

**16 SCOB [2022] AD 62****APPELLATE DIVISION****PRESENT:****Mr. Justice Syed Mahmud Hossain, Chief Justice****Mr. Justice Muhammad Imman Ali****Mr. Justice Hasan Foez Siddique****Mr. Justice Md. Nuruzzaman****Mr. Justice Obaidul Hassan****CRIMINAL APPEAL NO.127 OF 2014 WITH JAIL APPEAL NO.26 OF 2014 AND JAIL APPEAL NO.29 OF 2014**

(From the judgment and order dated 11.05.2014 passed by the High Court Division in Death Reference No.07 of 2009 with Criminal Appeal Nos.616, 670 and 698 of 2009 with Jail Appeal Nos.155-159 of 2009).

<b>Md. Shukur Ali and another</b>	:	..... <u>Appellants</u> (In Crl. A. No.127 of 2014)
<b>Mamun</b>	:	..... <u>Appellant</u> (In Jail Appeal No.26 of 2014)
<b>Sentu and another</b>	:	..... <u>Appellants</u> (In Jail Appeal No.29 of 2014)
	-Versus-	
<b>The State</b>	:	..... <u>Respondent</u> (In all the appeals)

For the appellants (In Crl.A. No.127 of 2014) : Mr. S.M. Shahjahan, Advocate with Mr. Ragib Rouf Chowdhury, Advocate, instructed by Ms. Shahanara Begum, Advocate-on-Record.

For the appellants (In Jail A. Nos.26 & 29 of 2014) : Mr. S.M. Aminul Islam, Advocate.

For the Respondent (In all the appeals) : Mr. Biswajit Debnath, Deputy Attorney General, instructed by Mrs. Madhu Malati Chowdhury Barua, Advocate-on-Record.

Date of Hearing and Judgment : The 18<sup>th</sup> day of August, 2021.

**Editors' Note**

This is a case of gang rape and murder. There was no eyewitness. Appellants were suspected of being involved with the commission of crime. Police arrested appellant Mamun and Azanur who gave confessional statements describing vividly the role played by them and other co-accused, namely, Shukur and Sentu in committing the crime which was supported/corroborated by the inquest report, postmortem report and by the depositions of the witnesses regarding the marks of injury on the body of the deceased. The Appellate Division held that in such case the non-confessing accused persons can be equally held liable like Azanur and Mamun for murdering the deceased after committing rape. The Court further observed that, the confessional statement of a co-accused can be used for the purpose of crime control against other accused persons even if there is a little bit of corroboration of that

confessional statement by any sort of evidence either direct or circumstantial and adverse inferences may be drawn upon silence on part of those who have been so incriminated by the confession of the co-accused. However, the Appellate Division maintained the death sentence of the appellant Shukur Ali who inflicted fatal knife injuries to the deceased and commuted the sentence of death of other appellants to imprisonment for life.

### **Key Words**

Section 9(3) of the Nari O Shishu Nirjaton Daman Ain, 2000; Confessional Statement; Section 164 of the Code of Criminal Procedure; Section 8 and 30 of Evidence Act; Due process; Crime control

### **Section 164 of the Code of Criminal Procedure and Section 8 of the Evidence Act:**

**It is true that there is no eye witness in the instant case, but the inculpatory, true, and voluntary confessional statements of two accused, and the circumstances particularly long absconion by Shukur and Sentu are so well connected to indicate that those circumstances render no other hypothesis other than the involvement of the appellants Shukur, Sentu, Mamun and Azanur in the alleged rape and murder thereof. ...(Para 63)**

### **Due process vis-a-vis crime control consideration:**

**In performing our duties, this court is charged with the task of not only assessing the facts against the law, but also considering the impacts of judgments that are pronounced and any assessment made on the overall justice system. With modern criminal justice mechanism, the right against self-incrimination is one that stands as a cornerstone. As such, confessions by a co-accused are generally inadmissible against the accused in a concerned case. However, in our duties of administering justice, we are sometimes faced with a case that forces us to consider aspects of larger policy at play. The balance between crime control and due process models of justice is such a consideration that requires reassessment with changing times and upon the fact of each case. The case before us is one of such a heinous crime, where measures of control are made far more necessary, to ensure that justice can be brought to the victim in question. As such, while due process is still of utmost importance; crime control considerations must be made as well. ...(Para 64, 65 and 66)**

### **Adverse inferences may be drawn upon silence on part of those incriminated:**

**The principle of the right against self incrimination is also accompanied by the principle that upon silence on part of those incriminated, adverse inferences may be drawn at any stage of the trial and pre-trial procedures. When the co-accused, Azanur and Mamun put forth their confessions, incriminating the accused Shukur and Sentu, they had the opportunity to present their accounts of the events in question. Their refusal to adduce defence witness and to give any statement, allows this Court to draw an adverse inference against them, in conjunction with the inferences drawn from the period of their absconcion. ...(Para 68 and 69)**

### **Section 30 of the Evidence Act:**

**We hold that confessional statement of a co-accused can be used against others non-confessing accused if there is corroboration of that statement by other direct or circumstantial evidence. In the instant case, the makers of the confessional statements vividly have stated the role played by other co-accused in the rape incident and murder of the deceased which is also supported/corroborated by the inquest report, postmortem report and by the depositions of the witnesses particularly the deposition of**

**P.Ws.1,2,3,10,11,12,14 and 18 regarding the marks of injury on the body of the deceased. Every case should be considered in the facts and circumstances of that particular case. In light of the facts and circumstances of the present case, we are of the view that the confessional statement of a co-accused can be used for the purpose of crime control against other accused persons even if there is a little bit of corroboration of that confessional statement by any sort of evidence either direct or circumstantial. (Emphasis added). Thus, the accused namely Shukur and Sentu are equally liable like Azanur and Mamun for murdering the deceased after committing rape.**

...(Para 70)

## JUDGMENT

**Obaidul Hassan, J.**

1. This Criminal Appeal No.127 of 2014 with Jail Appeal Nos.26 and 29 of 2014 is directed against the judgment and order dated 11.05.2014 passed by a Division Bench of the High Court Division in Death Reference No.07 of 2009 with Criminal Appeal Nos.616, 670 and 698 of 2009 with Jail Appeal Nos.155-159 of 2009 accepting the Death Reference while dismissing all the appeal and thereby upholding the judgment and order of conviction and sentence dated 04.02.2009 passed by the learned Nari O Shishu Nirjatan Daman Tribunal, Kushtia (hereinafter referred to as the Tribunal/trial Court) in Nari O Shishu Nirjatan Case No.147 of 2004 arising out of Daulatpur Police Station Case No.26 dated 27.03.2004 corresponding to G.R. No.69 of 2004 convicting the appellants under section 9(3) of the Nari O Shishu Nirjatan Daman Ain, 2000 (hereinafter referred to as the Ain, 2003) and sentenced them to death by hanging and to pay a fine of Tk.1,00,000.00 each.

2. The prosecution case, in short, is that one Md. Abdul Aziz alias Jhunu, father of the deceased Sabina Khatun lodged First Information Report (shortly, the FIR) with Daulatpur Police Station. Alleging that on the evening of 25.03.2004 his daughter Sabina Khatun (13) went to the house of neighbor Muna Mondal to watch television. As she did not return home, the inmates of Sabina's house went to the said residence to search for Sabina. One Rubina, wife of Azanur told them that the victim went away from their residence just after evening. They also looked for Sabina in every house of the village, but could not trace her. On 27.03.2004 at about 05:30 pm the informant came to know that a dead body has been found in the field of Lalnagar. Being informed, the informant, his wife, Hasina; daughter, Bedana; son, Mulluk Chand; along with other villagers, went to the place of occurrence and saw the naked dead body of Sabina Khatun, her mouth was fastened with her orhna. They saw several injury marks on her chest, both the thighs and sharp cutting injury on her private organ. Her body was partially decomposed and spreading bad smell. Later on, they came to know that one Samad first saw the dead body at the place of occurrence where he went to pluck buds of tobacco flowers. The informant suspected that the accused Mamun, Azanur, Sentu and others had raped and killed his daughter. On the basis of the said first information lodged by the informant, Daulatpur Police Station Case No.26 dated 27.03.2004 corresponding to G.R. No.69 of 2004 under section 9(3) of the Ain, 2000 was started.

3. Officer-in-Charge Md. Faruk Ahmmed started to investigate the case. On his transfer Sub-Inspector (SI), Md. Nabir Hossen investigated the case and finally when S.I. Md. Nabir Hossain was transferred S.I. Md. Mosaddek Hossen Khan completed the investigation and submitted charge sheet. The investigating officer visited the place of occurrence and prepared the Inquest Report of the dead body in the presence of witnesses, prepared the sketch map with index, seized the alamots and examined the witnesses under section 161 of the Code of

Criminal Procedure, 1898. He duly sent the body of the deceased to the Kushtia General Hospital for Postmortem. The postmortem examination of the victim was done by a group of doctors, they were Dr. Ashok Kumar Saha, Dr. Arbinda Pal, Dr. Saleh Ahmmmed and Dr. Abdus Salam. Ultimately, on conclusion of investigation of the case, the Investigating Officer submitted charge sheet being No.108 dated 25.07.2004 against the accused Azanur Rahman, Mamun, Shukur, Kamu (Kamrul) and Sentu under section 9(3) of the Ain, 2000.

4. Later, the case was duly sent to the Tribunal for trial. The learned Judge of the Tribunal on taking cognizance of the offence against the accused persons under section 9(3) of the Ain, 2000 framed charge against them. On being read over and explained the charge to the accused persons, they pleaded not guilty and asked for a trial. To substantiate the case the prosecution examined as many as 18 (eighteen) witnesses, but the defence examined none.

5. On the closure of the evidence of the prosecution witnesses, the convict-appellants were examined under section 342 of the Code of Criminal Procedure, 1898 whereupon they pleaded innocence. They informed the Tribunal that they would not adduce any evidence on their behalf.

6. The defence case as it appears from the trend of cross-examination is that the appellants are innocent and have been falsely implicated in this case out of enmity and personal grudge and the accused appellants are not involved with the offence of committing rape on the deceased Sabina, and murdering her. The accused Sentu, son of Tizabuddin, is the brother of Montu. Sentu is not named in the FIR. It is also the case of the defence is that from the date of occurrence the accused persons were very much present in the locality and they did not flee-away. The victim was not at all subjected to the commission of rape by the appellants. The confessional Statements of accused Mamun and Azanur are not true and voluntary. Owing to merciless torture and enticement of the police the accused persons were compelled to give involuntary confessional statements.

7. During the course of trial, the prosecution produced as many as 18 witnesses including the Medical Officer and the Investigating Officer. The trial Court after considering the evidence and materials on record found the accused persons Sentu, Mamun, Azanur Rahman, Shukur and Kamu (Kamrul) guilty under section 9(3) of the Ain, 2000 and sentenced them to death by its judgment and order dated 04.02.2009.

8. Death sentence proceeding has been submitted to the High Court Division by way of Reference by the Tribunal and the Reference has been noted as Death Reference No.07 of 2009. Being aggrieved by the judgment and order of the Tribunal, the convicts Shukur, Kamu alias Kamrul and Sentu preferred Criminal Appeal No.616 of 2009, convict Azanur Rahman preferred Criminal Appeal No.670 of 2009, convict Mamun preferred Criminal Appeal No.698 of 2009 before the High Court Division. Convict Mamun, Azanur Rahman, Md. Shukur Ali, Kamu alias Kamrul and Sentu presented petition of appeals from jail, which have been numbered as Jail Appeal Nos.155, 156, 157, 158 and 159 of 2009 and the same were heard with Death Reference No.07 of 2009.

9. The High Court Division by its judgment and order dated 11.05.2014 accepted the Death Reference and dismissed all the Criminal Appeals and Jail Appeals affirming the judgment and order passed by the Nari O Shishu Nirjatan Daman Tribunal, Kushtia.

10. Being aggrieved by, and dissatisfied with the judgment and order of conviction and

sentence passed by the High Court Division dated 11.05.2014, the convict-appellants, namely, Md. Shukur Ali, Sentu, Mamun and Azanur Rahman preferred Criminal Appeal with Jail Appeal before this Division.

11. Mr. S. M. Shahjahan, the learned advocate appearing along with Mr. Raghieb Rouf Chowdhury, the learned Advocate, appearing for the appellants in Criminal Appeal No.127 of 2014, Mr. S.M. Aminul Islam, the learned advocate, appearing for the appellants in Jail Appeal Nos.26 and 29 of 2014, have taken us through the FIR, the inquest report, the postmortem report, the charge sheet, testimonies of the witnesses, the judgment and order passed by the Tribunal and the appellate Court (High Court Division), connected materials on record and submit that the High Court Division failed to consider that the judgment and order of conviction is bad in law as well as in facts and, as such, the impugned judgment and order of conviction is liable to be set aside. They further submit that the High Court Division failed to consider that the judgment and order of conviction is based on surmise and conjecture and not on legal evidence and, as such, the impugned judgment and order of conviction is liable to be set aside. They also submit that the High Court Division failed to consider that the judgment and order of conviction has been passed by the Tribunal without applying its judicial mind as the case was not proved by the prosecution witnesses beyond reasonable doubt and, as such, the impugned judgment and order of conviction is liable to be set aside. They next submit that during trial the prosecution examined as many as 18 prosecution witnesses, but all the witnesses disowned the prosecution case and none of the witnesses witnessed the occurrence and, as such, the impugned judgment and order of conviction is liable to be set aside. Moreover, they submit that there is no evidence against the appellants except exculpatory confessional statements made by co-accused, but the same cannot be used against the appellants without corroboration and cannot be basis of conviction and it is not an evidence as per section 3 of the Evidence Act, 1872 and, as such, the impugned judgment and order of conviction is liable to be set aside. They added that the High Court Division failed to consider that in the judgment and order of conviction passed by the learned Judge of the Nari O Shishu Nirjaton Daman Tribunal it was not considered that out of 18 witnesses P.Ws.10 and 11 deposed about the searching of the appellants, but their evidence was not supported by P.Ws.1,11, 6,13 and they deposed that at the time of occurrence three witnesses were present, but P.Ws.1,2,6 and P.W. 13 did not support this story. Rather those evidence were contradicted by P.Ws.6 and 13, P.W.6 in his cross-examination stated that “আমি আসামীদের সন্দেহ করি না and P.W.13 in his cross-examination stated that “আসামীদের বাড়িতে আমরা কেহ যাই নাই।” So it appears that there is no circumstantial evidence against the appellants and, as such, the impugned judgment and order of conviction is liable to be set aside. They also submit that the High Court Division failed to consider that in passing the judgment and order of conviction, the learned Judge of the Nari O Shishu Nirjaton Daman Tribunal did not consider that the confessional statement must be left out of consideration as it was contradicted by medical evidence. The absence of spermatozoa in the private organ of the deceased throws doubt on the prosecution story of rape. They also submitted that the doctor stated that the cause of death was strangulation, but confession do not disclose the same and, as such, the impugned judgment and order of conviction is liable to be set aside. Besides, they submit that there is no evidence against the appellants except confession of co-accused which is not substantial evidence in convicting appellants without any other corroborative evidence, moreover it appears from the record that the victim went to watch television in a house, but the owner of that house was not examined and the witnesses Kanchan and Hasina and other witnesses did not disclose the name of the appellants in their evidence and the circumstantial evidence also did not prove the involvement of the appellants and, as such, the impugned judgment and order of conviction is liable to be set aside. They again submitted that the confession of

accused Mamun and Azanur Rahman were not made voluntarily and those are not true as no certificate was issued by the statement recording Magistrate in this regard and, as such, the said confession is a nullity in the eye of law and, as such, the impugned judgment and order of conviction is liable to be set aside.

12. They further submit that the allegation against the appellants does not come under section 9(3) of the Nari O Shishu Nirjaton Daman Ain, 2000 as the doctor opined that the death was due to asphyxia as a result of above mentioned injuries, caused by strangulation which was ante-mortem and homicidal in nature with rape, but the rape was not proved by any other evidence including medical certificate and, as such, the impugned judgment and order of conviction is liable to be set aside. Finally, they submit that the learned Magistrate recorded confessional statement of the two accused, but did not follow the prescribed procedure as mentioned in section 364 of the Code of Criminal Procedure, 1898 and, as such, the confessional statements are not admissible evidence resulting a judgment invalid.

13. Mr. Biswajit Debnath, the learned Deputy Attorney General, appearing for the respondent-the State, made his submissions supporting the judgment and order passed by the High Court Division and prays for dismissal of the appeal.

14. Now, to ascertain whether the prosecution has been able to prove the charge against the appellant Md. Shukur Ali, Mamun, Sentu and Azanur Rahman, let us examine and analyze the depositions of the witnesses adduced by the prosecution.

15. P.W.1, the informant Abdul Aziz @ Jhunu deposed that they saw several injury marks on the body of the deceased and the dead body was partially decomposed. He further stated that they suspected the involvement of accused Azanur, Mamun, Sentu and others as they were missing since the occurrence of the crime.

16. During cross-examination he stated that he heard that deceased had gone to watch television. The occurrence took place in the evening of Thursday and they found the dead body on Saturday afternoon. The informant and others suspected that the accused Mamun, Azanur, Sentu and others had raped and killed his daughter. The police prepared the inquest report before filing of the case. He identified the FIR and his thump impression.

17. P.W.2, Rokeya Khatun, wife of Nuna (Muna), a neighbour of the deceased, stated that around 8:00 pm Sabina's father told her that Sabina was missing. She heard that dead body of the deceased Sabina was found on Saturday afternoon and there were some marks of injury on her body.

18. The cross-examination of the witness was declined by the defence.

19. P.W.3, Kanchon (Kazoli), stated that the dead body of the deceased was found from a Tobacco field of Dharonggari and there were injury marks on her body.

20. The cross-examination of the witness was declined by the defence.

21. P.W.4, Hasina Khatun, the mother of deceased Sabina, stated that on the date of occurrence the deceased Sabina went to the house of Muna to watch television. They searched for her as she did not return home. Two days after the occurrence, they found the naked dead body of the deceased in a tobacco field. There were several injury marks on her

body and her orhna was wrapped round her face over her mouth.

22. During cross-examination she stated that she heard from local people that accused Azanur and Mamun had been arrested.

23. P.W.5, Md. Fazlur Rahman, deposed that after returning home from Allardarga he heard hue and cry from the field and also heard a dead body was found, he informed the police and went to the place of occurrence with the police. He saw the dead body in the tobacco field. The police prepared the inquest report and his signature so endorsed thereon and marked as exhibits-1 and 1/1 respectively.

24. The defence declined to cross-examine this witness.

25. P.W.6, Rahidul Islam, deposed that he heard about the disappearance of Sabina and subsequently after two days the dead body was found from a tobacco field. He also heard that accused Azanur and Mamun were arrested. He heard that accused Kamrul, Shukur and Sentu were also with them.

26. P.W. 7, Bishoyot Ali, deposed that he heard about the disappearance of Sabina and subsequently her dead body was found. He stated that he went to place of occurrence with police and saw the dead body. His signature so endorsed in the inquest report, has been marked as exhibit-1/2.

27. The cross-examination of the witness was declined by the defene.

28. P.W.8, Helal Uddin, deposed that he went to the tobacco field and saw the dead body of deceased Sabina. He identified his signature on the inquest report which was marked as exhibit-1/3.

29. The defence had declined to cross-examine the witness.

30. P.W.9, Abdul Goni, father of accused Kamrul, deposed that the inquest report was prepared in his presence and his signature so endorsed thereon has been marked as exhibit-1/4.

31. The cross-examination of the witness was declined by the defence.

32. P.W.10, Md. Mulluk Chand, deposed regarding the date, time and place of occurrence. He stated that before the occurrence the deceased went to the dwelling house of neighbour Muna Mondal to watch Television and went missing. They searched for the deceased at different places. They suspected the involvement of the accused Azanur, Mamun, Shukur, Sentu and Kamrul. He identified the accused persons in the dock of the court. He deposed that they did not find the accused persons at their houses on that day and because of this reason they suspected their involvement with the occurrence. He deposed that on March 27, 2008 the dead body of the deceased was found from the tobacco field of Dharonggari. They saw the naked dead body having several injuries on it. He heard that the accused Azanur and Mamun had been arrested at Kushtia. Accused Mamun and Azanur made confessional statements.

33. During cross-examination, he stated that they had searched the respective houses of

the five accused. He denied defence suggestion that out of enmity and grudge the accused persons had been implicated in the instant case.

34. P.W.11, Alauddin, stated that the accused Azanur, Mamun, Sentu, Kamrul and Shukur were also missing. He stated that the five accused persons also went to watch television. They searched for the deceased from door to door. He stated that they saw the naked dead body of the deceased with several injuries which was found on March 27, 2004 at about 5:30 pm lying in the tobacco field of Dharonggari. He stated that after being arrested the accused Mamun and Azanur admitted their guilt to the police.

35. During cross-examination, he stated that his father-in-law told him that the accused had gone to watch television. He deposed that they searched for the deceased at many houses including the houses of the accused persons. He stated that the accused persons were inhabitants of the same village.

36. P.W.12, Zabed Ali, stated that on March 25, 2007 at about 6:00/7:00 pm the deceased went to the neighbor's house to watch television and thereafter went missing. He searched for the deceased at different houses. On hearing being found a dead body, he went to the place of occurrence on March 27, 2004 and saw the naked dead body of the deceased with several injuries.

37. The defence declined to cross-examine this witness.

38. P.W.13, Md. Zainal Haque, had been declared hostile and was cross-examined by the prosecution and he deposed that at the time of searching for the deceased accused Azanur, Shukur, Mamun, Sentu and Kamrul were not with the villagers.

39. P.W.14, Dr. Ashok Kumar Saha, deposed that on March 28, 2004 he was performing his duty at General Hospital, Kushtia as Emergency Medical Officer. A Medical Board was constituted consisting 4 members where he was the president and other three members were Dr. Arbinda Pal, Dr. Saleh Ahmed and Dr. A. Salam. After conducting the Autopsy the Board noted their findings as under:

I. Body partially decomposed and distended with Maggat formation with loss of epidermis with burst abdomen with expulsion of coils of intestine.

II. One continuous ligature mark at the middle of the throat size 1" in breadth with knot a tie.

III. One incised penetrating injury on front of the right side of the chest, size 2" x 1 $\frac{1}{2}$ " up to chest cavity.

IV. Two incised penetrating injury on front of the left side of the chest, size 2" x 1 $\frac{1}{2}$ " up to abdominal cavity.

V. Four incised penetrating injury on anterior abdominal wall, size 2 $\frac{1}{2}$ " x 1 $\frac{1}{2}$ " up to abdominal cavity.

VI. One incised penetrating injury on inner aspect of left thigh up size 1 $\frac{1}{2}$ " x 1 $\frac{1}{2}$ " x  $\frac{2}{3}$ ".

VII. One incised injury on inner aspect of right thigh up, size 2 $\frac{1}{2}$ " x  $\frac{2}{3}$ ".

VIII. One lacerated injury in vagina on right wall size 1" x 1" mucus membrane.

40. On dissection: Antemortem blood clot and tissue laceration and congestion were seen associated with the injured/places stated above trachea congested both lung are injured, liver



injured, stomach injured. Brain is soften. High vaginal swab was taken and sent for pathological examination for spermatozoa. But no spermatozoa was found.

41. After conclusion of the autopsy the Doctors opined as under:

“In our opinion the cause of death was due to asphyxia as a result of above mentioned injuries, caused by strangulation which were ante-mortem and homicidal in nature with rape”.

42. This witness proved the postmortem report and his signature so endorsed thereon and marked as exhibits-2 and 2/ 1 respectively. He also identified the signatures of Dr. Arbinda, Dr. Saleh Ahammad and Dr. Abdus Salam which were marked as exhibits-2/2,2/3 and 2/4 respectively.

43. During cross-examination he deposed that they found evidence of rape on the dead body. He further deposed that they found the injury in the inner part of the vagina of the deceased which may have been caused due to rape.

44. P.W.15, Md. Nabirul Islam, stated that when he was on duty on March 29, 2004 as 1<sup>st</sup> Class Magistrate at Kushtia Collectorate, he recorded the confessional statement of accused Azanur and Mamun under section 164 of the Code of Criminal Procedure, 1898 and he followed the provisions of section 364 of the Code of Criminal Procedure, 1898. He found the confessional statements of the accused were true and voluntary. He proved the confessional statements and his signature so endorsed thereon and marked as exhibits-3,3/1,3/2,3/3 and 3/4 respectively. His signature and signature of the accused were marked as exhibits-4,4/1,4/2,4/3 and 4/4 respectively.

45. P.W.16, Md. Nabir Hossen, stated that on April 04, 2004 he took the charge of investigation of the case on transfer of the Officer-in-Charge Faruk Ahmmed and perused the case docket, autopsy report. Subsequently, he handed over the C.D to S.I. Musaddek on his transfer.

46. The cross-examination of the witness was declined by the defence.

47. P.W.17, Md. Mosaddek Hossen Khan, deposed that as the final Investigating Officer he took the charge of investigation of the case on April 22, 2004. He perused the case docket including sketch map, index, deposition of witnesses and confessional statements of the accused Mamun and Azanur. He recorded statements of some witnesses. He submitted charge sheet No.108 dated July 07, 2004 against the accused persons finding prima facie ingredients of crime.

48. During cross-examination he deposed that he compared the confessional statements of the accused persons with autopsy report.

49. P.W.18, Faruk Ahmmed is one of the three Investigating Officers of the case. He stated that on oral presentation of the informant he wrote the FIR. He also identified the thumb impression of the informant. He prepared the inquest report of the deceased, his signature so endorsed thereon has been marked as exhibits-1 and 5/1 respectively. He stated that he sent the FIR for recording. He also deposed that he as Officer -in-Charge signed the FIR as exhibit-5 and he identified his signature thereon as exhibit-5/1. He also stated that Mosharrof Hossain as duty officer filled up the FIR form as exhibit-6 and he identified his signature thereon as exhibit-6/1. He took up the case for investigation; visited the place of occurrence; prepared sketch map thereof with index and his signature so endorsed thereon has been marked as exhibits-7,7/1, 8 and 8/1 respectively. He duly sent the dead body to the

morgue for autopsy. He deposed that the mouth of the victim was fastened with orhna. He recorded the statement of 4 witnesses. He arrested accused Azanur, Mamun and Sentu and produced them to the learned Magistrate for recording their confessional statements. He stated that the tobacco plants were three or four feet tall.

50. During cross-examination he stated that he did not seize blood stained mud of place of occurrence. He stated that he found some injures on the dead body of the deceased. He did not mark any apparent injury marks. He suspected that the deceased was murdered after commission of rape.

51. These are the witnesses adduced by the prosecution. On scrutinising the depositions of the witnesses, the features appeared that the deceased Sabina went to watch television to the neighboring house and went missing. On searching, the naked dead body of the deceased was found in the tobacco field with marks of injuries on her chest, thigh and private organ. From the postmortem report, the cause of death was found due to asphyxia caused by strangulation which was ante-mortem and homicidal in nature with rape.

52. In the instant case, two appellants namely Mamun and Azanur Rahman made confessional statement before the Magistrate under section 164 of the Code of Criminal Procedure, 1898.

53. The confessional statement of Mamun reads as follows:

“সাবিনাদের বাড়ি থেকে আমাদের বাড়ি কিলো দূরে তিজার প্রামাণিক এর ছেলে সেন্টুর সাথে সাবিনার ভালবাসা ছিল। সাবিনার বান্ধবী কাঞ্চন (পিং-রবজেল মন্ডল)কে সেন্টু বলে সাবিনাকে সাবিনাদের বাড়ির পাশের তামাকের ক্ষেতে ডেকে আনতে বলে। সেন্টুর সাথে তার বন্ধু কামু (পিং- গনি মাস্টার) ছিল। ২৫/৩/২০০৪ তারিখ বৃহস্পতিবার রাত ৭/৮ দিকে কাঞ্চন সাবিনাকে ডেকে এনে দিয়ে বাড়িতে চলে যায়। সাবিনা, সেন্টু ও কামু তামাক ক্ষেতের মধ্যে বসে গল্প করতে থাকে। রাত হয় তারা সাবিনা বাড়িতে রাখতে যায়। বাড়ির কাছে গিয়ে সাবিনাকে খোঁজাখুঁজি হচ্ছে জেনে আবার মাঠের মধ্যে নিয়ে আসে। সেন্টু সাবিনাকে বলে চল বিয়া করব। সে সেন্টু ও সাবিনাকে বসিয়ে রেখে কামু টাকা আনার নাম করে বাড়িতে যাওয়ার কথা বলে শুকুর (পিং-কইরুদ্দিন মন্ডল)কে ডেকে আনে। কামু ও শুকুর আজানুর কে ডাকতে আসে। কামু আজানুরকে বলে চল মাঠের মধ্যে কাজ আছে। ওরা তিনজন এসে আমাদের ডাকে। বলি যেতে পারব না। তারা পীড়াপীড়ি করায় তাদের সাথে গেলাম। ৪ জন সাবিনা ও সেন্টুর কাছে পৌঁছানোর পর কামু সাবিনার মুখ চেপে ধরে। সেন্টু সাবিনার ওড়না দিয়ে সাবিনার মুখ বাধে। শুকুর সাবিনাকে কাছে করে তামাকের ক্ষেতের মধ্যে আনে। সেন্টু সাবিনার দুই হাত চেপে ধরে রাখে। কামু মুখ চেপে ধরে শুকুর সাবিনার ও কামিজ টেনে ছিড়ে গা থেকে খুলে ফেলে। শুকুর সাবিনার সাথে খারাপ কাজ করে। শুকুরের হয়ে গেলে সে সাবিনার মুখ চেপে ধরে তখন কামু সাবিনার সাথে কারাপ কাজ করে। শুকুর ও কামু দুই হাত চেপে ধরে রাখে তখন সেন্টু সাবিনার সাথে খারাপ কাজ করে। সেন্টু উঠে দাঁড়ানোর পর আজানুর খারাপ কাজ করে। তারপর আমি খারাপ কাজ করি। আমি যখন করি তখন সাবিনা হাত পা এড়িয়ে দেয়। মনে হয় অজ্ঞান হয়ে গিয়েছিল। শুকুর তার কোমরের থেকে একটা চাকু বের করে। আমি ও আজানুর জিজ্ঞাসা করি চাকু কি করবি? বলে খুন করে ফেলতে হবে। আমরা বাধা দি। তখন আমাদের শুকুর লাথি মারে। আমরা একটু সরে গিয়ে চোখ তেকে ফেলি। শুকুর চাকু দিয়ে আরও কয়টি কোপ দেয় তা অন্ধকার বুঝতে পারিনি। সাবিনাকে ধর্ষণ করার পরে যে যার মত পালিয়ে যাই।”

54. The confessional statement of Azanur Rahman reads as follows:

“২৫/৩/২০০৪ তারিখে রাত্রি ১১ টা সাড়ে ১১ টার দিকে আমাকে শুকুর ও কামু এসে ডাকে। বলে মাঠে যেতে হবে। বলি কেন? বলে কাজ আছে। পীড়াপীড়ি করে আমাকে নিয়ে মামুনের বাড়িতে যায়। মামুনকেও ডেকে নেয়। মাঠের মধ্যে গিয়ে আমি সেন্টু ও সাবিনাকে দেখি। তারা পাশাপাশি বসেছিল। আমি কামুর কাছে জানতে পারি কাঞ্চনের মাধ্যমে TV দেখার নাম করে সাবিনাকে কামু ও সেন্টু ডাকায় আনে। সাবিনাকে দিয়ে কাঞ্চন চলে যায়। আমাদের ডেকে আনার পর কামু হাঠে সাবিনার মুখ চেপে ধরে। সেন্টু সাবিনার ওড়না দিয়ে সাবিনার মুখ বেধে ফেলে। শুকুর, কামু ও সে মিলে সাবিনাকে পেড়ে ফেলে। শুকুর সাবিনার জামা পায়জামা টেনে ছিড়ে নেংটা করে ফেলে। সেন্টু মুখ চেপে ধরে রাখে। দুই হাত চেপে ধরে কামু। শুকুর দুই পা দুই হাত দিয়ে ধরে সাবিনার সাথে খারাপ কাজ করে। শুকুরের হাতে বড় নখ আছে। তা দিয়ে সাবিনার দুধে জোড়ে টান দেয়। শুকুরের কাজ হয়ে গেলে কামু সাবিনার উপর চড়ে খারাপ কাজ করতে থাকে। শুকুর গিয়ে মুখ চেপে ধরে। কামুর হয়ে যাওয়ার পরে সেন্টু খারাপ কাজ করে। তখন কামু গিয়ে সাবিনার হাত দুইটা ধরে। তখন মেয়েটা আর নড়াচড়া করছিল না। সেন্টুর হয়ে যাওয়ার পর আমি দাঁড়িয়ে ছিলাম। আমাকে শুকুর খারাপ কাজ করতে বলে তখন আমার পেন্টের চেইন খুলে সাবিনার সাথে কারাপ কাজ করি। তারপর আমি ওঠার পরে মামুনকে খারাপ কাজ করার জন্য শুকুর বলে। তখন মামুন খারাপ কাজ করে। সাবিনা সেন্টু খারাপ কাজ করার সময় থেকে গা এড়িয়ে দিয়ে অজ্ঞান হয়ে যায়, আমি এবং কামু যখন খারাপ কাজ করি তখন তার

জ্ঞান ছিল না। সবার খারাপ কাজ হয়ে যাওয়ার পর শুকুর তার কোমড় থেকে চাকু বের করে। চাকু হঠাৎ শাট করে। আমি বলি কি করছিস? সে বলে একে খুন করব। আমি বাধা দি। তখন আমাকে গালি দিয়ে লাথি মারে। মামুন বাধা দিলে তাকেও লাথি মারে। আমরা ভয়ে একটু দূরে গিয়ে দাড়াই। শুকুর চাকু মারছে এই শব্দ শুনতে পাই। সাবিনা একবার শুধু 'উ' করে শব্দ করে। তার কোন শব্দ পাইনি। শুকুর বলে বাড়ি যায়। আমরা ভয়ে পালিয়ে যাই। আমি আর মামুন শুকুরবাবুরে জীব বাসে ঢাকা যাই। ঘুরে ফিরে কোন কাজ না পেয়ে ঐ দিনই রাত ৯টার বাসে কুষ্টিয়া চালের বর্ডার এ আমার খালার বাড়িতে যাই। পরে আমার ভাই এসে পুলিশের হাতে ধরিয়ে দেয়।”

55. In the inquest report regarding the marks of injury on the dead body of the deceased it has been mentioned that there were seven marks of injuries with sharp knife on her chest, 2 marks of injuries on her thighs and one mark of injury on her private organ and his mouth was fastened with orhna. It is also mentioned that deceased was raped before murder.

56. The injuries found on the dead body of the deceased after autopsy, have been mentioned in the preceding paragraphs during discussion of the evidence of P.W.14 the doctor, who held the postmortem.

57. So, the nature of injuries found in the inquest report as well as in the postmortem report and in the inculpatory confessional statements made by Mamun and Azanur Rahman corroborate one another. The inculpatory confessional statements of Mamun and Azanur Rahman vividly narrated the circumstances how they committed rape and thereafter killed the deceased. The confessional statements support the inquest report as well as the postmortem report.

58. From the deposition of P.W.15, Md. Nabirul Islam, Magistrate, 1<sup>st</sup> Class, and on perusal of confessional statements, it appears that the statements were recorded by the learned Magistrate following all the provisions required by law to be followed at the time of recording the confessional statements. P.W.15 stated that the confessional statements made by Mamun and Azanur were done voluntarily and it was true. The appellants Mamun and Azanur made confessional statements incriminating themselves along with Shukur, Sentu and Kamrul. Now, the question arises whether the confessional statements of Mamun and Azanur can be used against Shukur and Sentu.

59. Section 30 of the Evidence Act, 1872 provides that as follows:

“30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other persons as well as against the person who makes such confession.”

60. The ingredients of this section are that:

- I. More persons than one are to be tried jointly for the same offence.
- II. One of such persons has to make confessional statement affecting himself and others. and
- III. Such confession can be taken into consideration by the Court against others as well as the maker of the confession.

61. In the instant case, the appellants Mamun and Azanur made inculpatory confessional

statements which vividly narrated the crime committed by all of them. They made the inculpatory confessional statements incriminating themselves along with other co-accused and the defence failed to prove any personal enmity or grudge of Mamun and Azanur with the non-confessing appellants Shukur, Sentu and Kamu. Moreover, P.Ws.1,10 and 11 gave evidence to the effect that they suspected the involvement of all the accused in the occurrence as they were missing after the occurrence and appellants Mamun and Azanur were arrested on such suspicion. In their confessional statements, both of them in a voice narrated the role played by themselves and other accused persons in the occurrence and there is no inconsistency in their statements which leads us to believe the confessional statements of Mamun and Azanur involving Shukur and Sentu in the said occurrence are true.

62. Moreover, the deposition of P.Ws.1,10 and 11 regarding the absconding of Shukur and Sentu along with Mamun and Azanur after the occurrence took place, provides strong corroboration to the confessional statements of Mamun and Azanur. Besides, the postmortem report and the depositions of the witnesses clearly it reveals that there was sign of rape on the victim girl and accordingly, the appellants Mamun and Azanur confessed about the role played by all of them at the time of committing rape. The confessional statements of Mamun and Azanur are not contradictory rather they in a voice categorically stated the acts committed by each of them.

63. It is true that there is no eye witness in the instant case, but the inculpatory, true, and voluntary confessional statements of two accused, and the circumstances particularly long absconsion by Shukur and Sentu are so well connected to indicate that those circumstances render no other hypothesis other than the involvement of the appellants Shukur, Sentu, Mamun and Azanur in the alleged rape and murder thereof.

64. In performing our duties, this court is charged with the task of not only assessing the facts against the law, but also considering the impacts of judgments that are pronounced and any assessment made on the overall justice system.

65. With modern criminal justice mechanism, the right against self-incrimination is one that stands as a cornerstone. As such, confessions by a co-accused are generally inadmissible against the accused in a concerned case. However, in our duties of administering justice, we are sometimes faced with a case that forces us to consider aspects of larger policy at play.

66. The balance between crime control and due process models of justice is such a consideration that requires reassessment with changing times and upon the fact of each case. The case before us is one of such a heinous crime, where measures of control are made far more necessary, to ensure that justice can be brought to the victim in question. As such, while due process is still of utmost importance; crime control considerations must be made as well. (Emphasis added)

67. As such, the considerations of the use of a co-accused's confession, where supported by corroborating evidence, in the face of an overwhelming presence of circumstantial

evidence, must be made. In this instance, the accused's absconcion prior to trial, suggests an intent to obstruct justice. Corroborative evidence presented by the prosecution shows that there is sufficient reason to suggest that the co-accused's accounts of the events are likely to be true. It is therefore, that this court is of the opinion that in order to pursue a model of crime control in this regard, this court is willing to admit, in such rare instances, the confession of a co-accused as incriminating evidence against the other accused. Albeit, such evidence is still circumstantial.

68. The principle of the right against self incrimination is also accompanied by the principle that upon silence on part of those incriminated, adverse inferences may be drawn at any stage of the trial and pre-trial procedures. (Emphasis added)

69. When the co-accused, Azanur and Mamun put forth their confessions, incriminating the accused Shukur and Sentu, they had the opportunity to present their accounts of the events in question. Their refusal to adduce defence witness and to give any statement, allows this Court to draw an adverse inference against them, in conjunction with the inferences drawn from the period of their absconcion.

70. We hold that confessional statement of a co-accused can be used against others non-confessing accused if there is corroboration of that statement by other direct or circumstantial evidence. In the instant case, the makers of the confessional statements vividly have stated the role played by other co-accused in the rape incident and murder of the deceased which is also supported/corroborated by the inquest report, postmortem report and by the depositions of the witnesses particularly the deposition of P.Ws.1,2,3,10,11,12,14 and 18 regarding the marks of injury on the body of the deceased. Every case should be considered in the facts and circumstances of that particular case. In light of the facts and circumstances of the present case, we are of the view that the confessional statement of a co-accused can be used for the purpose of crime control against other accused persons even if there is a little bit of corroboration of that confessional statement by any sort of evidence either direct or circumstantial. (Emphasis added). Thus, the accused namely Shukur and Sentu are equally liable like Azanur and Mamun for murdering the deceased after committing rape.

71. We are also of the view that confession of Azanur and Mamun and the inculpatory facts furnished by the circumstances appearing from the evidence as discussed above are incompatible with the innocence of the appellant Shukur and Sentu.

72. In consideration of the matters discussed above, we are of the view that the deceased Sabina was raped before murder. The post mortem report shows that her death was due to asphyxia caused by strangulation which was ante-mortem and homicidal in nature with rape. The marks injuries found on her body as well as the discovery of naked dead body which was supported by the witnesses i.e. P.Ws.1,2, 4,5,10 and 11 clearly indicate that she was raped before murder. It is a strong circumstantial evidence that the deceased was raped before murder by the appellants.

73. In the light of the discussions we may conclude that the prosecution has been able to prove the charge against all the appellants beyond reasonable doubt and the Tribunal has rightly convicted and sentenced the appellants to death and the confirmation thereof by the High Court Division is justified. We find no cogent reason to interfere with the judgment and order passed by the High Court Division.

74. In the instant case, it is found that the deceased Sabina was a girl of 13 years and she had a relation with Sentu. On the date of occurrence, the deceased went to meet with Sentu. At one moment Sentu along with other appellants, namely Shukur Ali, Mamun and Azanur to fulfill their nefarious desire raped Sabina and thereafter, Appellant Shukur Ali killed the deceased with a knife which he brought with him. Before killing, appellant Shukur Ali stabbed Sabina with the knife on the different parts of her body including on her private organ which resulted to her harrowing death.

75. Mr. S.M. Shahjahan learned advocate appearing for the appellant Shukur lastly drew our attention regarding the age of the appellants and submits that Shukur Ali was very young at the time of offence, the other appellants were also of very tender age, considering their age the sentence of death may be reduced.

76. In this regard it is pertinent to mention the observation of his Lordship H.L. Dattu former Honorable Chief Justice of India & two other honorable judges of the Supreme Court made in the case of *Mofil Khan Vs State of Jharkhand, (2015) 1 SCC 67, Para-20* that “Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a threefold purpose—punitive, deterrent and protective.”

77. Regarding appropriate punishment and sentence his Lordship Mr. Justice P. Sathasivam, J. in the case of **Ahmed Hussain Vali Mohammed Saiyed Vs. State of Gujarat, (2009) 7 SCC 254, Paras 99 & 100** observed that “Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the victim of the crime but the society at large while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong.”

78. We are of the view that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence on the judiciary. It is the duty of the Court to award appropriate sentence considering the gravity of the offence. Considering the nature and gravity of the offence committed by the appellant Shukur Ali, we are of the view that the cruelty and violence with which he killed Sabina, the ends of justice demands his death sentence.

79. From the materials on record, it appears that the appellants Sentu, Mamun and Azanur are in the condemned cell for more than 12(twelve) years suffering the pangs of death. It was held in the case of *Nazrul Islam (Md) vs. State* reported in [66 DLR (AD) 199] that, *“Lastly with regard to the period of time spent by the accused in the condemned cell, there are numerous decisions of this Division which shed light on this aspect. In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death.”* In view of the decision cited above as well as the circumstances of this case, we are of the view that justice would be sufficiently met if the sentence of death of the appellants Sentu, Mamun and Azanur be commuted to one of imprisonment for life.

80. Accordingly, the Criminal Appeal No.127 of 2014 is **dismissed**. The sentence of death of the appellant in respect of condemned-prisoner, namely Md. Shukur Ali is maintained.

81. The sentence of death in respect of the appellant condemned-prisoner, namely, Sentu, son of Tijabuddin, Village-Lalnagor, Police Station-Daulatpur, District-Kushtia is commuted to imprisonment for life and also to pay a fine of Tk.50,000.00(fifty thousand), in default, to suffer rigorous imprisonment for 02(two) years more. He will get the benefit of section 35(A) of the Code of Criminal Procedure, 1898 in calculation of his sentence. The concerned Jail Authority is directed to shift the appellant to the normal jail from the condemned cell forthwith.

82. Jail Appeal No.26 of 2014 is **dismissed with modification of sentence**.

83. The sentence of death of appellant condemned-prisoner, namely, Mamun, son of Sirajul Pramanik of Village-Lalnagor, Police Station-Daulatpur, District-Kushtia is commuted to imprisonment for life and also to pay a fine of Tk.50,000.00(fifty thousand), in default, to suffer rigorous imprisonment for 02(two) years more. However, he will get the benefit of section 35(A) of the Code of Criminal Procedure, 1898 in calculation of his sentence. The concerned jail authority is directed to shift the appellant to the normal jail from the condemned cell forthwith.

84. Jail Appeal No.29 of 2014 is **dismissed with modification of sentence**.

85. The sentence of death of appellant condemned-prisoner, namely, Azanur Rahman, son of Talemuddin Mondal, Village-Lalnagor, Police Station Daulatpur, District-Kushtia is commuted to imprisonment for life and also to pay a fine of Tk.50,000.00(fifty thousand), in default, to suffer imprisonment for 02(two) years more. He will get the benefit of section 35(A) of the Code of Criminal Procedure in calculation of his sentence. The concerned jail authority is directed to shift the appellant to the normal from the condemned cell forthwith.

86. Jail Appeal No.29 of 2014 in respect of the appellant Sentu is redundant in the light of the judgment in Criminal appeal No.127 of 2014.