

**18 SCOB [2023] HCD 224**

**HIGH COURT DIVISION**  
**DEATH REFERENCE NO.42 OF 2016**  
**with**  
**CRIMINAL APPEAL NO.4915 OF 2021**  
(Arising out of Jail Appeal No. 152 of 2016)

**The State**

**Vs.**

**Md. Hamidul**

Mr. Bashir Ahmed, D.A.G with  
Mr. Nirmal Kumar Das, A.A.G. with  
Mrs. SyedaShobnumMustary, A.A.G with  
Mr. Md. Tariqul Islam (Hira), A.A.G.  
..... For the State.

Mr. S.M. Shahjahan, Advocate with  
Mr. Md. Mohinur Rahman, Advocates  
..... For the Condemned-Prisoner

Heard on 03.11.2021, 04.11.2021,  
07.11.2021, 08.11.2021 and 11.11.2021  
Judgment on 22.11.2021

**Present:**

**Mr. Justice Shahidul Karim**

And

**Mr. Justice Md. Akhtaruzzaman**

**Editors' Note:**

In the instant case the dead body of a three year old son of the informant was recovered from a nearby turmeric field on the next day after he went missing. The condemned-prisoner is the 2<sup>nd</sup> husband of the informant and step-father of the victim. After recovery of the dead-body of the victim, the people of the locality questioned the condemned-prisoner and he confessed that he killed the victim. Later on, confessional statement of the condemned-prisoner was recorded under section 164 of the Code of Criminal Procedure. Upon trial, learned Additional Sessions Judge, 2<sup>nd</sup> Court, Rangpur sentenced the accused to death. The High Court Division observed that, as the confessional statement was found to be true, voluntary and inculpatory, it is sufficient evidence to convict the accused. However, the Court took mitigating circumstances into consideration and commuted the sentence of the convict to one of life imprisonment with fine. The Court further observed that, asking many questions while examining the accused under section 342 of the Code of Criminal Procedure, 1898 and using the same against the accused in determining his culpability is illegal, uncalled for and altogether foreign in criminal jurisprudence.

**Key Words:**

Confessional Statement; Mitigating Circumstances; Aggravating Circumstances; Use of examination under Section 342 of the Code of Criminal Procedure; Section 164 of the Code of Criminal Procedure

**The Code of Criminal Procedure, 1898, Section 164:**

It is by now well settled that an accused can be found guilty and convicted solely banking on his confession if, on scrutiny, it is found to be true, voluntary and inculpatory in nature.

...(Para 42)

**Effect of belated retraction:**

During making confession, as it appears, the accused did not make any complaint about police torture or inducement. Even, after coming out of the clutches of the police the accused did not also raise any complaint touching the veracity of his confession immediately thereafter. Rather, after almost 5(five) years of making confession the accused filed a retraction application directly to the court which was also signed by an Advocate. Therefore, it can easily be said that such retraction application is nothing but the brainchild of the concerned Advocate. Moreover, no tangible material is found on record in support of the above application which was a belated one as well. In such a posture of things; the confession of accused Hamidul can be regarded as voluntary as well. (Para 48)

**Appropriateness of quantum of sentence awarded to the convict:**

Now, we can turn our eyes to the quantum of sentence awarded to accused Md. Hamidul to see whether the same is appropriate in the facts and circumstances of the instant case. Admittedly, there is no eye witness of the occurrence leading to the incident of murder of victim Milon Babu and the fate of the case mainly hinges upon the lone confession of the accused together with some incriminating circumstances. Moreover, as per record, there is no previous criminal history of the accused who has been suffering the pangs and torments of the death sentence for the last about more than 5(five) years for no fault of his own. Therefore, considering the aggravating as well as mitigating circumstances of the case, we are of the dispassionate view that justice would be best served if the death sentence of the accused is commuted to one of life imprisonment along with fine. (Para 51)

**The Code of Criminal Procedure 1898, Section 342:**

We would like to put on record one legal infirmity that has been committed by the learned Judge of the court below. On perusal of the impugned judgment and order, it reveals that the learned Judge on his own accord asked as many as 13(thirteen) questions to the accused while he was being examined under section 342 of the Code. Not only that the judge concerned has also used the same against the accused in finding his culpability in the killing of the victim boy. The above approach adopted by the trial Judge is absolutely weird, uncalled for and illegal as well. ...(Para 52)

**Section 342 of the Code of Criminal Procedure, 1898:**

It is apparent that the learned Additional Sessions Judge has committed gross illegality in using the statement of accused Md. Hamidul under section 342 of the Code which is all together foreign in criminal jurisprudence inasmuch as a statement given by an accused cannot be used as evidence to find his culpability. ...(Para 53)

## JUDGMENT

**Shahidul Karim, J:**

1. Accused Md. Hamidul was put on trial before the learned Additional Sessions Judge, 2<sup>nd</sup> Court, Rangpur to answer charge under section 302/201 of the Penal Code. The learned Judge of the Court below found him guilty under the aforesaid section of law and sentenced him to death by the impugned judgment and order dated 12-04-2016 in Sessions Case No.149 of 2004, arising out of Badargonj P.S. Case No. 24 dated 24-10-2003, corresponding to G.R.

No. 765 of 2003. Thereafter, the learned Additional Sessions Judge transmitted the entire proceedings of the case for confirmation of the sentence of death imposed upon the accused vide his office Memo No.110/16 of 2016 dated 20-04-2016. Against the aforesaid judgment an order of conviction and sentence, condemned accused Md. Hamidul filed Jail Appeal No. 152 of 2016 which was subsequently converted to a regular Criminal Appeal being No. 4915 of 2021.

2. Since the death reference and the connected Criminal Appeal originated from the same judgment and order of conviction and sentence, they have been heard together and are being disposed of by this consolidated judgment.

3. The prosecution case arose out of an infernal incident in which a minor boy named MilonBabu (3) was brutally done to death by manual strangulation (throttling).

4. The essence of the prosecution story as projected in the FIR as well as unfurled during trial is that informant Anjuwara Begum got married with one Raju of Village Mohona and they were blessed with 2(two) children namely, Moushumi (6) and Milon Babu (3). About 1 (one) year prior to the incident, Raju divorced informant Anjuwara Begum and negotiated another marriage with someone else following which the informant Anjuwara started living with her 2(two) children in her mother's residence. Accused Hamidul, son of Md. Abdur Karim of Mothpara under P.S. Panchbibi came to do construction work of a bridge near the house of the informant as a result both of them became familiar to each other. About 6(six) months prior to the occurrence, victim Anjuwara got married with accused Hamidul and they started living in the residence of her maternal grandfather. After marriage, accused Hamidul could not take the children of the informant well sight. In the evening of 23-10-2003 victim Milon Babu could not be found in the homestead following which the informant searched for him here and there. The informant also did not find her husband, Md. Hamidul after sunset who returned back home at the dead hour of night while being asked about the victim he replied incoherently. Thereafter, the informant along with her relation started searching the victim boy from pool to post. In the morning of 24-10-2003, informant's niece Mst. Sobuja Khatun (P.W.10) went to respond natural call to the Turmeric field near the house of Kumarpara while she raised alarm seeing the dead body of victim Milon Babu there. Thereupon, the informant along with her other relatives went to the spot and brought back the dead body of his son to her homestead. Being suspicious, the local villagers started making query to accused Md. Hamidul while he admit that in the evening of 23-10-2003 at around 7.00 pm he took victim Milon Babu in his lap and went to the nearby Turmeric field and thereafter killed him by throttling and also abandoned the dead body in the Turmeric field. Subsequently, the accused was detained and sent to the Police Station through maternal cousin of the informant Md. Nazrul Islam (P.W.4) and others along with the FIR. On the basis of the said FIR filed by the informant, Badargonj Police Station Case No. 24 dated 24-10-2003 was started.

5. After lodgment of the case, the task of investigation was firstly entrusted to S.I. Md. AbdusSabur (P.W.7) and thereafter, S.I. Md. Lokman Hossain Sarkar was made the Investigating Officer. During investigation, the Investigating Officer visited the place of occurrence and prepared sketch map with separate index, seized alamat and sent the dead body for post-mortem examination and also recorded the statement of witnesses under section 161 of the Code of Criminal Procedure (Shortly, the Code). Moreover, the Investigating Officer also took necessary measures for recording the confession of accused Md. Hamidul as, on preliminary quizzing, he confessed to his guilt. However, having found prima facie

incriminating materials the Investigating Officer submitted police report recommending trial of the accused under sections 302/201 of the Penal Code.

6. At the commencement of trial, charge was framed against the accused under the aforesaid sections of law to which he pleaded not guilty and claimed to be tried as per law.

7. In support of the charge, the prosecution had adduced 10 witnesses out of 15 witnesses cited in the charge sheet who were aptly cross-examined by the defence.

8. After closure of the prosecution witnesses, the accused was called upon to enter into his defence while he repeated his innocence and expressed his desire to adduce evidence in his defence. But ultimately the accused did not examine any defence witness.

9. The defence case, that could be gathered from the cross-examination of the prosecution witnesses, is of complete innocence and false implication. The further case of the defence is that he was falsely implicated in the case at the behest of some vested quarter of the locality. Moreover, the confession of the accused is not voluntary and true, rather it was extracted from him by torture.

10. Mr. Bashir Ahmed, the learned Deputy Attorney General along with Mr. Nirmol Kumar Das, learned Assistant Attorney General appearing on behalf of the State and in support of the death reference upon placing the FIR, charge-sheet, charge, inquest as well as post-mortem examination report, evidences of the witnesses, confession of the accused, impugned judgment and order of conviction and sentence and other connected materials available in the paper book submits that the prosecution has successfully been able to prove the charge brought against the accused by adducing some cogent evidences which got support and corroboration from the facts and circumstances of the case as well. He further submits that accused Hamidul himself admitted his guilt by making confession which is found to be true, voluntary and inculpatory in nature. He lastly submits that in the trial court the learned public prosecutor did not perform his duty judiciously.

11. On the other hand, Mr. S.M. Shahjahan, the learned Advocate appearing on behalf of convict accused Md. Hamidul in Criminal Appeal No. 4915 of 2021 (arising out of Jail Appeal No. 152 of 2016) has assailed the impugned judgment and order critically submitting that there is no eye witness of the occurrence leading to the incident of killing of the victim boy, either direct or circumstantial. He further submits that P.W.1 Anjuwara Begum is the mother of the victim boy who herself did not support the FIR story as was made against the accused. Moreover, the witnesses also did not utter a single word against the accused connecting him with the killing of the victim boy. Mr. Shahjahan also contends that the alleged confession of the accused is exculpatory in nature and further that no motive has also been proved by the prosecution to make it case believable. Moreover, the examination of the accused under section 342 of the Code is highly defective which has prejudiced the accused in his defence. In a last ditch attempt, Mr. Shahjahan submits that if the conviction of the accused is maintained in that event his sentence may be commuted to one of life imprisonment.

12. Heard the submissions advanced by both the parties and perused the impugned judgment and order of conviction and sentence together with the evidences on record and also considered the facts and circumstances of the case minutely.

13. With a view to arriving at a correct decision in the Death Reference and the connected Criminal Appeal, we are now called upon to scrutinize as well as to weigh and sift the relevant evidences together with the facts and circumstances of the case by juxtaposing the defence version of the story.

14. P.W. 1 Mst. Anjuara Begum is the informant as well as the mother of deceased victim Milon Babu (3). In her evidence this witness gives out that the occurrence came into existence in the evening of 23-10-2003 at around 7.00 pm and the place of occurrence is the Turmeric field of one Mahmud Ali. In the evening of the date of occurrence her son Milon Babu was playing outside the hut. At the relevant time her daughter Moushumi wanted to have dinner while she (P.W.1) asked her to have it along with her younger brother. Thereafter, Moushumi went to the mother of the informant in search of victim Milon Babu while the latter informed that the victim boy did not go there and also asked her to return back home. Later, her (P.W.1) mother came and informed that she found victim Milon Babu playing there. Thereafter, search was carried out to find the victim boy but to no avail. On the following morning at around 9.00 am, her (P.W.1) niece Mst. Sobuja Khatun (P.W.10) went to the Turmeric field in a bid to response natural call while she found victim Milon Babu lying there following which she returned back home screaming. Having heard sound of screaming, the neighboring witnesses rushed to the P.O. spot and brought back deceased victim Milon Babu and handed him over to her (P.W.1) mother in the road. The dead body of victim Milon Babu was recovered from the Turmeric field while the accused was at Badargonj which is 1(one) mile away from her (P.W.1) homestead. The villagers suspected accused Hamidul for the death of victim Milon Babu. Subsequently, the villagers including witnesses apprehended accused Hamidul and flogged him. Earlier, she got married with one Raju and out of that wedlock victim Milon Babu was born. Accused Hamidul is her second husband who used to behave properly with her 2(two) children. Eventually, the villagers brought her to Badargonaj Police Station and compelled her to file the FIR. P.W.1 proves the FIR and her signature appearing thereon as Exhibit Nos. 1 and 1/ka respectively.

15. In reply to cross-examination done by the learned State Defence Advocate P.W.1 states that the accused was engaged with the construction work of the road located along side her homestead. The accused negotiated marriage with her on humanitarian ground upon seeing her 2(two) children. The accused used to love and take care of her including her 2(two) children. After marriage with the accused, she used to stay in her maternal grandmother's house along with her children while the accused gave their maintenance cost. Seeing their happy conjugal life some local villagers became antagonistic. She did not see as to where his victim son went to play and how he died. She did not suspect her husband for the death of her son. On the following morning of the date of occurrence while her husband came to her house, the angry villagers took him to the police station after flogging and further that they also obtained her signature to a written FIR giving out threat of beating. She has no allegation against the accused for the death of her son.

16. In his testimony P.W.2 Md. Roshidul Islam claims that the occurrence came to pass in the evening of 23-10-2003 at around 7.00pm. The P.O. Turmeric field is located near his house. In the evening of the date of occurrence at around 7.00 pm accused Hamidul came to his (P.W.2) house and washed his hands and face by pulling water from the tubewall and he (accused) also inhaled burnt tobacco (পান) after taking it from him. He (P.W.2) heard that informant's son Milon Babu went missing and search was carried out for that purpose. On the following morning at around 9.00 am, witness Sobuja Khatun (P.W.10) saw the dead body of victim Milon Babu in the Turmeric field of Mahmud Ali. He (P.W.2) saw the dead body of

victim Milon Babu with finger impression mark on either side of neck including spot on one side of the face. Police held inquest (Exhibit No. 2) of the dead body of victim Milon Babu to which he put his signature (Exhibit No. 2/ka). Police also seized 2(two) pieces of Turmeric tree plants from the place of occurrence Turmeric field vide seizure list Exhibit No. 3 and also obtained his signature thereto (Exhibit No. 3/ka). This witness identified accused Hamidul in the dock.

17. In reply to cross-examination of P.W.2 says that he is the brother-in-law (ভগ্নিপতি) of the informant. After marriage with the accused, the informant used to stay in her maternal grandmother's house along with her 2(two) children. There was no dispute between the accused and the informant and they used to live a healthy conjugal life. Accused Hamidul used to take care of the 2(two) children of the informant alike his own offspring. He (P.W.2) did not see as to how victim Milon Babu was killed in the Turmeric field and further that he also knew nothing about the same. He did not suspect accused Hamidul for the death of the deceased victim.

18. P.W.3 Bhutto alias Moksadul is a shop kipper by profession. In his evidence this witness discloses that the occurrence took place in the evening of 23-10-2003 at around 7.00 and the place of occurrence is the residence of informant Anjuara Begum. At around 7.00 pm he came to learn that informant's son by her first husband could not be traced out. Search was carried out for the victim boy. After coming from shop he went to bed. On the following morning he came to learn that the dead body of the informant's son was found in the Turmeric field located near his shop. Later, he came to know that the accused went to Badargonj for buying some commodities while the dead body of the deceased boy was found. Subsequently, he heard that the villagers caught hold of the accused and handed him over to Badargonj Police Station.

19. In reply to cross-examination P.W.3 states that on the following morning of the date of occurrence the informant sent accused to Badargonj Bazar for marketing. Some villagers were against the accused since he got married with the informant. He heard that the villagers compelled the informant to register a case against the accused with Badargonj Police Station. The accused has no animosity with the informant and his children. He (P.W.3) could not say as to how the deceased boy died and also heard nothing about the same.

20. In his testimony P.W.4 Md. Nazrul Islam claims that in the evening of 23-10-2003 at around 7.00 pm victim child Milon Babu could not be traced out following which they carried out search for him but to no avail. On the following morning, Sobuja (P.W.10) went to response natural call in the Turmeric field while she found the dead body of victim Milon Babu lying there which was covered with Turmeric plant leaves. Later, the local police caught hold of the accused in front of the house of M.P, Badargonj, whereupon he was handed over to the police. Subsequently, the dead body of victim Milon Babu was brought to Badargonj Police Station where inquest of the same was held to which he (P.W.4) put his signatures (Exhibit No.2/kha). The learned State Defence Advocate was found absent in the Court to cross-examine P.W.4, though he filed hazira.

21. P.W.5 Nurun Nessa is the mother of the informant as well as the maternal grandmother of victim Milon Babu. In her testimony this witness avers that the occurrence had happened in the evening of 23-10-2003 at around 7.00 pm. On the date and time of occurrence victim Milon Babu was playing outside of the house while she was at the neighbouring residence. Her granddaughter, Moushumi suddenly appeared to hear and

disclosed that victim Milon Babu could not be found following which she also made search here and there but on that night victim boy could not be trace out. On the following morning her another granddaughter Sobuja (P.W.10) went to response natural call in the Turmeric field while she found the dead body of victim Milon Babu which was covered with Turmeric plant leaves. Thereafter, Sobuja made outcry disclosing that victim Milon Babu was found, whereupon her (P.W.5) brother Abdul Bari rushed to the Turmeric field and brought back deceased victim Milon Babu and placed it into her lap. In the morning at around 9.00 am her brother Abdul Bari sent accused Hamidul to Badargonj wherefrom the villagers caught hold of him after recovery of the dead body of victim Milon Babu and handed him over to the police. Police held inquest of the dead body of victim Milon Babu after taking it to the Police Station to which she (P.W.5) put his thumb impression. She saw the dead body of victim Milon Babu and found finger impression on its neck as well as blood in the mouth. Later, her daughter filed the case. P.W.5 identified accused Hamidul in the dock.

22. In reply to cross-examination conducted by the learned State Defence Advocate P.W. 5 says that she could not say as to how deceased victim Milon Babu died and who killed him. The accused got married with her daughter who used to look after the 2(two) children of the informant, who were born by her first husband. Some villagers became angry with the accused as her daughter got married with him. On the following morning of the occurrence her brother Abdul Bari sent the accused to Badargonj while he was caught by some opponent party and they took him to the house of MP, Badargonj. She has no allegation against the accused about the death of his grandson, victim Milon Babu.

23. In his evidence P.W.6 Md. Wahed Ali divulges that informant Anjuara is known to him and as per her dictation, he wrote the FIR on 24-10-2003. Thereafter, he read it over to the informant who put his signature thereto and he also put his signature (Exhibit No. 1/kha) as scribe thereof.

24. In reply to cross-examination by the learned State Defence Advocate P.W.6 states that the informant is not related to her whose residence is 3(three) kilometer away from that of his own. The informant and the accused are respectively husband and wife. P.W.6 denied the defence suggestions that he along with others became opponent of the accused as the informant got married with him for the second time or that they obtained the signature of the informant to the FIR against her will or that no incident had happened as alleged in the FIR.

25. P.W.7 S.I. Md. AbdusSabur is the 1<sup>st</sup> Investigating Officer of the case. In his evidence this witness avers that on 24-10-2003 he was posted at Badargonj Police Station under Rangpur District. During investigation, he visited the place of occurrence and prepared sketch map (Exhibit No.4) along with a separate index (Exhibit No.5), seized alams vide seizure list (Exhibit No.3), sent the dead body of deceased victim Milon Babu for post mortem examination, recorded statement of witnesses under section 161 of the Code and made necessary arrangements for recording the confession of accused Hamidul and obtained the post-mortem examination report. Subsequently, on account of transfer he handed over the CD to the Officer-in-charge on 27-12-2003. This witness also proves the FIR form including the signature of the then Officer-in-charge as he was acquainted to the hand writing of the latter as Exhibit Nos.6 and 6/1 respectively.

26. In reply to cross-examination P.W.7 says that the FIR was lodged as per instructions of the informant and thereafter, it was read over to her who admitted the same by putting her signature thereto. The accused was brought to the police station by the cousin brother (খালাতো ভাই) of the informant and others and further that he (P.W.7) found the accused in the Police Station. P.W.7 denied the defence suggestions that the informant was forced to put her signature to the FIR or that the local opponent of the informant as well as of the accused

apprehended the latter as a part of conspiracy and handed him over to the Police Station or that they (P.W.7) extracted the confession from the accused by torture and intimidation or that accused Hamidul is not concerned in the killed incident of deceased victim Milon Babu or that being biased by the opponent of the accused, charge sheet was filed against him.

27. P.W.8 Md. Abu Jubayer Hossain is the relevant Magistrate who recorded the confessional statement of accused Hamidul. In his testimony this witness asserts that on 25-10-2003 accused Hamidul was produced before him for recording his confession, whereupon he afforded him 3(three) hours time for reflection and also made him understood that he is not bound to make confession and assured him that he will not be sent back to police custody again and if he makes any confession it will be used against him. As the accused still expressed his willingness to confess, he jotted it down and thereafter read it over to the accused who put his signature thereto admitting the same to be correct. It was his perception that the accused made confession voluntarily. P.W.8 proves the confession including his 5(five) signatures appearing thereon as Exhibit Nos.7 and 7/1 series.

28. In reply to cross-examination P.W.8 states that it was not written in Exhibit No.7 that he afforded 3(three) hours time, but the relevant time was mentioned therein. At the relevant time the accused was in his chamber (খাসকামড়া). P.W.8 denied the deference suggestion that the confession of the accused was not voluntary rather it was obtained by torture.

29. P.W.9 Dr. Abdul Jalil is the concerned doctor who, on 25-10-2003 at around 12.00 noon, carried out autopsy of the cadaver of deceased victim Milon Babu, at the identification of constable No. 1079 Shariful Islam and found the following injuries.

“Bruise and ecchymosis present on the both sides of neck. Nail marks (Abrasion) present on the front of the neck (above the larynx). Abrasion present on the back. On dissection-subcutaneous tissues found extravasations. Submucosal haemorrhage of larynx found. Internal haemorrhage found at the bone of tongue. Extravasations of blood and blood clots found corresponding to the wounds.”

According to him, the cause of death was due to shock and asphyxia following manual strangulation (throttling) which was ante-mortem and homicidal in nature.

30. P.W.9 proves the post mortem report including his signature appearing thereon as Exhibit No.8 and 8/1 respectively. P.W.9 denied the defence suggestion that the victim died a natural death.

31. P.W.10 Mst. Sobuja Khatun is the niece of informant Anjuara. In her evidence this witness divulges that the occurrence held in the year 2003. In the morning at around 9.00 am she went to the Turmeric field in a bid to defecate while she found the dead body of deceased victim Milon Babu lying there following which she raised alarm, whereupon the neighbouring people rushed to the spot and recovered the dead body of the victim. Informant Anjuara suspected her husband Hamidul for the killing of the victim boy and took him to the police Station, who confessed to his guilt. P.W.10 identified accused Hamidul in the dock.

32. In reply to cross-examination P.W.10 says that she did not see accused Hamidul in the Turmeric field and she also did not go to the Police Station. This witness denied the defence suggestion that she deposed falsely.

33. These are all about the evidences that had been adduced by the prosecution in a bid to prove the charge brought against the accused.

34. Upon skimming through the evidences on record, it appears explicitly that in the evening of 23-10-2003 at around 7.00pm deceased victim Milon Babu, the male child of informant was playing outside of his residence wherefrom he went missing and thereafter a



vigorous search was carried out but to no avail. Subsequently, on the following morning at around 9.00 am, P.W.10 Sabuja Khatun went to defecate in the Turmeric field of one Mahmud Ali while she found the dead body of the victim boy lying there following which she raised alarm, whereupon the neighbours rushed to the spot and recovered the dead body there from. It further reveals that after recovery of the cadaver the victim boy, P.W.2 Rashidul Islam witnessed the same while he found finger marks on either side of the neck of the victim boy including spot mark on one side of his face. The aforesaid factual events of the case were not at all challenged or denied by the defence.

35. It is on record that P.W.7 Abdus Sabur held inquest of the corpse of victim Milon Babu which has been marked as Exhibit No.2. It would be profitable to have a peep at the inquest report (Exhibit No.2) to see for ourselves as to what injury or injuries were found on the person of the victim boy at the initial stage of the case and what the apparent cause of death. The exact text of the relevant portion of Exhibit No.2 is quoted below in verbatim:

“মৃতের লাশ আঙ্গিনার মধ্যে উত্তর দক্ষিণে মাদুরের উপর একখানা পুরাতন কাপড় দিয়া ঢাকা রহিয়াছে। কাপড়খানা উঠাইয়া দেখা গেল যে, মৃত শিশুটির বয়স অনুমান ০৩ বছর গায়ের ভং ফর্সা। মাথার চুল ছোট। মুখমন্ডল গোলাকার। চোখ দুইটি বন্ধ। মুখে রক্ত দেখা যাইতেছে। গলার দুইপার্শ্বে আঙ্গুলের চাপ দেওয়ার দাগ, গলার মাঝখানে দাগ দেখা যায়। পিঠে কয়েকটা দাগ দেখা যায় যাহা ঘায়ের বলে মৃতের মা জানায়। হাত দুইখানা সোজা হয়ে আছে। গায়ে ও পরনে কোন কাপড় নাই। পা দুইখান লম্বা ভাবে রহিয়াছে। মৃত দেহ চতুর্দিকে ওলটপালট করিয়া আর কোন জখম দেখা যায় না”

(Emphasis put).

36. From the above narration it is thus apparent that at the time of holding inquest blood was found in the mouth cavity of the victim boy including finger impression marks on either side of the neck as well as spot mark on the mid portion thereof.

37. Regarding cause of death it has been stated in Exhibit No.2 that, “তদন্তকালে জানা যায় যে, উক্ত শিশু বাচ্চাটিকে গলাটিপে শ্বাসরুদ্ধ করিয়া হত্যা করা হইয়াছে। তাই মৃত দেহের ময়না তদন্ত করতঃ মৃতের মৃত্যুর সঠিক কারন নির্ণয়করত ময়না তদন্তের রিপোর্ট সত্বর প্রেরনের নিমিত্তে স্কট (অপার্ট্য) মাধ্যমে প্রয়োজনীয় কাগজপত্রসহ লাশ রংপুর মেডিকেল কলেজ মর্গে প্রেরন করিলাম।”

(Emphasis added).

38. Therefore, on preliminary investigation, it was revealed that the victim boy was killed by manual strangulation.

39. P.W.9 Dr. Abdul Jalil is the concerned doctor who carried out autopsy of the dead body of victim Milon Babu on 25-10.2003 at around 12.00 noon. In order to avoid repetition we don't want to refer to the injuries found on the person of the victim boy again since those were mentioned earlier. Suffice it to note that during post-mortem examination, it was revealed that the cause of death of victim Milon Babu was due to asphyxia following manual strangulation (throttling) which was ante-mortem and homicidal in nature. P.W.9 proves the autopsy report including his signature appearing thereon as Exhibit Nos.8 and 8/1 respectively. We don't find any earthly reason to hold a different with that of the medico legal evidence furnished by P.W.9 so far the cause of death of the victim boy is concerned. The defence also did not make any attempt to discard the evidence of P.W.9 which also comes in agreement with that of the inquest report. In such a backdrop; it can safely be concluded that the prosecution has successfully been able to prove that victim Milon Babu was murdered.

40. Now, the most striking question that calls for our determination is, who is or are responsible for the killing of victim Milon Babu.

41. Admittedly, in the instant case at our hand there is no ocular evidence of the occurrence leading to the incident of killing of victim Milon Babu. The mainstay in

embroiling accused Hamidul in the killing incident of victim Milon Babu is his own confessional statement regarding which we will take stock of now.

42. It is by now well settled that an accused can be found guilty and convicted solely banking on his confession if, on scrutiny, it is found to be true, voluntary and inculpatory in nature. In this connection, we may profitably refer the case of Md. Islam Uddin @ Din Islam Vs. The State reported in 27 BLD (AD) 37 wherein our Appellate Division has observed as under:

*“7.It is now the settled principle of Law that judicial confession if it is found to be true and voluntary can form the sole basis of conviction as against the maker of the same. The High Court Division as noticed earlier found the judicial confession of the condemned prisoner true and voluntary and considering the same, the extra judicial confession and circumstances of the case found the condemned prisoner guilty and accordingly imposed the sentence of death upon him.”*

43. In the case of Dogdu V. State of Maharastra reported in AIR 1977 SC 1759 it was observed that when in case involving capital punishment, prosecution demands conviction primarily on the basis of confession, the court must apply the double tests: (I) Whether the confession is perfectly voluntary, and (II) if so, whether it is perfectly true.

44. Keeping the aforesaid principle in view, let us now have a close look at the confession of accused Hamidul to see for ourselves whether it has satisfied all the above criteria or not. The exact text of the confession (Exhibit No.7) of accused Hamidul is quoted below:

“২৩-১০-২০০৩ তারিখ সন্ধ্যায় আমি আমার স্ত্রীর সংগে TV দেখি। এরপর সন্ধ্যা ৭ঃ০০ টার দিকে বাড়ী থেকে বের হই। বের হওয়ার পর আমার শরীরে কি যেন ভর করে। তখন একটি বাচ্চাকে ধরে নিয়ে যাই। এরপর ছশ হয় আমার। দেখি আমি হলুদ ক্ষেতে এবং সামনে একটি বাচ্চা মরে আছে। আমি বাড়ী চলে আসি।আমার স্ত্রীকে জিজ্ঞাসা করি আমার ছেলে মিলনবাবু কোথায়। সে বলে তার নানীর সংগে গেছে। এরপর তার লাশ পরের দিন হলুদ ক্ষেতে পাওয়া যায়। বাচ্চাটিকে জিনে মেরেছে। কিভাবে মেরেছে বলতে পারবো না”

(Emphasis put).

45. Upon scanning the above confession, it becomes clear that accused Hamidul admitted that in the occurrence night at about 7.00 pm he came out of his house and took away victim MilonBabu to a nearby Turmeric field and thereafter, he found that the victim boy was lying dead in front of him. It is to be noted that as per confession of the accused at the relevant time there was none except him and the victim boy at the spot which clearly shows that it is none but the accused who is responsible for the killing of the victim boy. It is true that in his confession the accused had made a futile attempt to prove his innocence saying that at the material time he was possessed by some evil spirits. But this plea of the accused is nothing but a ruse only to escape his criminal liability inasmuch as there is nothing on record either to show or at least suggests that accused Hamidul had ever been possessed by any evil spirit either on any earlier occasion or subsequently after the incident. Moreover, from the testimony of P.W.2 it reveals manifestly that on the occurrence night at around 7.00 pm accused Hamidul visited his (P.W.2) house located nearby the P.O. Turmeric field and thereupon washed his hands and face after pulling water from tube-well and also inhaled burnt tobacco after taking it from him (P.W.2). This clearly indicates that accused Hamidul was completely in sense at the material time. We have observed earlier that the cadaver of victim Milon Babu was found in the Turmeric field which fact also comes in agreement with the confession of the accused who disclosed that he took the victim boy to a Turmeric field wherefrom his dead body was recovered on the following morning. In the aforesaid premises, the confession of accused Hamidul can be regarded as true and inculpatory in nature.

46. Now, we can consider the voluntary character of the confession made by accused Hamidul.

47. P.W.8 Md. Abu Jubayer is the relevant Magistrate who got down the confessional statement of accused Hamidul which has been marked as Exhibit No.7. From a combined reading of the evidence of P.W.8 together with the confession (Exhibit No.7), it appears that the concerned Magistrate undertook genuine effort to find out the real character of the confession made by accused Hamidul inasmuch upon his production before the Magistrate he was afforded sufficient time for reflection during which he was placed under the custody of court peon named Md. Azahar Ali. Thereafter, the accused was made to understand the necessary questions as set out under column 5 & 6 of the confession recording form and having understood the effect of making such confession as he still expressed his willingness to make confession, the Magistrate concerned penned down the same. Furthermore, after jotting down the confession it was read over and explained to the accused who admitted the contents thereof to be true account of the incident by putting his signature thereto. In his evidence P.W.8 also stated in clear terms that the accused made confession voluntarily. On top of that under column No.8 of the confession P.W.8 gave memorandum to the following effect: “আসামী স্বেচ্ছায় স্বপ্রনোদিত হয়ে এই জবানবন্দী প্রদান করেছে তাকে কোন ভয়ভীতি বা প্রলোভন দেখানো হয়নি।”

48. It further reveals that after penning down the confession accused Hamidul was sent to Rangpur Jail on the same date i.e. on 25.10.2003 at around 5.30 pm. During making confession, as it appears, the accused did not make any complaint about police torture or inducement. Even, after coming out of the clutches of the police the accused did not also raise any complaint touching the veracity of his confession immediately thereafter. Rather, after almost 5(five) years of making confession the accused filed a retraction application directly to the court which was also signed by an Advocate. Therefore, it can easily be said that such retraction application is nothing but the brainchild of the concerned Advocate. Moreover, no tangible material is found on record in support of the above application which was a belated one as well. In such a posture of things; the confession of accused Hamidul can be regarded as voluntary as well.

49. There is another strong incriminating circumstance available in the case to fasten up the accused with the murder of the victim boy. Admittedly, Victim Milon Babu was the step son of accused Md. Hamidul. P.W.6 is the scribe of the FIR who testified that the FIR was written as per dictation of informant, Aanjuara and it was read over and explained to her who put her signature thereto being satisfied about the contents thereof. According to the FIR story after marriage accused Md. Hamidul could not take her (informant) children well sight. In the evening of the occurrence date victim Milon went missing and accused Md. Hamidul also could not be traced out at the material time who returned home late in that night while being accosted he replied incoherently. It has further come to light from the evidences of the prosecution witnesses that on the following morning of the occurrence night after recovery of the cadaver of victim Milon Babu the villagers suspected accused Md. Hamidul as the killer of the former, whereupon he was apprehended as well as handed over to the local M.P. and ultimately, he was handed over to the police. Thus, it transpires that immediately after recovery of the corpse of the victim boy the local villagers including the informant, which is evident from the FIR, suspected accused Hamidul as the killer of the former and accordingly caught hold of him as well as put him under the custody of police. But, it is curious to note that while deposing in the court after a lapse of almost 2 (two) years, P.W.1 Aanjuara Begum did not support the FIR story so far the involvement of the accused is concerned, rather she made obliging statement about her husband, accused Md. Hamidul. But in the prevailing facts and circumstances of the case, we cannot align with the evidence of P.W.1 so far the involvement of the accused is concerned. Rather, if we consider the case upon blending the above circumstances together with the confession of accused Md. Hamidul in that event it becomes crystal clear that he alone is responsible for the killing of victim Milon Babu.

50. From the aforementioned discussions and the observations made thereunder, we are constrained to hold that the prosecution has successfully been able to prove the charge brought against the accused to the core and accordingly the learned Additional Sessions Judge rightly and correctly adjudged his guilt in the killing of victim Milon Babu by the impugned judgment and order which does not call for any interference by this court.

51. Now, we can turn our eyes to the quantum of sentence awarded to accused Md. Hamidul to see whether the same is appropriate in the facts and circumstances of the instant case. Admittedly, there is no eye witness of the occurrence leading to the incident of murder of victim Milon Babu and the fate of the case mainly hinges upon the lone confession of the accused together with some incriminating circumstances. Moreover, as per record, there is no previous criminal history of the accused who has been suffering the pangs and torments of the death sentence for the last about more than 5(five) years for no fault of his own. Therefore, considering the aggravating as well as mitigating circumstances of the case, we are of the dispassionate view that justice would be best served if the death sentence of the accused is commuted to one of life imprisonment along with fine.

52. Before parting with the case, we would like to put on record one legal infirmity that has been committed by the learned Judge of the court below. On perusal of the impugned judgment and order, it reveals that the learned Judge on his own accord asked as many as 13(thirteen) questions to the accused while he was being examined under section 342 of the Code. Not only that the judge concerned has also used the same against the accused in finding his culpability in the killing of the victim boy. The above approach adopted by the trial Judge is absolutely weird, uncalled for and illegal as well. In this connection, we may profitably refer to the case reported in 42 DLR (AD) 31 wherein our Appellate Division has observed as underneath:

“..... A statement of the accused under section 342 CrPC is meant for giving him and also to explain the circumstances appearing against him in the evidence adduced by the prosecution. This is entirely for the benefit of the accused and the accused only. This statement cannot be used by the court against him, nor is the prosecution permitted to use it to fill up any gap left in the prosecution evidence. A statement under section 342 CrPC is not evidence within the meaning of section 3 of the Evidence Act.”

53. Thus, it is apparent that the learned Additional Sessions Judge has committed gross illegality in using the statement of accused Md. Hamidul under section 342 of the Code which is all together foreign in criminal jurisprudence inasmuch as a statement given by an accused cannot be used as evidence to find his culpability.

54. Accordingly, the Death Reference is rejected.

55. Accused Md. Hamidul is found guilty under section 302 of the Penal Code and he is sentenced to imprisonment for life along with a fine of Tk.10,000/-, in default, to suffer simple imprisonment for 6(six) months more.

56. With this modification, the impugned judgment and order dated 12-04-2016 recorded in Sessions Case No.149 of 2004 is maintained.

57. Connected Criminal Appeal being No.4915 of 2021 (arising out of Jail Appeal No.152 of 2016) is hereby dismissed being devoid of any substance.

58. The authority concerned is directed to shift accused Md. Hamidul from death cell to a normal prison.

59. Send down the L.C. record along with a copy of the judgment to the Court concerned at once.