and seized the alamat. After coming from leave he interrogated accused Ramjan on remand who informed him that Sarower Talukder, Arif, Rafiq all of them killed Shahid with the help of his aunt Haruza Begum. He produced Ramjan before the magistrate for recording his confessional statement under section 164 of the Cr.P.C. Thereafter,

DB Bagerhat started investigating the case. A spade, Iron rod and some jute scraps were recovered and seized by him on 07.10.2008 from the house of Haruza Begum. He prepared seizure list, marked as exhibit-13 and his signature as exhibit-13/01, Spade as material exhibit-I, Iron rod as material exhibit-II, jute scraps as material exhibit-III.

In cross-examination, he has responded that informant along with respectable persons brought Ramjan, Rafiq, Lebu Sheikh to the police station. Dead body was found at the middle of two houses, one of the owners of the house is Haruza Begum. Dead body was found about fifty cubits far from the house of Haruza. The house of Shawpon was situated in the western direction. No house was available in the east and northern side. He has further replied that he did not show any threat to accused Ramjan and did not beat him up. He has denied the defence suggestions that he did not properly investigate the case and obtained

confessional statements from the accused persons under threat, torture and in fear of cross-fire.

Pw-10 Sheikh Abu Bakar has stated that on 12.11.2008 he was on duty at DB office, Bagerhat. He analyzed the docket of the case investigated by other officers prior to him. He visited the place of occurrence and found the previous sketch maps with index correct. He produced accused Shafiq before the court for recording his confessional statement and finally submitted investigation report vide charge sheet No.127 dated 01.09.2009 against the six accused persons including condemned prisoners under sections 364/ 302/ 201/ 379/ 34/ 109/ 114 of the Penal Code.

In cross-examination, he has replied that he firstly visited the place of occurrence on 13.11.2008 and secondly on 15.03.2009 and raided various places to apprehend the accused. He has further replied that accused Shafiq told that Razzaq purchased the stolen motorcycle by Tk. 40,000/- [forty thousand]. It is

mentioned in both the confessional statements that sleeping medicine was used in the food of the victim. It is found in the post mortem examination report that the victim had been killed by strangulation. He arrested Shafiqul Islam on 30.04.2009 and produced him before the court on 02.05.2009 seeking 07[seven] day's police remand and further prayed for recording his confessional statement on 04.05.2009.

In cross-examination he has replied that he sent the accused before the magistrate at 04:30 pm. He has denied the defence suggestions that he gave simple hurt on the body of the accused and the accused Ramjan, Rafiq, Arif and Sarwar have been included in the charge sheet by him at the influence of the informant and others. And accused Shafiq made a confessional statement by giving threat to him and the accused might have been left out from the police-report or allegation if the investigation was held properly.

Pw-11, Sub-inspector Md. Humayun Kabir has stated that he was on emergency duty on 30.09.2008 and was informed that the dead body of victim Shahid of Chitolmari case No.16 dated 25.09.2008 was found in a dumping position. He along with other constables including Sumanto Kabiraj went to the spot as investigating officer Sub-inspector Lokman Hossain was on leave. In presence of the witnesses they recovered the dead body of deceased Shahid recognized by his brother Hafiz. He prepared inquest report, marked as exhibit-06 and his signature as exhibit-06/04. He sent the dead body to Bagerhat Sadar Hospital for an autopsy. He seized the wearing apparels of the victim after post mortem examination on 01.10.2008. His signature marked as exhibit-08/02 in the seizure list and he has identified the wearing appears namely an old printed lungi, a black colour half t-shirt and some jute scraps, marked as material exhibits- IV, V and VI respectively.

In cross-examination, he has replied that he was informed by an unknown person about the dead body of the victim at 21:00 hours. Most of the limbs of the dead body were decomposed and it was withdrawn with the help of some local men. Relatives and brother of the victim recognized the dead body. It is not true that the dead body was not of Shahid.

In support of the Death Reference, Mr. Zahirul Haque Zahir, learned DAG along with Mr. Abdur Rokib [Montu] and Mr. Md. Atiqul Haque [Salim], learned A.A.Gs contends that the prosecution could establish the case against the condemned prisoners beyond reasonable doubt. Evidence of pws-05, 07 and 8 are found to be corroborated with the support of circumstantial evidence in proving the allegation against the condemned prisoners. Moreover, both the condemned prisoners made confessional statements involving themselves in the commission of offence and it partly shows that their statements are in the same tune

regarding the commission of offence. So, there is no scope to disbelieve their statements made before the magistrates with regard to their involvement in the commission of offence.

It is further contended that condemned prisoner Shafiqul Nikari was present during killing of the victim at the scene as disclosed by him in his confessional statement which clearly indicates that he has complicity in the crime having murdered the victim in furtherance of common intention. In this regard, learned DAG has referred to the decision in the case of State-Vs-Badiuzzaman, reported in 25 DLR [HD] 41. He further submits that the victim along with motorcycle was missing on 23.09.2008 from Soildah bazaar. On query by the relatives of the victim and owner of the motorcycle, caught hold of accused Ramjan Sehikh from Barogunia who admitted that Shafiq and others hired motorcycle of the victim and finally the victim was recovered from the place near the house of Ramjan's

aunt. These are the strong circumstances of which could not be reverted or discarded by the defence in any way. He lastly contends that both the condemned prisoners made confessional statements before the magistrates voluntarily and they did not file any application for retraction of their confessions immediately after they made such statements, which indicates that they have committed the offence as to the killing of the victim.

On the contrary, Ms. Momtaz Begum, learned state defence lawyer has argued that there are many contradictions in the evidence of prosecution witnesses and no one had directly seen the condemned prisoners taking the victim along with his motorcycle from the first place of occurrence i.e Soildah bazaar to Barogunia. She further submits that the prosecution alleged that one Hossain saw accused Ramjan with victim Shahid at Barogunia bazaar but the prosecution did not produce Hossain before the trial court for taking his evidence in proving such allegation.

It is further contended by her that as per confessional statements of both the condemned prisoners, sleeping medicine was blended in the meal of the victim but it was not examined as to whether the victim took such meal before he was killed. She finally submits that there is no eye witness in the instant case. Only, on the basis of hearsay evidence the trial judge found the condemned prisoners guilty of the offence which was absolutely beyond the law and ethics.

On a careful scrutiny of the evidence it has emerged that the prosecution to prove the instant case, has examined as many as 11 witnesses of whom pws-01-03 as a Judicial Magistrates recorded confessional statements of accused Arif, Ramjan Sheikh and Shafiqul. Pw-04 examined the dead body of the deceased giving opinion on the autopsy report as an expert. Pw-05, brother of the deceased, being informant lodged the FIR on 25.09.2008 around 23:25 hours. Pw-06 is a police constable who took the dead body to the morgue

for an autopsy. Pw-07 is a motorbike driver by profession like deceased while pw-08 is the owner of the stolen motorcycle. Pw-09 is a partly investigating officer while pw-10 as investigating officer submitted charge sheet against the accused persons and pw-11, Sub-inspector of police prepared inquest report of the dead body of the victim when investigating officer was on leave.

According to FIR lodged by pw-05, accused Ramjan Sheikh and Monir Talukder both hired the motorcycle bearing registration No. Khulna Metro-Ha-11-8030 from Soildah bazaar and took them to Barogunia on 23.09.2008 at 03:30 pm. As the victim did not return home, they made search and got message that Ramjan and Arif took the motorcycle with victim Shahid to the house of aunt of Ramjan Sheikh who was subsequently apprehended by pw-08 and others. In their presence Ramjan Sheikh made extra judicial confession stating that they hired the motorcycle along with its

driver victim Shahid to be found in Jessore but the victim was subsequently found dead on 30.08.2008 near the house of his aunt Haruza Begum.

Pw-05 has stated in his examination-in-chief that his brother did not return home along with motorcycle on 23.09.2008. They tried to trace him out knocking the door of some places including the house of Haruza Begum. Pw-08 and one Rakon Sheikh caught hold of Ramjan Sheikh on 25.09.2008 who admitted that Arif and Haruza Begum have been involved in the murder. On 30.09.2008 at night dead body of victim Shahid was recovered from the Mehegoni Garden of one Shawpon Mondal near the house of Haruza Begum. This version of evidence is found to be similar to the FIR story. It is also revealed from his evidence that condemned prisoner Ramjan Sheikh tried to ignore himself for his involvement in the incident whereas he knew that Arif and Haruza Begum are involved in the incident which clearly shows that he had all sorts of knowledge about

the killing of the victim. It is also evident in the cross-examination that this witness heard directly from the mouth of Ramjan that Ramjan took the motorcycle along with driver victim on a hire basis. Therefore, this piece of evidence is enough to consider the involvement of Ramjan Sheikh in the death of the victim.

By supporting the above evidence pw-07 states that he is also a driver of the motorcycle, was present at the stand when two passengers hired motorcycle of the victim in order to go to Barogunia on 23.09.2008 around 03:30 pm. When relatives and owner of the motorcycle started to find them at Baroguna someone named Hossain told them that he could recognize Ramjan among the two riding passengers on the motorcycle. On 30.09.2008 dead body of the victim was recovered from Mehegoni garden of Shawpon Mondal near the house of accused Haruza Begum at Barogunia. This evidence of this witness also corroborates the evidence of pw-05 as well as FIR story that one of the

riders was none but Ramjan. It finds support from the decision held in the case of Bhola-Vs-State, reported in 55 DLR [2003]36 =6 BLD[AD] which is run as follows

“If is proved that the deceased was last seen alive in the company of the accused in the absence of any other reasonable explanation as to the safe departure of the deceased from the company of the appellant no conclusion other than the guilt of the accused can be drawn.”

Ramjan made an attempt to create confusion among the searchers of the victim taking them to Jessore where the victim and motorcycle were not found. This plea he took during searching of the victim with a view to get him away from the killing incident as he is a professional criminal according to his previous record.

Pw-08, the owner of the motorcycle, was told by one Hossain that he could identify one of the riders of the hired motorcycle as Ramjan Sheikh. Thereafter, pw-08 along with relatives of the deceased by another motor cycle went to the house of accused Haruza

Begum, aunt of the accused Ramjan Sheikh and then went to the Ramjan Sheikh's newly married wife's house and caught hold of Ramjan Sheikh on 25.09.2008 who in presence of pw-01 and others confessed that he along with accused Shafiq and others in order to steal and sell the motorcycle hired the same from Shahid. And they killed Shahid and dumped his dead body in a cavity by digging earth around 50 cubits far from the house of accused Haruza Begum in order to conceal the evidence of stealing, so that the victim could not be able to disclose about the stealing of the motorcycle. It is also evident that the motorcycle was sold for Tk. 40,000/- which accused Ramjan Sheikh got a share of some money. Accused Ramjan also admitted the occurrence in his confessional statement and said adding that he and Monir collected a bundle of rope and took the motorcycle away.

Accused Shafiqul was arrested on 30.04.2009 and he made a confessional statement on 04.05.2009. In his

confession he narrated that Ramjan rushed to Soildah Bazaar in order to hire motorcycle along with driver and the driver of the motorcycle has been killed by tying a rope around his neck by Ramajan and Sarow. He was then at the balcony [barnda]. Three of them all took the dead body to nearby garden and dumped the dead body in a well by digging earth. So, the FIR story and the evidence of pws- 05, 07 and 08 have been corroborated by the said statements of two confessing accused.

Although circumstance shows that the victim was liquidated earlier but Ramjan tried to make confusion among the relatives of the victim and other witnesses having referred to different places of victim's whereabouts. Because his previous record shows that he is a professional criminal. Two days before the incident he got out of the jail after having been involved in a theft case. It is also revealed in course of cross-examination of pws-02 and 03 that by questioning the condemned prisoners after giving reasonable time for

reflection they being satisfied recorded the confessional statements made by the condemned prisoners voluntarily having involved them partly in the commission of offence. Condemned prisoners being satisfied put their signatures on those statements which were read over to them by the said pws after recording those confessional statements.

Nevertheless, condemned prisoners particularly Ramjan Sheikh soon after his apprehension made extra-Judicial confession before pw-05 and others remains unassailed. It appears from record that condemned prisoners Ramjan Sheikh made confessional statements on 04.10.2008 and Shafiqul made on 04.05.2009 and the charge against them was framed on 13.04.2010 in the case. From the date of their confessions till framing of the charge they were silent with regard to their confessional statements. Even then, there has been found no application for retraction of their confessions if the same were not made by them voluntarily. It finds

support from the case of Nausher Ali Sarder and others –Vs- the State, reported in 39 DLR [AD] [1987] where it was held that,

“It is true that a confessional statement should be recorded in the words of the prisoner. But it is not correct to say that the confession not recorded exactly in the prisoner’s own words is inadmissible. It appears that the prisoner did not make any complaint before the Magistrate [pw-1] about any torture or mal-treatment upon him by the police who produced him before the court within 36 hours including the period spent on the journey. The Investigating Officer [pw-25] who produced him before the Magistrate denied the suggestion that he had subjected the prisoner to torture or mal-treatment. The Magistrate deposed that by questioning the prisoner and giving him caution and reasonable time for reflection he was satisfied that the prisoner made the statement voluntarily. This statement is in full agreement with the oral statement of Nausher given before pw. Toyeb Ali and others, as stated above. Even if, for the sake of argument, this judicial confession is ignored, the extra-judicial confession made

within a few minutes of the incident remains un-assailed.”

During examination under section 342 of the Code of Criminal Procedure they [condemned prisoners] denounced that their statements were not made voluntarily which this court finds, not correct or true. It was made by them before the trial court after thought. The confessions of both the condemned prisoners were recorded after taking them on remand, do not make those confessions illegal or unlawful since they were taken on police remand by the order of the concerned Court and made the same by their willingness. Even then, the defence did not raise any focus on illegality of the confessional statements during cross-examination of the recording magistrate.

Learned Deputy Attorney General contends that all the provisions and requirements of sections 364 and 164 of the Cr.P.C have been complied with. We also find substance advanced by him in this regard. It is true that only on the basis of confessional statement of co-

accused conviction cannot be formed. There must have other evidence supporting on it. Condemned prisoner Shafiqul was present at the time of killing of the victim and he along with Ramjan and another dumped the dead body of the victim in a cavity by digging earth as disclosed by him in his confessional statement. Here Shafique made this confession involving him in the screening of the dead body. On the other hand, Ramjan did not disclose directly about his involvement in the killing of the victim in his confession but on a careful scrutiny of his confession it appears that he had absolute knowledge over the stealing of the motorcycle and the killing of the victim and extra judicial confession made by him before the witnesses particularly pws-05 and 08 also proves that he has failed to escape him from the commission of the offence.

Both the condemned prisoners were put on trial jointly for the same offence. One of them namely Shafiqul made confession affecting himself and others

including Ramjan. And Ramjan apart from confessional statement, made also extra judicial confession before the aforesaid witnesses who have given same evidence as he [Ramjan] disclosed before them. So, there is no scope to save them from the crime committed in the horrific killing of the victim. Extra judicial confession of a co-accused may be taken into consideration along with other evidence. In this case it finds sufficient evidence as stated above. Though, there is no eye witness in the killing of the victim. Circumstantial evidence proves the prosecution case along with confessional statements made by the condemned prisoners. Because of the fact that the dead body was found within the vicinity of accused Haruza Begum, aunt of condemned prisoner Ramjan Sheikh.

With regard to the confessional statement of accused Ramjan Sheikh the judicial magistrate states in evidence that he received the accused at 01:00 pm on 04.10.2008 and recorded his statement following all

provisions of law which he explained to accuse Ramjan who being satisfied made left thumb impression [LTI] on it. Pw-03 also narrated in his deposition in the same tune like pw-02. In cross-examination, he also responded that he kept accused Shafiqul under custody of his office staff from 01:00 pm to 04:00 pm. Hence, it is revealed that both the recording officers had given reasonable time for reflection and pre-caution. Though it is erroneously stated in the confessional statement of accused Shafiqul that he was produced before the Magistrate at 04:30 pm and his departure at 04:50 pm but the oral evidence of pw-02 on oath, shows different scenario that Shafiqul was produced before him at 01:00 pm on 04.10.2008 which this court finds appropriate and correct.

In those statements, it is found that both the condemned prisoners tried to escape involving themselves from the commission of offence but from a combing scrutiny of their statements it appears that they

had absolute knowledge in stealing the motorcycle as well as killing of the deceased. It is a true fact that the investigating officers failed to recover the stolen motorcycle during investigation of the case, such laches on the part of the investigating officers, do not make the murder case shaky or doubtful and has been unable to prove this case beyond reasonable doubt. Moreover, material exhibits namely old stripe lungi, a half-black colour gengi and a rope of jute scraps have been produced before the trial court and the same are not challenged by the defence that those were not belonged to the deceased of the case. At the time of recovery of the dead body from Mehegoni garden of Shawpan Mondal near the house of Haruza Begum pws-05, 07 and 08 were present there and pw-05 recognized the dead body of the deceased instantly as his brother Shahid by seeing wearing apparels of the deceased. It also appears from the inquest report that informant pw-05 recognized the dead body of the deceased as his

brother Shahid Sheikh dumped by earth in a cavity while it was recovered from the Mehegoni garden.

It is also found in inquest report that a rope around his neck tied up having wore a stripe lungi and a half-black gengi. The evidence of pws-05, 07 and 08 has been corroborated with regard to the apparels of the deceased by the inquest report, prepared by pw-11 who has narrated in his evidence that he prepared the inquest report [exhibit-06] and seized alamat of old lungi, half black colour gengi and a rope of jute scarps, marked as material exhibits- IV, V and VI respectively.

Nevertheless, pw-04 found injuries on the body of the victim as continuous circular ligature mark around the neck below the thyroid cartilage by a rope, which was with the neck, breathe $\frac{1}{2}$ ". Left foot absent below the left ankle. Here we find the cause of death by using a rope, which was found around the neck of the victim at the time of recovery of the dead body. More so, the doctor of the post mortem examination report opined

that the death was due to asphyxia and haemorrhage resulting from strangulation and head injury which were ante mortem and homicidal in nature. In reply to a question put to him by defence, he has also confirmed saying that the death was caused due to strangulation.

If all exhibits, material exhibits and confessional statements of both the condemned prisoners are taken together with the evidence of the witnesses and circumstantial evidence it finds that the condemned prisoners caused the death of the victim in order to steal the motorcycle and conceal the evidence of dead body after killing him for screening themselves from legal punishment and as such, we find that both the condemned prisoners also committed an offence punishable under section 201 of the Penal Code but the trial judge acquitted them from the charge of aforesaid section 201 of the Penal Code. Against such order of acquittal for the offence under section 201 of the Penal Code no appeal was presented by the State or the

informant of the case. Hence, there is no scope to impose punishment on them finding guilty of the offence under section 201 of the penal code though it is proved by evidence. But in the other facts and circumstances and evidence as discussed above, we are of the view that there is nothing wrong in finding the condemned prisoners guilty under sections 302/34 of the Penal Code for killing the victim by the trial court as the prosecution has been able to prove the allegation against them beyond reasonable doubt.

We have given our anxious consideration and thought on the point of sentence. The evidence of pws-05, 07 and 08 reveals that the victim was taken along with his motorcycle to the place of occurrence and killed by strangulation by the condemned prisoners along with other accused who were also put on trial before the trial court but subsequently they were acquitted by the trial court having considered the evidence on record. Whereas the allegation remains unshaken in accordance

with the evidence of pws-05, 07 and 08 against other accused persons that the victim along with his motorcycle was taken to the place of occurrence on hire basis and killed him there by the condemned prisoners along with others.

It is true as per evidence of prosecution witnesses that there is no ocular evidence in the case as to who inflicted on the person of the victim and by whose acts and action the victim had met with death by strangulation. More so, it appears from record that these two condemned prisoners have been in condemned cell from the date of delivery of the judgment on 15.11.2010 passed by the trial court, which means that they have suffered long pangs of death each and every day in prison. Moreover, before judgment they were in normal cell of the jail since their arrest.

In the above facts and circumstances and upon consideration of the entire evidence, we are of the agreed view that the ends of justice will be met if the

condemned prisoners are sentenced to imprisonment for life instead of awarding them to death in the sentence.

Accordingly, the sentence of death penalty passed by the Trial Court is altered and reduced to imprisonment for life.

In the result, the Death Reference is rejected. The Jail Appeals Nos. 361 of 2010 and 362 of 2010 are also dismissed with the aforesaid modification in the sentence. The order of conviction passed by the Trial Court as stated above is hereby upheld finding them guilty of the offence under sections 302/34 of the penal code but the order of sentence is altered and reduced to imprisonment for life with a fine of Tk- 5000/- each, in default, to suffer rigorous imprisonment for three months more.

The condemned prisoners are to be shifted from the condemned cell to normal cell meant for similar convicts at once. Send down the lower court's record along with a copy of this judgment expeditiously.

Md. Jahangir Hossain, J

I agree