

Bench
 Mr. Justice Bishmadev Chakrabortty
 and
 Mr. Justice A.K.M. Zahirul Huq
Criminal Appeal No.1916 of 2014
 Md. Tayaz Kha alias Tayez Kha
convict-appellant
 -Versus-
 The Stateopposite party
 Mr. Md. Mahabubar Rahman, Advocate
for the convict-appellant
 Mr. Sheikh Zulfikar Alam Shimul, Deputy
 Attorney Generals for the State
 Judgment on 05.09.2024.

Bishmadev Chakrabortty, J:

This appeal at the instance of sole convict is directed against the judgment and order dated 19.03.2014 passed by the Additional Sessions Judge, Court No.1, Pabna in Sessions Case No.44 of 2012 convicting the appellant under section 302 of the Penal Code sentencing him thereunder to suffer rigorous imprisonment for life and to pay a fine of Taka 10,000.00, in default, to suffer simple imprisonment for 2 (two) months more.

PW1 Mst. Rabeya Khatun lodged a first information report (FIR) with Ataikula police station at about 13.00 hours on 28.11.2009 stating, *inter alia*, that her husband Zamrul started a temporary shop of *Jalebi* on Eid day beside the road in front of Hamid's house which was 400 yards away from their

house. She started from their house towards the aforesaid shop at about 11.15 am on 28.11.2009 and while passed half of the way found 1. Md. Tayez (appellant) and 2. Nayeb Ali and unknown 4/5 accused attacking her husband with sharp weapons. Accused Nayeb gripped the victim and Tayez dealt a *kiris* blow on his back. The other accused also dealt blows on the hip of the victim with *kiris* and *dagger* causing his death. After committing the offence all the accused fled away towards the graveyard. At their hue and cry the musullis and others came forward and saw the occurrence. Rakibul and Saydul who were with the victim had seen the occurrence. Her husband was a member of extremist/outlaws party. She suspected that for internal clash with the party men he was murdered. On the aforesaid allegation Ataikula Police Station Case No.12 dated 28.11.2009 under sections 302 and 34 of the Penal Code against the appellant and another and 4/5 unknown accused was started.

PW11 Md. Saiful Islam, a Sub-Inspector (SI) of police investigated the case. In course of investigation, he visited the place of occurrence (PO), sent the dead body to the morgue for holding autopsy, collected necessary prosecution materials, arrested appellant Tayez Kha, forwarded him to the learned

Magistrate for recording his confession under section 164 of the Code of Criminal Procedure (the Code) and finally submitted a charge sheet on 04.11.2010 against 8 accused including this appellant under sections 302, 109 and 34 of the Penal Code.

The record of the case was then transmitted to the Sessions Judge, Pabna. The Sessions Judge framed charge against all the accused under the aforesaid sections of the Penal Code. The charge so framed was read over to all the accused to which they pleaded not guilty and claimed to be tried. In course of time the case was transferred to the Court of Additional Sessions Judge, Court No.1, Pabna for holding trial.

In trial the prosecution examined in all 11 witnesses and they were cross-examined by the defence. The defence case as it transpires from the trend of cross-examining the prosecution witnesses is that the appellant is innocent and has been implicated in this case out of enmity. The victim was murdered by the members of his outlaws party men due to internal clash. The police extracted the confession on duress and coercion which is not true and voluntary.

On conclusion of examination of prosecution witnesses, learned Judge examined all the accused under section 342 of the

Code in which they reiterated their innocence and demanded justice.

However, the Additional Sessions Judge considering the evidence and other materials on record found this appellant guilty of the offence under section 302 of the Penal Code and sentenced him thereunder to suffer imprisonment for life with fine but acquitted all other co-accused. The above appellant has challenged the aforesaid judgment and order of conviction and sentence passed against him in this appeal.

Mr. Md. Mahabubar Rahman, learned Advocate for the appellant taking us through the materials on record submits that although PW 1 claimed her as eyewitness to the occurrence but actually she did not see the occurrence of murder. The conviction is solely based on the confessional statement of appellant recorded by PW5. But the confession is neither true nor voluntary because in its recording the procedure as laid down under section 164(3) of the Code was not complied with by the learned Magistrate. Moreover, the statements made in the confession that he inflicted knife injury on the back of victim Zamrul do not support the postmortem examination report because in the report the injury is found on the chest of

the victim. He finally submits that the appellant has been in jail for more than 14 years and under the facts and circumstances, the appeal may be allowed and the appellant be acquitted from the charge levelled against him.

Mr. Sheikh Zulfikar Alam Shimul, learned Deputy Attorney General on the other hand submits that the confession made by the appellant is found true and voluntary. In its recording all legal formalities were complied with. Learned Magistrate as PW5 proved that the confession is true and made voluntarily. A confession, if it is found to be true and voluntary can be the sole basis of conviction of its maker. The trial Court correctly appreciated evidence of witnesses and convicted and sentenced the appellant which may not be interfered with by this Court in appeal.

To address the submissions of the parties and effective disposal of the appeal, let us have a bird's eye view on the prosecution witnesses.

PW 1 Mst. Rabeya Khatun, wife of the deceased stated that the occurrence took place 3½ years ago. The accused were Tayez Kha and Nayeb Ali. Nayeb Ali gripped her husband and accused Tayez dealt blows with *kiris* on his neck and throat.

Her husband tried to escape but Tayez chased him and further dealt four blows on his leg. The victim died instantaneously. She saw the occurrence from her own yard. She proved the FIR exhibit-1, inquest report exhibit-2 and identified her signatures thereon. In cross-examination she stated that Shakharipara eidgah field would be quarter kilometre away from their house and there are houses and trees between her house and the eidgah field. She denied the defence suggestion that she did not state the injuries in the FIR as deposed in the Court or that she did not state such facts in her statement recorded under section 161 of the Code. She further denied that she did not witness any occurrence or that she disposed falsely.

PW2 Rikat Ali Sheikh an elder brother of the deceased was a witness to the inquest. He stated that he heard that the victim was killed in the place of occurrence. He did not witness the occurrence. He proved the inquest report exhibit-2 and his signature thereon-2/2. In cross-examination he denied that the deceased was a member of extremist group and killed in the internal clash of it.

PW3 Lutfar Sheikh is another brother of the deceased. He stated that he carried the victim to hospital with a rickshaw van but on the way he died. He did not witness the occurrence.

PW4 Sukkur Ali Sheikh another brother of the victim stated that on the day of eidul adha his brother was killed beside Shakharipara eidgah field. He was not at home at that time. He heard about the occurrence subsequently.

PW5 Md. Parvej Shahriar was a Judicial Magistrate of Jhenaidah Court at the material time who recorded the confession of the accused. He stated that PW 11 produced accused Tayez Kha before him for recording his confession. He allowed him 3.00 hours time for reflection. He asked the accused the questions of the prescribed form at 4.00 pm again. The accused voluntarily made confession to him. He recorded the confession complying with the provisions of section 164 of the Code. He and accused put their signatures in the confession. He proved the signatures put by him and those of the accused exhibit-5 series. He denied the suggestion that police tortured the accused inhumanly and compelled him to make the confession. He further denied of not recording the statement as

per law. He sent the accused to jail through Court police but it was not written in the confession.

PW6 Nurai Sarder president of eidgah field stated that he was present in the eidgah at that time. After the occurrence took place he heard that Zamrul was murdered. He did not know who killed him. In cross-examination he stated that eidgah field would be half kilometre away from victim Zamrul's house. There are houses and trees between the two. The eidgah field could not be seen from victim's house. The IO did not examine him under section 161 of the Code.

PW 7 Abdul Hamid Mollah was tendered by the prosecution and cross-examined by the defence where he stated that the house of victim would be half kilometre away from eidgah field and there are houses and trees between the two. The eidgah could not be seen from the house of victim. PW 8 Md. Rokon Ali was tendered by the prosecution and the defence declined to cross-examine him.

PW 9 Md. Tariqul Islam, a constable of police stated that he went to the place of occurrence with PW 11 and found the dead body of victim with 8/9 injuries on his person. PW 11 held inquest on the corpse and sent the body to the morgue through

chalan. He proved the seizure of wearing apparels of the victim under exhibit-9 series and alamots material exhibits-I and II.

PW 10 Tariqul Islam is a doctor who was a member of the board of holding post mortem examination of the victim. He stated that as a member of the board he found the injuries in the body of the victim as stated in the report and passed opinion as to the cause of death for injury number 1. He proved the autopsy report exhibit-4 and identified his signature thereon. In cross-examination he stated that the death was due to injury number 1. He did not state the age of injuries in the report. He did not state the name of weapon used in the offence of murder. He denied the suggestion that he prepared the autopsy report as per the inquest report.

PW 11 Md. Saiful Islam is an SI of police and Investigating Officer (IO) of the case. He stated that he recorded the case and started investigation. He seized alamots, held inquest and sent the dead body to morgue for holding autopsy. He prepared the sketch map and index. He arrested accused Tayez Kha and forwarded him to the learned Magistrate for recording his confession and accordingly it was recorded. He submitted a charge against 8 accused under

sections 302, 201 and 34 of the Penal Code. He proved the inquest report, sketch map, FIR form, seizure of alamots and chalan exhibits-2, 5-8 and 9 respectively. He proved the alamots material exhibits- I-III also. In cross-examination he stated that in the investigation he found that victim Zamrul was a member of extremist group and an accused of a murder case. He denied the suggestion that on the threat of crossfire he extracted the confession of Tayez as tutored by him. He further denied that he implicated the innocent accused in the case by hiding real offenders.

We have considered the submissions of the learned Advocate for the appellant and learned Deputy Attorney General and gone through the materials on record.

On scanning the evidence of witnesses it is found that none of them claimed to be the eyewitness to the occurrence except informant PW1. In the FIR the informant stated that she started towards the *jalebi* shop of her deceased husband Zamrul which was 400 yards away from their house and when passed half of the way she witnessed the occurrence of murder. But as PW 1 she stated that she witnessed the occurrence from their own yard which is total departure from the FIR case and

contradictory. In cross-examination she stated that there are houses and trees between their house and the PO. PWs 6 and 7 in cross-examination stated that the distance of PO and victim's house would be half kilometre and there are houses and trees between them. PO eidgah field could not be seen from PW1's house. Therefore, PW 1 failed to prove that she witnessed the occurrence of murder. Moreover, in the FIR although Rakibul and Saydul were cited as eyewitnesses to the occurrence but none of them was examined on oath. The prosecution did not assign any reason for their non examination. Therefore, we hold that practically no witness had seen the occurrence of murder.

In the absence of any ocular evidence as discussed above it remains only the confession exhibit-3 made by the appellant namely Md. Tayez Kha alias Tayez Kha. His confession is reproduced below:

“আমি কাঁচা তরকারীর ব্যবসা করতাম। জামরুল, জলিলসহ মোট ১০ জন নকশাল আমাকে নিয়ে নওয়াব মেম্বারের বাড়ির পিছনে নিয়ে কোপ মারে, প্লাস দিয়ে পায়ে ও হাতের নখ তুলে নেয়। আমার মুখে প্রসাব করে দেয়। হাতের রগ কেটে দেয়, মাথায় কোপ দেয়। এর কিছু দিন পর জামরুল আমার বোনকে ধর্ষণ করে। আমি বিচার না পেয়ে এলাকা ছেড়ে পাঁচ বৎসরের জন্য চলে যাই। অবিকুল সংবাদ দেয় আমাকে যে জামরুল ঈদগাহ এর মাঠে জিলাপীর দোকান দিয়েছে। সংবাদ পেয়ে আমি, ফারুক, আলহাজ্ব ও রাজেম বসি এবং

বুদ্ধি পরামর্শ করি জামরুলকে কিভাবে মারা যায়। ফারুক এর বাবার নাম রহিম, আলহাজ্ব এর বাবার নাম ছকিম বিশ্বাস, রাজেম এর বাবার নাম মোকছেদ। এরপর যেহেতু কুরবানীর ঈদের দিন সেহেতু বাড়ী গিয়ে খাই এরপর ঈদের নামাজ পড়ি। আমি ও ফারুক গোরস্থানের কাছে দুটি চাকু লুকিয়ে রাখি। এরপর আমি, ফারুক, আলহাজ্ব, রাজেম, ইকবাল পিতা সোবহান, মুকুল পিতা সোরাই, আতিকুল পিতা সেরোই এক পাশে দিয়ে ফারুক, আমি ও রাজেম যাই আরেক পাশ দিয়ে রবিউল ইকবাল ও মুকুল যাই। আতিকুল জামরুলের সাথেই জিলাপী বিক্রি করছিল। আমরা যখন দোকানের সামনে যাই তখন আতিকুল দৌড় মারে। জামরুল দোকানে জিলাপীর দাড়ি ধরে ছিল। আমি গিয়ে জামরুলের ঘাড়ের উপর লাথি মারি। আমি চাকু দিয়া জামরুলের পিঠে মারি। তখন সবাই গিয়ে মারতে শুরু করে। এরপর আমরা মেরে চলে যাই। লোকজন জামরুলকে ভ্যানে করে হাসপাতালে নিয়ে যায় পথে জামরুল মারা যায়।”

On going through the aforesaid confession exhibit-3, we find that although PW5, learned Magistrate filled up columns 5 and 6 of the form by asking the convict questions prescribed therein but he did not write anything about the truth and voluntariness of the confession at the bottom of column 7 of the statement. The recording of confession is the solemn act to be performed by the learned Magistrate under section 164(2) of the Code. He is bound under section 164(3) of the Code to write at the bottom of the statement his satisfaction about its truth and voluntariness and make a note to that effect but he did not do so. In the case of State vs. Babul Miah, 63 DLR (AD) 10, our

Apex Court for non compliance of the provisions of section 164(3) of the Code disbelieved the truth and voluntariness of the confession and acquitted the convict from the charge of murder levelled against him by setting aside the judgment and order of conviction and sentence passed by the trial Court. Furthermore, column numbers 8, 9 and 10 of the confession of this case is found totally blank. Even PW 5 did not write in column number 10 where he sent the appellant after recording the confession. We find no reason to rely on such confession to pass conviction against the appellant. Moreover, the above confession exhibit-3 was not brought to the notice of the appellant during his examination under section 342 of the Code. The appellant has been seriously prejudiced for such error of the learned Judge. Since the charge has not been proved beyond reasonable doubt and he has been in jail for 14 years, we are not sending this case on remand to comply with the aforesaid provisions by the learned Judge.

Apart from the above position, it is found that confession of the appellant exhibit-3 do not support the autopsy report exhibit-4. In the autopsy report the vital injury on the person of the victim is found on the chest but in the confession the

appellant told that he inflicted knife injury on the back of victim and PW1 also deposed in the similar line. Moreover, the appellant has been languishing in jail from his arrest on 05.09.2010, *i.e.*, for more than 14 years. In the aforesaid premises, we find merit in this appeal.

Accordingly, the appeal is allowed. The judgment and order of conviction and sentence dated 19.03.2014 passed by the Additional Sessions Judge, Court 1, Pabna in Sessions Case No.44 of 2012 is hereby set aside. The appellant is acquitted of the charge under section 302 of the Penal Code levelled against him. The concerned authority is directed to release him from jail forthwith, if not wanted in any other cases.

Communicate the judgment and send down the lower Courts' record.

A.K.M. Zahirul Huq, J:

I agree.