

18 SCOB [2023] HCD 8**HIGH COURT DIVISION****Death Reference No.85 of 2016 with Criminal Appeal No. 6082 of 2016 with Jail Appeal No. 151 of 2016****The State and others
Vs.****Golam Mostafa Mithu and others**Mr. A.K.M. Fazlul Haque Khan Farid,
Advocate....Instructed by the prosecution with
Mr. Sarwar Hossain, D.A.G. with
Mst. Moududa Begum, A.A.G with
Mrs. Hasina Momotaz, A.A.G. with
Mr. Mohammad Salim, A.A.G. withMr. Mohammad Akter Hossain, A.A.G.
.....For the State

Mr. S.M. Shahajan, with

Mr. Forhad Ahmed with

Mr. Amir Hossain with

Mr. Shafiqul Azam Khan with

Mr. Anawarul Islam, Advocates

.....For the appellant

Heard on 22.03.2022, 23.03.2022

and Judgment on 28.03.2022

Mr. Justice Md. Rezaul Hasan**And****Mr. Justice Kazi Ebadoth Hossain****Editors' Note:**

In the instant case two elderly persons were murdered in a cold-blooded brutal manner by repeated chapati-blows and the accused was caught red handed. Later he made confessional statement. The trial court found the accused guilty and sentenced him to death accordingly. The defense case was that there was no legal evidence and the conviction was solely on the basis of confessional statement. They claimed that since the accused was produced before the magistrate beyond the statutory period, the confessional statement was not made voluntarily and it could not be relied upon. The High Court Division found that the confessional statement was true and voluntary and the accused was sentenced not only on the basis of confessional statement but also depending on other materials i.e testimony of the witnesses, material exhibits, inquest reports, post mortem reports and circumstantial evidences. The High Court Division also held that mere delay alone should not be a ground to brush aside a confessional statement which has been found to be true and voluntary in nature and corroborated by other evidence. Considering the brutal nature of the murder, the Court also refused to commute the sentence of the convict.

Key Words:Section 302 of the Penal Code, 1860; Section 164 of the Code of Criminal Procedure, 1898;
Delay to produce the accused within 24 hours**Section 164 of the Code of Criminal Procedure, 1898:**

In the case before us, we however, have found that the order of conviction and sentence is not based solely on the confessional statement of the convict, rather it is based on the testimony of the witnesses. Moreover, the material exhibits, inquest reports, post mortem reports all these evidence clearly establish the complicity of the convict in the commission of the offence, he has been charged with. In this case, the confessional statement under section 164 of the Code of Criminal Procedure, is supported by other

evidences and corroborated by the oral evidences. Moreover, when the truth of the statement made in the confessional statement are established by other relevant, admissible and independent evidences, then the voluntary nature of the same is proved. We have found the confessional evidence as true and voluntary. (Para 33 and 34)

Effect of delay in producing the accused:

We are of the opinion that, even if, there were some unintentional delay or failure of the police to produce the accused within 24 hours, this mere delay alone should not be a ground to brush aside a confessional statement which has been found to be truth and voluntary in nature, since established by other evidence. (Para 35)

JUDGMENT

Md. Rezaul Hasan, J.

1. This Death Reference No.85 of 2016, under section 374 of the Code of Criminal Procedure, 1898, has been made by the Sessions Judge, Mymensingh, for confirmation of the sentence of death imposed upon the condemned-prisoner Golam Mostafa Mithu, passed on 26.06.2016, in Sessions Case No.1458 of 2014. The Condemned-prisoner Golam Mostafa Mithu preferred Criminal Appeal No. 6082 of 2016 under section 410 of the Code of Criminal Procedure and also Jail Appeal No. 151 of 2016. The Reference, Criminal Appeal and also the Jail Appeals have been heard together and are being disposed of by this single judgment.

2. The facts leading to the prosecution are that, the informant Hasibul Haque Rana, an Area Manager of Imperial Shoe Company, accompanied by Md. Towhidul Islam, Lutful Kabir Chhana and Kamruzzaman lodged an F.I.R. with the Kotwai Model Police Station, Mymensingh alleging inter-alia that his father Abdul Haque was a retired Post Master and his mother Raihatun Nessa was an Assistant Teacher of Akua Government Primary School, Mymensingh. It has been also alleged that, the sister and the husband of the assailant Golam Mostafa Mithu, son of Abdul Jobber Member of Village-Choykhada, Police Station-Court Chandpur, District- Jhenaidah were residing for about 2-3 years as tenant in the residence of the victims and the assailant has easy access to the said house of the informant and on 12.07.2014, at about 7.30 p.m., in a preplanned manner he entered into the house of his parents and killed his father and mother by indiscriminate blows of sharp cutting weapon. It has also been stated that at their outcry, the surrounding peoples came to the spot and caught red-handed, detained the assailant Golam Mostafa Mithu and informed the police and the police came to the spot, took the assailant Golam Mostafa Mithu in their custody. It has been also stated that he got information about the incident over mobile phone, rushed to the place of occurrence and lodged the F.I.R.

3. On the basis of the F.I.R. S.I. Md. Shibirul Islam was entrusted into the investigation as investigating officer. During investigation, he visited the place of occurrence, seized alams, prepared sketch map alongwith index, and recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure. The investigating officer forwarded the assailant Golam Mostafa Mithu for recording confessional statement under section 164 of the Code of Criminal Procedure. On the basis of the confessional statement and the statements of the witnesses, the assailant was found preliminary guilty for committing the offence punishable under section 302 of the Penal Code and the investigating officer has submitted charge sheet No. 793 dated 11.09.2014.

4. After submission of the Police Report, the case was transferred to the Court of Session Judge, Mymensingh. The Sessions Judge, Mymensingh, after hearing both the prosecution and defence has framed charge punishable under section 302 of the Penal Code. The charge was duly read over and explained to the accused when he pleaded not guilty and claimed to be tried.

5. In order to prove the charge, the prosecution has examined as many as 22 witnesses and proved some documents which have been marked as exhibit 1-12 series and also material exhibit I,II, III and IV. However, the defence examined none.

6. The defence case, as it appears from the trend of cross-examination and suggestion put to the witnesses, is that, the accused is innocent, his sister and husband never resided in the house of the informant and he did not make any confession voluntarily, the police did not investigate the matter properly and he has been falsely implicated in this case.

7. On completion of the trial, the accused was examined under section 342 of the Code of Criminal Procedure in which he pleaded not guilty and prayed for justice.

8. The Sessions Judge, Mymensingh, having assessed the oral and documentary evidences on record, have found the accused guilty of the offence punishable under section 302 of the Penal Code and awarded capital sentence and a fine of Tk. 20,000/= (twenty thousand) in default to suffer rigorous imprisonment for 6(six) months more.

9. After pronouncement of the impugned judgment and order of capital punishment the learned Sessions Judge, Mymensingh, made this reference under section 374 of the Code of Criminal Procedure for confirmation of the death penalty.

10. Simultaneously, being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence, the condemned-prisoner Golam Mostafa Mithu preferred Criminal Appeal No. 6082 of 2016 and Jail Appeal No. 151 of 2016 which have been opposed by the State.

11. Learned Advocate Mr. A.K.M. Fazlul Haque Khan Faird, instructed by the prosecution along with Mr. Sarwar Hossain, D.A.G. with Mst. Moududa Begum, A.A.G with Mrs. Hasina Momotaz, A.A.G. with Mohammad Salim, A.A.G. with Mohammad Akter Hossan, A.A.G. have appeared on behalf of the prosecution. The learned D.A.G. having drawn our attention to the evidence on record, first of all submit that, this is a case of premeditated brutal murder of 2 (two) innocent persons namely, Abdul Haque (65) and his wife Raihatun Nessa (55). Referring to the facts narrated in the F.I.R. and to the prima-facie case narrated in the charge sheet, he submits that, the deceased Abdul Haque was a retired post master and his wife, another deceased, Raihatun Nessa was a teacher of a Government Primary School and the assailant was known to them and had easy access in their residence. In this circumstances, on the date of occurrence, on 12.07.2014, at about 7.30 p.m., the assailant entered into the house of the victims, at the first Floor with a preplanned motive to kill them and thereafter to steal the valuables. The learned D.A.G. further submits that, both the deceaseds were elderly persons and they were not in a position to resist the assailant and the assailant dealt indiscriminate '*Chapati*' blows on the persons of the deceased. Referring to the confessional statement of the assailant, he submits that, the assailant has confessed that one day before the date of occurrence he went to the house of the victims and asked them to pay Tk. 50,000/= as loan from the deceaseds, but the deceaseds refused to pay the same and

thereafter the convict made a plan to kill them. Accordingly, he continues, the convict purchased a *Chapati-Dao* from the shop of the P.W. 3 Badol Miah, who has identified the convict on dock during his deposition and has also proved the *Chapati-Dao*, material exhibit I. He then submits that, the P.W. 4 Md. Zakaria, who is a salesman, has proved the shirt worn by the assailant at the time of occurrence and that the shirt was proved and marked as material exhibit II and the P.W. 4 has also identified the convict present at the dock.

12. The learned D.A.G. next submits that, the assailant has admitted in his confessional statement that there was none else in the house of the two elderly deceaseds and they did not suspect the convict and the convict has admitted that he was offered tea by the deceased on the fatal night and that the victim Abdul Haque went to another room to attend a mobile call, when, taking this opportunity, he dealt severe blows on the person of the deceased Raihatun Nessa by taking out *Chapati-Dao* from his bag and, when another deceased came to the spot, the assailant indiscriminately dealt '*Chapati*' blows on him and both the victims had succumbed to the fatal wounds inflicted on them. The learned D.A.G. further submits that, hearing hue and cry of the deceaseds, the P.W. 2, Zakia Begum Rani (who is a new tenant of the ground floor) went to the upstairs to see what happened and, having seen the P.W. 2, the assailant tried to escape and went to the roof of the house and jumped from the roof upon the next tin shed house and the local peoples, having heard the sound of jump on the tin shed, rushed to the direction of the sound and found the victim and then caught him red-handed and detained him.

13. He proceeds on that, the P.W. 1 Md. Hasibul Haque Rana is the informant of this case and, having heard about the incident over mobile phone of one Towhidul Islam (P.W 17), he went to the house, seen the occurrence and lodged the F.I.R. He has stated the fact narrated in the F.I.R. during his deposition. The P.W. 2 Zakia Begum Rani (the new tenant and inmates of the ground floor) deposed that she heard of something fallen on the first floor and she rushed to the up stair and have seen the victims with bloodstained wounds. Besides, he proceeds on that, the P.W. 5 Md. Asaduzzaman Murad, P.W. 6 Md. Fazlul Karim Raja, P.W. 7 Md. Apu and P.W 8 Md. Kamruzzamana (Chanchal) deposed in a voice that the assailant after killing the victims, had jumped upon the next tin shed house and tried to escape, but he was apprehended red-handed by them.

14. The learned D.A.G. next submits that, the P.W. 9 Md. Abdul Alim (Kazol) who is a businessman at Akua Bazar (nearest to the place of occurrence) heard of something fallen at the tin shed house and then hearing the hue and cry he went to the spot and found that the convict was apprehended by P.W.Nos. 7, 8, 18, 19 and he were found blood-stains on his shirt. P.W. 12, Dr. Md. Lutful Kabir deposed that he was returning after offering *Tarabi* prayer, when he heard about the occurrence and went to the spot and found that the police was taking the assailant from the spot and he has identified the assailant, present at dock. He also deposed that, the police prepared inquest report and he has put his signature on the inquest report of deceased Abdul Haque (Ext. 4/2) and proved his signature put on the inquest report of deceased Raihatun Nessa (Ext. 3) and his signature exhibit 3/2. P.W 13, Hamida, deposed to have heard the hue and cry, she went to the spot. She also deposed that, the police prepared seizure list and she put her signature on the seizure list (Ext. 6/2). She also testified that, she had adjusted the clothing of the deceased Raihatun Nessa. P.W. 14 Mohd. Ahsan Habib, is the Judicial Magistrate, who had recorded the confessional statement and he proved confessional statement (Ext. 7) and his signatures put thereon (Ext. 7 series). The P.W. 15, Dr. A.N.M. Al Mamun has stated that on 13.7.2014, he held autopsy of the dead body of the victim Abdul Haque (65) and found the following injuries on the dead body.

1. Chop wound at right side of cheek from right ear lobule to tip of the mandible measuring 17'' × 5'' bone depth.
2. Just above the injury No.1 there are two sharp cut injuries 9'' × 3'' bone depth and 11'' × 3'' bone respectively.
3. A sharp cut injury 03'' × 1'' × 1'' at right angle of mandible.
4. Sharp cut injury at right lateral side of neck 6'' × 3'' × bone depth.
5. A sharp cut injury 03'' × 1'' × 1'' over right shapuler.
6. A sharp cut injury 4'' × 2'' × bone over right cheek.

The stomach was found healthy and a small amount of food was found inside it.

On dissection on retraction of the scalp he found huge haemorrhage at right side of temporal bone, meanings lacerated at right side, brain matter lacerated at right side, temporal reason, maxillous bone, zygomatic bone and body of the mandible (right side) clearly divided, neck structure of right side was clearly sharp cut and other internal organs are pale.

He has opined that the cause of death of the victim deceased was due to haemorrhagic and Neurogenic shock resulting from the above mentioned injuries which were ante mortem and homicidal in nature.

15. The P.W. 15 has also held the autopsy of the dead body of the deceased Raihatun Nessa (55) and found the following injuries:

- (1) Multiple sharp cut injuries (7 in numbers) with different size and shape over posterior aspect of neck from occipital region to shoulder.
- (2) One sharp cut injury 3'' × 1'' × bone depth at right temporal region from where brain matter come out externally.

In his opinion the cause of death was due to haemorrhagic and neurogenic shock resulting from the above mentioned injuries which were antemortem and homicidal in nature. He also proved both the autopsy report and his signatures put on the report.

16. The learned D.A.G. next, referring the deposition of P.W. 16 Md. Lutfor Rahman, submits that, this witness has proved his signature on the seizure list and has stated that he went to the spot and saw the dead body of 2 victims. This witness has also deposed that the *Daroga* prepared two seizure lists and he had put his signatures on it. He proved his signatures on the seizure list (Ext. 3/3 and 4/3 and he also proved the material exhibit I. Referring to the deposition of P.W. 17 Md. Towhidul Islam, the learned D.A.G. submits that this P.W. 17 has deposed that, on the date of occurrence he had rushed to the place of occurrence and that the convict Golam Mostafa Mithu was apprehended by Chanchal, Murad, Raja and others (P.W. 8, 5, and 6). He found that the dead body of the victims and heard that the victims were killed by the convict and found that the victims were brutally injured lying at dinning space with several marks of injury on their back of them and fatal injury on the body of the deceased Raihatun Nessa at her below the neck and on her back and that he found the dead body of Abdul Haque with serious bleeding injuries and he was found other injuries on the neck. P.W. 18 Md. Shahajan also deposed that, on 12.07.2014, at about 10.30 p.m. he rushed to the place of occurrence having heard the hue and cry and found that the convict was caught red-handed by the peoples and he also heard that the victims admitted to have killed by the convict. He saw the dead body of the victims and he was previously known to him. P.W. 21 S.I. Md. Saidul Rahman, the 1st investigating officer of this case. He deposed to have received the information of committing murder through Warless at about 10.45 p.m. on 12.07.2014 at Akua Warless Road Gorur Khoar Mor and that he rushed to the place of occurrence along with force and found that the assailant was caught red-handed by the peoples and he admitted to have killed the victims. He informed to the Officer-In-Charge and the Officer-in-Charge rushed to the place of occurrence with forces and sent the convict to

the police station. He then went to the 1st floor of the house where the deceaseds were killed by sharp cutting weapons. He then prepared inquest report of deceased Abdul Haque and took the signatures of P.Ws. 5, 17, 16, 12 and 13 and he has prepared another inquest report of the victim Raihatun Nessa and took the signatures of the witnesses which have been marked as exhibit 4/5 and 5/5, respectively. He has also seized the alams used by the convict during the commission of the offence of murder, prepared the seizure list and also took the signatures of the witnesses like P.W. 5, Md. Asaduzzalam Murad, P.W 16, Lutfor Rahman on the seizure list. He also seized sharp cutting Chapat-Dao having 13'' length including the handle.

17. The learned D.A.G. further submits that, this witness has also seized Orange colour shopping bag, blood sample of both the victims and took signature of the witnesses on the seizure list and taken the assailant in his custody. He has proved the seizure list (Ext. 10) and his signature (Ext. 10/1). Next referring to the deposition of P.W. 22, S.I. Shebirul Islam, the learned D.A.G. submits that, he was the 2nd Investigating Officer of this case. He deposed that he has consulted with the F.I.R., got the accused arrested and kept him in his custody. He has also docketed the 2 inquest reports, kept the alams and he has visited the place of occurrence, prepared sketch map along with the index and also recorded the statement of some of the witnesses under section 161 of the Code of Criminal Procedure. He has also deposed that, he went to the house of the assailant and as pointed out, he has seized Laptop, 2 Mobile sets. He has proved his signature (Ext. 6/2). He then took the assailant to the "Fashion Zone" from where he purchased a shirt used at the time of commission of the offence and also went to the Bazar from where he has purchased the *Chapati-Dao*. Being gathered the materials on fact he has produced the assailant before the Magistrate on 14.07.2014 at about 7.30 a.m. for recording the confessional statement under section 164 of the Code of Criminal Procedure and finding prima-facie case against the assailant he has submitted the Charge Sheet No. 793 dated 11.09.2014 under section 302 of the Penal Code. He also proved the index and sketch map (Ext. 11 and 12) and his signature on it Ext. 11/1 and 12/1 and identified the accused on dock.

18. The learned D.A.G. emphatically submits that, all the witnesses in a voice have supported the case of the prosecution and no inconsistency has been found in their deposition. He also submits that, during their cross-examination, nothing could be found to discredit them and that the prosecution has been able to prove it's case beyond all reasonable doubt and also proved the nature, the manner of occurrence by credible and reliable evidence. He proceeds on that, this kind of accused who has committed heinous murder by using sharp cutting weapons to these two innocent elderly victims by misusing their trust and at their own house should not be given any mercy and that considering the entire facts and circumstances of this case, the trial court has awarded capital punishment which is absolutely just and proper. He proceeds on that there is no mitigating circumstances to justify taking a different view for commuting the sentence, since the order of conviction and sentence passed on the basis of ocular evidence and in addition to the above facts, the convict has made confessional statement which is totally true and inculpatory in nature and which has also been proved by eye-witnesses of the occurrence, the material exhibits and the circumstantial evidence. He also submits that, the confessional statement is absolutely inculparoty in nature and that in this case, the decision reported in 73 DLR(AD)73 between Aziz @ Azizul @ Azid Vs. The State, wherein it has been held that, "when the character of the confession and truth are accepted it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement of threat or promise, is the most patent piece of evidence against the maker. A confession may form the legal basis of conviction if the court is satisfied that it was

true and was voluntarily made.” However, the learned D.A.G. further submits that, keeping apart the confessional statement, the prosecution has been adequately proved the case by adducing the reliable witnesses including the eye-witnesses and circumstantial evidence. Referring to the deposition of P.W. 2, Zakia Beum Rani, he proceeds on that, the occurrence took place on 12.07.2014, at about 10.30 p.m. and she heard sound of falling something on the roof of building of landlord Abdul Haque. Then and there she opened the door and found the accused Golam Mostafa Mithu was going towards the roof and she could recognize him with the light of electricity. After going a bit upward she found toAbdul Haque Master and his wife Raihatun Nessa in bleeding condition in the dining space, near the door. Then she cried out and the neighboring people came and saw that the P.Ws. 5, 6, 8 and others had apprehended the accused Mostofa Mithu and she heard that the accused Golam Mostafa Mithu had killed the deceased Abdul Haque Master and his wife Raihatun Nessa. Thereafter, other witnesses along with P.Ws. 9,10,11 and 13 came to the spot. This witness has proved her statement made under section 165 of the Cr. P.C. (Exhibit-2 and her signature in the same (Exhibit -2/1). She has identified the accused Golam Mostafa Mithu on dock.

19. The learned D.A.G. next submits that, all the circumstantial evidences, the seized alams, seizure list clearly indicate that the accused was liable for the commission of the offence as alleged in the F.I.R. and on the day before the occurrence, the convict purchased a Chapati-Dao and went to the house of the victims with intention to kill them. Therefore, he submits, the intention and motive of occurrence is clear and he has confessed in the confessional statement that he has dealt several blows by sharp cutting weapon like Chapati-Dao to these two helpless victims, which have been clearly proved. He next submits that the subsequent conduct to try flee away from the spot, the brutality of the murder of two victims, their depth of injuries on the sensitive parts of the body of two victims, which have clearly supported by the post mortem report and the blows have been dealt with intent to kill them. The Doctor P.W. 15 has opined that the death of the deceased were due to haemorrhagic and Neurogenic shock resulting from the above mentioned injuries which were ante mortem and homicidal in nature. Hence, he submits, the medical evidence also adequately proved as regards the brutality of the murder not only the 2 aged victims who are unable to defend themselves to resist the attack. In the inquest report, it has been recorded that on the dead body of victim Raihatun Nessa vividly described. He process on that there is extinguishable circumstances in this case and for the same reason this reference and the appeal has no merit and as such, he prays for acceptance of the reference and dismissal of the appeal.

20. Learned Advocates Mr. S.M. Shahajan, Mr. Forhad Ahmed, Mr. Amir Hossain, Mr. Shafiqul Azam Khan with Mr. Anawarul Islam have appeared on behalf of the condemned-prisoner. Mr. Shahajan having drawn our attention to the evidence on record mainly submits that, the appellant was produced for recording confessional statement before the Magistrate on 14.07.2014 at about 10.30 a.m. but the occurrence took place on 12.07.2014 at about 7.30 p.m. and he has detained in the police custody for more than that of the statutory period of 24 hours. He also submits that, there is no explanation of cause of such delay and he was detained in the police custody. Hence, the statement recorded under section 164 is not lawful evidence. As such, the statement made by the convict-appellant ought not to have been considered by the trial court and that the findings of the trial court passed on the basis of the confessional statement is not also lawful and is liable to be reversed and the appeal may be allowed. In support of his contention he has referred to the decision reported in 11 MLR (AD) 206: between the State Vs. Mofizuddin and others.

21. The learned Advocate, next referring to the statement made during the examination under section 342 of the Code of Criminal procedure submits that, the convict-appellant is the only child of their parents, therefore, the prosecution case that he had sister and sister-in-law residing at the house of the victims is totally false and, as such, the finding of the trial court is not lawful and the trial court did not also consider the statement of the convict-appellant under section 342 of the Code of Criminal Procedure. It is next argued that, the trial court did not appreciate that the prosecution could not prove its case beyond reasonable doubt. Referring to the deposition of P.W. 3, he next submits that, the *Dao* is one kind of iron made cutting instrument, that was recovered from the place of occurrence, but the P.W. 3 has deposed that the convict-appellant purchased a *Chapati* from the shop and his deposition is inconsistent with the material exhibit. He next submits that, the shirt material exhibit II is not proved the involvement of the convict-appellant in this case in as much as the blood stained shirt was not examined by D.N.A test. Similarly he submits that, there is no ocular evidence of the occurrence and, therefore, the prosecution has not been able to prove the case by required degree in the criminal case. On this ground he submits that, the findings of the court below is not based on proper appreciation of evidence and the trial court has totally failed to appreciate the defence case and the statement of the accused made under section 342 of the Code of Criminal Procedure. As such, he proceeds on that, the impugned judgment and order of conviction and sentence is liable to be set aside and the appeal may be allowed. Besides, the learned Advocate submits that, the investigation made by the police is not proper and it is faulty and this is a case of no evidence in the eye of law. Alternatively, the learned Advocate submits that without conceding the liability, the impugned judgment and order of conviction and sentence, in the facts and circumstances of the case can at best one of attempt of robbery as per the decision reported in Criminal Law Journal (Supreme Court), in the case of Subhash Vs. State of Haryana page 693, and that applies in this case. He then proceeds on that, the motive attributed in this case is absurd. He sums up that, the tenure undergone by the convict-appellant, in the meantime, can be considered and the punishment can be commuted, in case the conviction is upheld. Accordingly, the learned Advocate concludes that, the reference may kindly be rejected and the findings of the trial court may be reversed and the term of conviction may be considered as undergone and the appeal may be disposed of.

22. We have heard the learned Advocates for both the sides, consulted the decisions, cited by them, considered the deposition of the witnesses, F.I.R., the statement of the accused made under section 164 and 342 of the Code of Criminal Procedure, the seizure list, the inquest report, the post mortem report and the Memo of Criminal Appeal No.6082 of 2016 and other materials on record.

23. Let us examine the deposition of the witnesses and see as to whether the prosecution has been able to prove its case.

24. The P.W 1 Md. Hasibul Haque Rana is the informant of this case, who has proved the F.I.R. Ext. 1 and his signature Ext. 1/1. He has also deposed supporting the prosecution case as narrated in the F.I.R. The P.W. 2, Zakia Beum Rani, in her deposition supported the case narrated in the F.I.R. In her cross examination she has affirmed that she saw the blood stain on the floor and then she cried out (being shocked). She has denied the suggestion that the sister of the accused Golam Mostafa Mithu and her husband were not the tenants. This witness has further denied the suggestion that she had deposed falsely. The P.W.3 Badol Mia has stated in his examination-in-chief that on 12.7.2014, the convict purchased a *Chapati Dao* from his shop. The police went to his shop along with the convict and the *Dao* that was seized by the policed and he has indentified the *Chapati Dao* and the convict Golam Mostafa

Mithu on dock and proved the seized *Chapati Dao* (Material Exhibit-1). In his cross-examination, he deposed that he worked in the shop of Abdus Salam at Swadeshi Bazar. He has denied suggestion that he does not work in the shop and the convict did not purchase the *Dao* from that shop.

25. P.W.4, Md. Jakaria, deposed in his examination-in-chief that he is the Manager of shop, named Fashion Zone. Police along with the convict Golam Mostafa Mithu went to that shop, on 13.7.2014, at about 8.00-8.30 p.m. and he had identified the convict on dock and the shirt that was purchased from his shop (material Exhibit-II). He affirmed that, the accused Mithu had purchased the shirt 7 days before the date of occurrence. In reply to cross-examination he has stated that the proprietor of the shop is Sujon and he sits in the shop occasionally. The P.W. 5 Md. Asaduzzaman Murad, is a grocer. He has stated in his examination in chief that the occurrence took place on 12.7.2014, at about 10.30-10.40 p.m. He was standing along with his friends Raja and Shohag adjacent to *Garur Khuar Mor*, which is near to the place of occurrence. Suddenly he heard an outcry from the first floor of the building of Abdul Haque and Raihatun Nessa. He also deposed that, the place of occurrence is about 10 yards away from his shop and that all on a sudden, he heard a big sound as the accused Golam Mostafa Mithu jumped on the northern shed of a tin roof house from the roof of the building of Mr. Abdul Haque and the accused was coming toward the north by walking on that tin-shed when the witnesses Raja (P.W. 6), Murad (P.W. 5) and Apu (P.W. 7) detained the accused Golam Mostafa Mithu and the accused confessed that he had killed the victim-deceaseds Abdul Haque and Raihatun Nessa. Then they took the convict to the place of occurrence and found the victims lying dead in bleeding condition. He also deposed that thereafter, the accused Golam Mostafa Mithu was handed over to the police, who had rushed to the spot on call, and the police prepared two inquest reports of the dead bodies in his presence and he has proved the inquest report of the deceased Raihatun Nessa (Exhibit-3) and his signature in the same (Exhibit-3/1), the inquest report of the deceased Abdul Haque (Exhibit-4) and his signature in the same (Exhibit-4/1). He next deposed that the seizure list was prepared in his presence and he proved the seizure list (Exhibit-5) and his signature on the same (Exhibit-5/1). A blood stained shopping bag and an iron made hammer were seized in his presence. He has proved the blood stained shopping bag (Material Exhibit-III) and an iron made hammer (material Exhibit-IV). In his cross-examination, the witness has stated that the inquest reports were read over to him and he has put his signatures on it and he was examined by police on the following afternoon. He denied the suggestion that he did not go to the place of occurrence and did not detain the accused Golam Mostafa Mithu and did not hand over him to the police and did not see the occurrence.

26. P.W. 6 Md. Fazlul Karim Raja has stated in his deposition that on 12.7.14 A.D. at about 10.30-10.45 p.m. the occurrence took place. He was standing beside the shop of Murad, along with Sohag, when they heard an outcry from the building of Mr. Abdul Haque and hurried up there. He saw the accused Golam Mostafa Mithu upon the Northern tin shed and then he along with Murad, Sohag, Apu detained the accuse Golam Mostafa Mithu. They took the accused in front of the house of the informant and he admitted that he had killed Abdul Haque, the father of the informant and Raihatun Nessa with the blows of *Chapati*. He recognized the accused, the accused Golam Mostafa Mithu was the student of his college earlier and he used to reside as tenant in the house of the informant. He identified the accused in the light of electricity. He identified the accused on dock. In his cross-examination he deposed that the house of Mr. Abdul Haque is about 20-30 yards far from his house. He frequently goes to the shop of Murad. He went to the shop 5-7 minutes prior to the occurrence. It is visible from the shop of Murad as to who enters into the house of Mr. Abdul

Haque. The P.W. 8 Kamruzzaman Chanchal has stated in his examination-in-chief that on 12.7.2014, at about 10.30- 10.45 p.m. he was sitting on the road opposite to the building of the informant and he heard a hue and cry from the first floor of the building of Mr. Abdul Haque and called Murad to see as to what happened in the first floor of that building and he heard a sound of jump made upon an adjacent tin shed house from the roof of the building of deceased Abdul Haque. Then he, alongwith others, rushed there and detained the accused Golam Mostafa Mithu. Thereafter, they went in front of the residence of Abdul Haque along with accused Mithu and interrogated him and in reply to the interrogation he told that he killed 'Khalu' and 'Khalamma' (of the witness) and they found Mr. Haque and his wife Raihatun Nessa lying dead with bleeding injuries. Then police was informed, they came in time, and the accused Mithu was handed over to the police and identified the accused Mithu on the dock.

27. The P.W. 9 Abdul Alim Kajoil, the P.W. 10 Md. Azizur Rahman deposed supporting the case of the prosecution. The P.W.11 Md. Shariful Islam was tendered by the prosecution. The defence has declined to cross-examine him. The P.W. 12 Md. Latful Kabir has stated in his examination-in-chief that he got the information of killing after Tarabi prayer. He saw the dead bodies of Abdul Haque and his wife Raihatun Nessa at about 10.30 p.m. after going to their residence. He saw police taking away the accused Mithu. He identified the accused in the dock. The police prepared inquest report and he put his signatures on the same. He proved the signatures made on the inquest reports of dead bodies of Abdul Haque (Exhibit-4/2 and Raihatun Nessa (Exhibit-3/20). The P.W. 13 Hamida has supported the case of the prosecution. The P.W. 14 Mr. Md. Ahsan Habib, the Senior Judicial Magistrate, has deposed that he has recorded the confession of the accused Golam Mostafa Mithu, under section 164 of the Cr. p.c. and that the confession of the accused was true and voluntary. He has proved the confessional statement (Exhibit-7) and his signatures put on the same (Exhibit-7 series).

28. The P.W. 16, Md. Lutfor Rahman, has stated in his examination-in-chief that on 12.7.2014 A.D at about 10.45 p.m. his wife made a phone call to him informing about the murder and, having immediately come to the place of occurrence, he found that the accused Mithu was in custody of the police, in front of the house of the informant. He has heard that the accused Mithu has killed Abdul Haque and Raihatun Nessa and then reached to the first floor of the building of Abdul Haque and found that the deadbodies of Abdul Haque and Raihatun Nessa lying dead with bleeding injuries in the dining space. The police prepared two inquest reports of the dead bodies of Abdul Haque and Raihatun Nessa and he put his signatures on the same, as the reports were read over to him. This witness has proved his signature in the seizure lists (Exhibits 3/3, 4/3). During cross-examination, he stated that his residence is at the eastern side of the residence of Abdul Haque. He did not see the occurrence of killing. He was examined by police on 02.8.2014 in the police station. This witness has denied the suggestions made to him. He has denied the suggestion that he has deposed falsely. The P.W.17 Md. Towhidul Islam has deposed supporting the deposition of P.W. 5 and 6 has identified the accused present in the dock. He was present at the time of preparation of inquest report of the dead bodies and has proved his signatures in the inquest reports (Exhibit-3/4,4/4). He also deposed that he went to the police station with the informant at the time of lodging the FIR. The P.W. 18, Md. Shahjahan has made deposition supporting the case of the prosecution and has indentified the accused on the dock.

29. We have also examined as to whether the prosecution did not held the D.N.A. test of the convict. In reply, the learned D.A.G. drawn out attention to the statement made by the P.W. 22 that, “২৭.০৭.২০১৪ ইং তারিখ চীফ জুডিসিয়াল ম্যাজিস্ট্রেট আদালত বরাবরে আসামী গোলাম মোস্তফা মিঠুর

ঘাম, রক্ত ও লালা ডি . এন. টেস্ট করার জন্য একটি আবেদনপত্র দাখিল করিয়াছিলাম। কিন্তু পরবর্তীতে মামলার মূল রহস্য উদঘাটিত হওয়ায় পরীক্ষা করার প্রয়োজন মনে করি নাই। ইহা ইতোপূর্বে তদন্তকালীন সময়ে বিজ্ঞ আদালতকে প্রতিবেদনের মাধ্যমে অবগত করানো হইয়াছে।” The learned D.A.G. also submits that the clarification given by the P.W. 22 before the Court as to why the D.N.A. test was not essential in this case is reasonable and fair. He further submits that, the sole accused in this case was caught red-handed by the witnesses along with incriminating articles and that the guilt and complicity of the accused has been proved by the natural witnesses. There was no circumstance in this case to require D.N.A. test, since other witnesses are adequate.

30. We find substance in the submission of the learned D.A.G. and we are satisfied that the D.N.A. test was not required in this case in as much as all other evidences are sufficient to come to the conclusion about the guilt or innocence of the convict-appellant.

31. Having considered the entire evidence on record, we are of the considered opinion that the facts and circumstances proved in this case, the involvement of the convict-appellant with the offence of heinous murder of two innocent persons has been proved beyond any shadow of doubt. We found no infirmity in any of these evidences, nor we found any inconsistency in the evidence considered by the court below. None of the witnesses could have been discredited by the defence side. The prosecution has been able to prove the case by adequate, consistent and credible evidence.

32. Now, having turned our attention to the point as to whether the decision cited on behalf of the convict-appellant reported in 11 MLR (AD) 206: between the State Vs. Mofizuddin and others is applicable in this case or not. In this decision, the Appellate Division held that, “in a case of capital punishment the charge must be proved by legal and consistent evidence beyond doubt. In a case where there is no legal evidence. The conviction and sentence passed solely on the confessional statement of the accused produced from police custody beyond the statutory period without explanation of the delay is held to be not voluntary and the High Court Division is perfectly justified in rejecting the death reference and in acquitting the condemned-prisoner the case being one of no evidence.

33. In the case before us, we however, have found that the order of conviction and sentence is not based solely on the confessional statement of the convict, rather it is based on the testimony of the witnesses. Moreover, the material exhibits, inquest reports, post mortem reports all these evidence clearly establish the complicity of the convict in the commission of the offence, he has been charged with. In this case, the confessional statement under section 164 of the Code of Criminal Procedure, is supported by other evidences and corroborated by the oral evidences.

34. Moreover, when the truth of the statement made in the confessional statement are established by other relevant, admissible and independent evidences, then the voluntary nature of the same is proved. We have found the confessional evidence as true and voluntary. Therefore, the decision, reported in the case of 11 MLR (AD) 206 is not applicable in the fact and circumstances of the present case.

35. As such, the issue of delay raised on behalf of the convict, we are of the opinion that, even if, there were some unintentional delay or failure of the police to produce the accused within 24 hours, this mere delay alone should not be a ground to brush aside a confessional statement which has been found to be truth and voluntary in nature, since established by other evidence.

36. Lastly, the decision cited by the learned Advocate for the appellant reported in 17 BLC (AD)(2012) 204: between Nalu Vs. State submits that, the condemned-prisoner was a young man of 22 years at the time of commission of the offence and he has been detained in Condemned Cell for more than 6 years. Accordingly, he submits that, the sentence already undergone may be considered and the appeal any be disposed of by commuting the sentence. On this point, we have also considered the case of Indian jurisdiction AIR 1971 (SC) 429 between Bhagwan Swarup Vs. The State, which is more applicable in the facts and circumstances of this case in as much the convict-appellant has committed murder of 2(two) innocent persons and are aged persons of 65 and 55 years, respectively. In his confessional statement, the convict has vividly admitted that the deceased Abdul Haque went to receive a phone call and then he dealt severe *Chapati* blow on the person of the victim Raihatun Nessa, inhumanly, and when the deceased Abdul Haque came in response to the cry for help then he has also brutally killed this old man too, by making repeated *Chapati* blows on those two helpless victims. He did not want to keep any eye-witness to these horrible murders. This kind of brutality having refused to payment of taka and his subsequent conduct, how to escape from the place of occurrence should not be taken lightly.

37. যেহেতু, স্বাক্ষীগন সামঞ্জস্য পূর্ণ স্বাক্ষ্যদ্বারা এবং জন্মকৃত আলামত, সুরতাহাল রিপোর্ট ও ময়নাতদন্ত রিপোর্ট সহ স্বীকারোক্তীমূলক জবানবন্দী সন্দেহাতীতভাবে জোড়া খুনের ঘটনা এবং উহার সাথে মৃত্যুদন্ডপ্রাপ্ত ব্যক্তির সংশ্লিষ্টতা প্রমান করে এবং যেহেতু ২(দুই) জন ভিকটিম যথাক্রমে ৫৫ ও ৬৫ বছরের বৃদ্ধা ও বৃদ্ধ ব্যক্তিকে তাদের নিজ গৃহে খুন করে এবং যেহেতু প্রত্যেক নাগরিকের জন্যই নিজ গৃহে নিরাপত্তা নিশ্চিত হওয়া অপরিহার্য এবং যেহেতু দন্ডপ্রাপ্ত ব্যক্তি পূর্বপরিকল্পনা মত চাপাতি-দাও খরিদ করে এবং তা সঙ্গে এনে বৃদ্ধা-বৃদ্ধকে হত্যার উদ্দেশ্যেই এইরূপ আক্রমণ ও উপর্যপরি আঘাত করা হয় এবং তাদের মৃত্যু নিশ্চিত করা হয়। ফলে এইরূপ বর্বর খুনের শাস্তি মৃত্যুদন্ডই যথার্থ। অতএব, মৃত্যুদন্ড কনফার্ম করার এবং আপীল খারিজ করার সিদ্ধান্ত গৃহীত হলো।

38. ORDER-

39. In the result, the reference is accepted and the Criminal Appeal No. 6082 of 2016 and Jail Appeal No. 151 of 2016 are dismissed. The impugned Judgment and order of conviction and sentence dated 26.06.2016, passed by the Sessions Judge, Mymensingh, in Sessions Case No.1458 of 2014 arising out of Kotwali P.S. Case No. 60 dated 13.07.2014 corresponding to G.R. No. 707 of 2014 is hereby affirmed.

40. Let a copy of this judgment along with L.C.R. be sent to the concerned court at once.