

**6 SCOB [2016] HCD 43****High Court Division  
(Criminal Appellate Jurisdiction)**

Death Reference No. 42 of 2010

**The State**

Versus

**Kalam alias Abul Kalam**

- Convict.

Mr.M.A Mannan Mohan,  
Deputy Attorney General  
with

Mr. Md. Aminur Rahman Chowdhury

with

Mr. Kazi Bazlur Rashid,  
Assistant Attorney General  
- For the State.Mr. Begum Ayesha Flora, Advocate,  
- State Defence Lawyer.Heard on 26.07.2015 and  
Judgment on 27.07.2015 and 28.07.2015**Present:****Mr. Justice Soumendra Sarker****And****Mr. Justice A.N.M. Bashir Ullah****Dying declaration:****A dying declaration, whether written or oral, if accepted by the Court unhesitatingly, can itself provide a strong basis for convicting an accused. ... (Para 48)****Motive when immaterial:****In a murder case like this where the occurrence appears to be proved by the direct evidence of the eye witnesses, the proof of motive is always immaterial. When the proof of any grave offence depends upon the circumstantial evidence, the motive is one of the component to find the accused guilty. ... (Para 53)****Abscondence when material:****From the materials on record we find that soon after the occurrence convict Kalam had fled away and remained absconding during the trial and trial was held in his absentia. Such abscondence of the accused is an incriminating circumstances connecting him in the offence and conduct of a person in abscondence after commission of crime is an evidence to show that he is concerned in the offence. ... (Para 61)****Judgment****A.N.M. Bashir Ullah, J:**

1. This Death Reference being no. 42 of 2010 has been sent by the Additional Sessions Judge, 2<sup>nd</sup> Court, Kishoreganj under section 374 of the Code of Criminal Procedure (in short, the Code) for confirmation of sentence of death awarded by him upon convict Kalam (who is an absconding convict from the date of occurrence of this case) passed in Sessions case no. 03 of 2003 by his judgment and order dated 21.06.2010 convicting the convict under section 302 of the Penal Code for causing murder of deceased Sohel.

2. The prosecution case as unfurled at trial, in short, is that, Sohel Mia aged about 18 years was a student of class X in the year 2001 having his residential address at village Charfaradi under Pakundia Police Station of Kisoreganj District. On 13.09.2001 at 6.00 pm there was an altercation between the victim Sohel Mia and accused Kalam on a very trifling matter on a bridge 100/150 yards away to the east direction from the house of the victim and at one stage of the said occurrence accused Kalam with an intention to murder victim Sohel Mia had inflicted dagger blow on the throat of the victim causing serious bleeding injury. One Kanak of Kishoreganj and Rabiul, son of Ibrahim, a neighbour of the victim had shifted the victim through a rickshaw to Pakundia Hospital. Md. Azizul Haque, the informant as well as the full brother of the victim being informed of the said occurrence through his cousin Mokhles had accompanied the victim from Pakundia bazaar and on there way on his query the injured victim told the informant that Kalam had inflicted dagger blow on his throat.

3. The doctor of Pakundia Hospital pushing an injection on the victim advised them to shift the victim at Bhagalpur Hospital at Bazitpur and the informant and others without any late started their journey for the said hospital on a microbus but on there way when they reached at Katiadi Upazilla the over all situation of the victim was critical . As a result, they had gone to Katiadi Hospital where the doctor declared the victim Sohel dead.

4. The informant had informed the occurrence to the Katiadi Police Station and the Katiadi Police Station prepared the inquest report on the dead body of the deceased through PW 6 Police Sub Inspector Md. Rabiul Islam and the informant having been at Pakundia Police Station lodged the FIR at 23.05 hours. The occurrence of murder has been witnessed directly among others by Rabi, Mokhles and Rekha Begum.

5. On the basis of the FIR lodged by informant Md. Azizul Haque, Pakundia Police Station case no. 4 dated 13.09.2001 corresponding to G.R case 375(2) 2001 were started under section 302 of the Penal Code and the case was endorsed for investigation to Police Sub Inspector S.I Md. Anower Hossain (PW 8) and ultimately for his transfer to else where the case was investigated by Police Sub Inspector Md. Nawb Ali who on completion of the investigation had submitted Police report recommending the trial of accused Kalam under section 302 of the Penal Code.

6. The Magistrate Court having been received the Police report made the case ready for trial and when the case became ready for trial, the same was sent to the Court of Sessions Judge, Kishoreganj where the case was registered as Sessions case no. 03 of 2003 and the trial of the case was started in the Court of Sessions Judge, Kishoreganj where the charge under section 302 of the Penal Code was framed against the accused Kalam on 10.04.2003. Since the sole accused was an fugitive accused immediate after occurrence his answer on the charge could not be recorded by the Trial Court.

7. At trial the prosecution examined 11 witnesses and their such evidence has been recorded by the Sessions Judge, Kishoreganj. Thereafter on 27.04.2010 the case was transferred in the Court of Additional Judge, 2<sup>nd</sup> Court who hearing the arguments of the parties pronounced the judgment on 21.06.2010 convicting the convict Kalam under section 302 of the Penal Code and sentenced him to death and also sent the matter to the High Court Division of the Supreme Court of Bangladesh for confirmation of sentence of death as awarded upon the condemned convict Kalam under section 374 of the Penal Code and the same has been registered as Death Reference case no. 42 of 2010.

8. At the time of hearing of this death reference Mr. M.A. Mannan Mohan, the learned Deputy Attorney General (in short, the DAG) appearing along with Mr. Md. Aminur Rahman Chowdhury and Kazi Bazlur Rashid, the learned Assistant Attorney Generals, having taken us through the FIR, charge, post mortem report, evidence, other materials on record and the judgment pronounced by the trial Court submits that it is a case where the innocent victim Sohel Mia was done to death in the hands of the accused Kalam for no fault of him. The accused Kalam happens to be a very notorious and dangerous man in the locality. He for a very trifling matter had murdered the deceased Sohel Mia inflicting dagger blow on his throat.

9. He also submits that the occurrence took place at 6.00 pm of the day and the same has been witnessed by eye witnesses Rekha, Mokhles, Rabi and Alamgir who were examined as PWs 2, 3, 4 and 5 in this case at trial. The eye witnesses have given a vivid and smart description of the occurrence as to how the convict Kalam had murdered the deceased inflicting a dagger blow on his throat.

10. The learned DAG also submits that the throat is the most vital and sensitive organ of a human being. Since the accused had the intention to murder the deceased he had inflicted a dagger blow on the vital and at the same time very sensitive part of the deceased like throat. Had the accused no intention to kill the victim by the dagger blow he could have assaulted the victim on any other parts of the deceased. So the very dagger blow on the very sensitive and vital organ of the deceased clearly points out that the accused had assaulted the victim with a total intention to kill him.

11. The learned DAG also submits that the occurrence of this case have been witnessed at least by 03 eye witnesses and apart from those eye witnesses there is a dying declaration of the deceased himself. When the deceased Sohel Mia was taken to Pakundia Hospital he was accompanied among others by the informant Azizul Haque also and on his query, the victim told him in a very clear language that Kalam had inflicted dagger blow on his throat.

12. He also submits that dying declaration whether it is written or oral if the same is proved by the cogent evidence that can be the strong basis to find the accused guilty. The deceased Sohel Mia immediate after occurrence and also immediate before of his last breath made the said dying declaration. It is not usual that a man before his death when he passes a very critical moment of his life would involve any other person leaving the real perpetrator of the crime as such the dying declaration if it is proved can be considered as the solemn and strong basis to find the accused guilty and the dying declaration of the deceased of this case has been proved at trial. The said dying declaration had also been heard by other witnesses namely PWs 3,4, and 5. So the evidence of eye witnesses has been strongly corroborated by the dying declaration of the deceased also.

13. The learned DAG also submits that immediate after occurrence the accused had fled away successfully and thereafter he was never found in the locality, as such, Police could not nab him till now and the accused did not surrender in the Court to face the trial which ultimately indicates about the involvement of the accused with the occurrence of the murder of the deceased. Absconion of the accused immediate after occurrence with the guilty knowledge is always an incriminating circumstance accessed the accused. So if, the direct evidence of the eye witnesses, the dying declaration of the deceased made immediate before his last breath and the fugitiveness of the convict immediate after occurrence is considered culminatively there would have no alternative but to find that nobody else but the accused

Kalam had murdered the deceased and the trial Court on the right assessment of the evidence and other materials on record found the accused Kalam guilty under section 302 of the Penal Code and considering the gravity of the offence and the direct involvement of the accused and the very nitid and transparent evidence of the prosecution witnesses rightly awarded him the sentence of death. So the same may kindly be upheld and affirmed in this Death Reference.

14. On the other hand, Begum Ayesha Flora, the learned State Defence Advocate appearing for the convict Kalam assailing the judgment and order passed by the trial Court and controverting the argument sofar placed by the learned DAG from the side of the State submits that in a case under section 302 of the Penal Code the motive is all ways important and if it is conceded for a moment that the convict had inflicted a dagger blow on the person of the deceased but the nature of infliction of the dagger blow will go to show that the accused had no any intention to kill the deceased although the deceased died of the said injury and when there appears no motive to cause the murder of the deceased by the accused, the accused should not be held guilty under section 302 of the Penal Code but the trial Court totally failed to consider this important aspect of the present case.

15. She also submits that all the witnesses who were examined by the prosecution are the close relations and the neighbours of the informant party, as such, the trial Court should not have relied upon their such evidence.

16. The learned State Defence lawyer also submits that an accused may abscond for many reasons in our society particularly for the fear of the police torture or to avoid the difficulty of facing the trial but the absconsion is not itself the proof of the guilt of a man. So, the fugitiveness of the convict cannot be considered as an adverse circumstance against him. So, the sentence of death as awarded by the Trial Court should not be affirmed by this Court rather the convict deserves the order of acquittal from this Court in this Death Reference.

17. We have considered the above submissions and arguments given by the learned Advocates of both the parties meticulously and have gone through the materials on record particularly the FIR, the charge, the post mortem examination report, the evidence recorded by the trial Court and the judgment pronounced by the trial Court with profound attention. Now, in order to appreciate the arguments of the learned Advocates of the respective parties, now, let us have a look into the evidence on record.

18. PW 1 Md. Azizul Haque Jaj Mia, the informant of this case admittedly is not an eye witness of the occurrence testified that on 13.09.2001 at 6.00 pm when he had been at Pakundia bazaar, Mokhles informed him that accused Kalam had inflicted a dagger blow on the throat of his younger brother Soheli and also came to know that Rabi, Kanak and Alamgir had started for Pakundia Hospital with the victim Soheli on a rickshaw and he also accompanied with them and on his query Soheli told him that accused Kalam had inflicted dagger blow on his throat. He also stated that the doctor of Pakundia Hospital had advised them to shift the victim at Bhagalpur Hospital and accordingly they were going to Bhagalpur Hospital on a microbu but on there way the condition of victim was critical, as such, they had gone to Katiadi Hospital where the doctor declared his brother dead. He informed the occurrence to the Katiadi Police Station thereafter lodged the FIR with Pakundia Police Station. He proved the FIR and his signature on it, marked exhibits 1 and 1/1. He identified the blood stained shirt of the deceased, marked material exhibit 1 and a napkin which was used to stop the bleeding from the cut injury has been marked as material exhibit II . He also

stated that immediately after occurrence a snap of his injured brother was taken. The photos have been marked as material exhibits IV. He also stated that the occurrence of murder had been witnessed by witnesses Rabi, Kanak and Alamgir.

19. In cross examination of the state defence he has stated that Rekha is his neighbour and Mokhles. Rabi and Alamgir are his cousins. The witness Azaharul Islam Kanak is his distant relative. The FIR was written by the Police Officer of the Police Station. He denied the state defence suggestion that no such occurrence had taken place as stated by him.

20. PW 2 Rekha Begum has testified that both the parties are known to her, She is a neighbour of both the deceased and the accused, the occurrence took place at 6.00 pm on 29th Bhadra, She was in front of her house and the bridge is only 20/25 hands away from her house, She found an altercation between Kalam and Soheli, Kalam uttering a slang language and also shouting that he would kill Kalam had inflicted a dagger blow on the throat of the victim, thereafter he fled away towards east direction, she, Rabi, Alamgir and Kanak had rushed to the victim, Rabi bringing a napkin from his house tried to stop the bleeding from his throat, thereafter they tried to shift the victim to hospital, Mokhles informed the occurrence to the informant at bazar.

21. In cross examination of the state defence she has stated that Mokhles is his full brother and there is no any house between the place of occurrence and her house, the occurrence had been witnessed by also Rabi, Kanak and Alamgir, She had witnessed the occurrence only 10 hands away from the place of occurrence, the bloods were gushing from the throat of the deceased. She denied the defence suggestion that she did not witness the occurrence.

22. PW 3 Mokhles has testified that both the deceased and accused are known to him and both of them are his neighbours, the occurrence took place at 6.00 pm on 29<sup>th</sup> Bhadra, he was going to Pakundia bazar riding on a motorcycle, there is a bridge adjacent to the east of his house where he found Soheli and Kalam in an altercation, Kalam uttering a very slang language and also shouting that he would kill Soheli had inflicted dagger blow on the throat of the deceased and he found the occurrence 100 hands away from the place of occurrence, Rabi, Alamgir and Kanak also had witnessed the occurrence, Kalam fled away successfully through east direction, Alamgir and Kanak tried to help Soheli, Rabi bringing a napkin from his house tried to stop the bleeding from the throat of the victim. He informed the occurrence to the informant at Pakundia bazaar, Rekha also had witnessed the occurrence like them, on their way to hospital victim Soheli Mia told his brother Jaj Mia that Soheli had inflicted dagger blow on his throat, immediately after occurrence accused Soheli had fled away and thereafter he was never found in the locality. In cross examination of the state defence PW 3 stated that Pakundia bazar is within one kilometer from his house, he tried to save Soheli but could not reach to them as the accused was armed with dagger. He denied the defence suggestion that he did not witness the occurrence.

23. PW 4 Rabi has testified that the occurrence had taken place on 13.09.2001 at 5.45/6.00 pm, he, Alamgir and Kanak had been passing some times at the western side of Charlakkhia bridge, they found Soheli and Kalam in an altercation on the bridge, Kalam rebuked Soheli with the reference of his mother, Soheli was protesting the same and at that juncture of the occurrence Kalam uttering a slang language and also shouting that he would kill Soheli had inflicted dagger blow on the throat of the Soheli, thereafter Kalam fled away through east direction, Kanak and Alamgir tried to help Soheli, he brought a napkin from his

house, thereafter tried to stop the bleeding from the throat of the deceased, the occurrence had been witnessed like them by Rekka and Mokhles, Mokhles informed the occurrence to the informant at Pakundia bazaar, they were going to Pakundia Hospital on a rickshaw with Soheli and on their way on the query of the informant Soheli informed his brother that Kalam had inflicted dagger blow on his throat.

24. He also stated the doctor of Pakundia had advised them to shift the patient at Bhagalpur Hospital but he ultimately did not accompany with them. He also stated that he had deposed before the Magistrate, he proved his deposition before the Magistrate, marked exhibit 4. In cross examination of the state defence he stated that he had been only 15/16 hands away from the place of occurrence, he did not know exactly what was the issue of the altercation between Kalam and Soheli, they did not give much importance of that altercation, he found the accused to inflict dagger blow on the deceased, Kanak and Alamgir also had witnessed the same. He denied the defence suggestion that he did not witness the occurrence.

25. PW 5 Alamgir Hossain testified that on 13.09.2001 at 6.00 pm he, Kanak and Rabi had been roaming in the western side of Charlakkhia bridge when they found Kalam and Soheli in an altercation on the said bridge, Kalam rebuked Soheli with reference to his mother and since Soheli protested the same Kalam uttering a slang language and also shouting that he would kill him had inflicted dagger blow on the throat of Soheli, thereafter he fled away towards the east direction, they tried to help Soheli, Rabi brought a napkin from his house and tried to stop the bleeding, they shifted Soheli at Pakundia Hospital, on their way to hospital Soheli told his brother Jaj Mia that Kalam had inflicted dagger blow on his throat. He further stated that he had deposed before the Magistrate, he proved his deposition before the Magistrate, marked exhibit 5. In cross examination of the state defence he denied the defence suggestion that he did not witness the occurrence.

26. PW 6. Police Sub Inspector Md. Rabiul Awal testified that on 13.09.2001 he had been posted at Katiadi Police Station and he on the basis of a requisition from the Medical Officer of Katiadi Hospital and also on the basis of the G.D no. 846 dated 13.09.2001 had prepared the inquest report on the dead body of Soheli at Katiadi Hospital, he proved the inquest report of Soheli, marked exhibit 1, thereafter he sent the dead body to the Kishoreganj morgue through Police Constable Md. Badiur Rahman for post mortem examination. In cross examination of the state defence he stated that he had found an injury on the left side of the throat and save and except the preparation of the inquest report he did not know anything in connection of this case.

27. PW 7 doctor Md. Israil Hossain testified that on 14.09.2001 he had been posted at Kishoreganj Sadar Hospital, on that day at 3.00 pm he held the post mortem examination on the dead body of Soheli and found the following injuries:

1. One incised wound at the anterior aspect of the neck about  $2\frac{1}{2}$ " X  $1\frac{1}{2}$ " cutting trachea and its adjacent structures. He further stated that in his opinion death was due to shock and haemorrhage as a result of injury which was antemortem and homicidal in nature. He proved the post mortem examination report and his signature on it, marked exhibit 7 and 7/1. In cross examination of the defence he stated that he had found the incised wound on the person of the deceased.

28. PW 8 Md. Anwar Hossain, Police Sub Inspector and the first Investigating Officer of this case testified that on 13.09.2001 he had been posted at Pakundia Police Station, the case

was recorded by the then O.C Nur Ahammad, he proved the FIR columns and signature of Nur Ahammad on it, marked exhibits 8 and 8/1. He further stated that he investigated the case and at the time of investigation he had visited the place of occurrence, prepared the sketch map of the place of occurrence along with its index, he proved the sketch map, marked exhibit 9 and index exhibit 10, recorded the statements of the witnesses under section 161 of the Code, seized the alampats under seizure list, he proved his signature on the seizure list, marked exhibit nos. 3/4, produced 2/3 witnesses before the Magistrate for recording their statements and procured the post mortem examination report and since he was transferred in the district of Tangail he had handed over the case docket to the officer-in-charge. In cross examination of the state defence he stated that the then O.C Nur Ahammad is still alive but he cannot say where he has been serving now, he had gone in the place of occurrence in the night of occurrence at 1.15 hours and he examined 03 witnesses on that day, the occurrence of this case took place on a culvert, he did not mention the length and breadth of the said culvert, since the dagger which was used in causing the murder of the deceased could not be traced out the same had not been seized also, he examined Rabi on 14.09.2001, Rabi did not state anything to him that he was chatting with others on the western side of the bridge, Rekha and Mokhles also did not state anything to him that they had witnessed the occurrence; Alamgir also did not state anything to him that he had witnessed the occurrence. He denied the defence suggestion that he did not investigate the case properly.

29. PW 9 Md. Rais Uddin, the then Magistrate First Class testified that on 16.09.2001 he had been posted as Magistrate First Class at Kishoreganj Collectorate, he on that day had recorded the statements of witnesses Azharul Islam Kanak, Rabi and Alamgir Hossain in connection of the Pakundia Police Station case no. 4 dated 13.09.2001. He proved the statements of witnesses Rabi, Alamgir and Kanak, marked exhibit nos. 4, 5 and 11 respectively. In cross examination of the state defence he stated that the investigating officer Police Sub Inspector Md. Anwar Hossain had produced those witnesses before him for recording their statements. He did not mention the time of the recording of their statements. He also stated that he had recorded the statements of the witnesses which they said to him.

30. PW 10 Nur Ahammad, the then Officer-in-Charge of Pakundia Police Station testified that on 13.09.2001 he had been posted as Officer-in-charge at Pakundia Police Station, he recorded the present case filling up the FIR columns. He further stated that Police Sub Inspector Nowab Ali had submitted the Police report in this case, his signature is known to him as he worked under him, the case was investigated firstly by Police S.I. Anwar and thereafter by Md. Nawab Ali and they have no information as to the whereabouts of Police S.I. Nowab Ali, later on he also stated that he heard it that Nowab Ali had been living in America now. In cross examination of the state defence he stated that Police S.I Nowab Ali did not record the statement of any witness, the first I.O had recorded the statements of the witnesses and the second I.O. did not even prepare any fresh sketch map.

31. PW 11 and the last witness Masud Rana testified that in his presence the Police had prepared the inquest report. He found wound on the throat of the deceased which was given by a sharp weapon, he proved the inquest report and his signature in it, marked exhibit nos. 6 and 6/1. In cross examination he stated that the police officer had prepared the inquest report thereafter he signed it.

32. These are the evidence that have been given by the prosecution in this case. From the evidence discussed above it is found that the prosecution examined 11 witnesses out of which PWs 1-5 and 11 (6 in numbers) are the local witnesses while PWs 9 is the Magistrate who

recorded the statements of 03 witnesses, PWs 06 prepared inquest report, PW 8 is the investigating officer, PW 10 is the recording officer and PW 7 is a doctor who held the post mortem examination on the dead body of the deceased.

33. The prosecution case as has been found, in short, is that there took place an altercation between deceased Soheli and accused Kalam on a bridge at village Charlakkhia and at one stage accused had inflicted dagger blow on the throat of the deceased as a result of the said injury within a short period of one or two hours the deceased took his last breath on the way to Bhagalpur Hospital from Pakundia. After the death of the deceased post mortem examination on the dead body of the deceased was held by the PW 7 doctor Md. Israil Hossain who in his evidence stated that he had found one incised wound at the anterior aspect of the neck about 2'' X  $\frac{1}{2}$  X 1  $\frac{1}{2}$ '' cutting the trachea and its adjacent structures and in his opinion the death was due to shock and hemorrhage as a result of the said injury which was antemortem and homicidal in nature.

34. PWs 2, 3, 4 and 5 who are the eye witnesses of the occurrence in a very chorus voice testified that they had found accused Kalam to inflict a dagger blow on the throat of the deceased and immediate after occurrence he (PW 4) bringing a napkin from his house tried to stop the gushing bleeding from the throat of the deceased. Thus the evidence of the ocular witnesses as to the assault on the throat of the victim by accused Kalam is very much consistent with the post mortem examination report.

35. The doctor found cut injury on the anterior aspect of the neck that is in front of the neck and he also found that his trachea at its adjacent structure were also cut. Thus from the very evidence of the ocular witnesses as well as from the medical evidence it has been found that deceased Soheli Mia was done to death in the occurrence of this case.

36. In this case though trial was not faced directly by the accused himself but he was defended by the state defence lawyer. There is no case on the part of the defence that the deceased Soheli Mia had met his death in any other manner than that of the alleged occurrence. Both the evidence of ocular witnesses and the medical evidence is very much harmonical regarding the cause of death of the deceased.

37. Now, let us examine as to who is responsible for the causing murder of the deceased Soheli Mia. PW 2 Rekha Begum testified that she had witnessed the occurrence 20/25 hands away from the place of occurrence. She had found the accused to inflict a dagger blow on the throat of the deceased. PW 3 Mokhles, PW 4 Rabi and PW 5 Alamgir almost in a chorus voice very consistently testified that when the deceased and victim were at logger head on a bridge at village Charlakkhia at one stage of that occurrence accused Kalam had inflicted dagger blow on the throat of the deceased. These witnesses were cross examined by the state defence lawyer but by a such cross examination their evidence have not been shaken away in any way.

38. At the time of hearing of this Death Reference the learned Advocate for the state defence assails the evidence of these 04 witnesses blemishing them as near relatives but in fact none of them are near relative of the deceased rather they are the simply neighbours of the deceased and same phenomenon is also applicable to the accused also. So I find nothing wrong for which the evidence of these 04 witnesses can be disbelieved or discarded from consideration on those flimsy grounds.

39. Over and again in the FIR it has been clearly asserted that Rekha, Mokhlesh and Rabi had witnessed the occurrence, as such, we find that at the very initial stage of the case it was within the knowledge of the informant that the occurrence of the murder had been witnessed by these 03 witnesses and they coming in the Court gave a vivid description of the occurrence as to how the accused Kalam had inflicted dagger blow on the throat of the deceased.

40. In this case though the name of the PW 5 did not appear in the FIR as eye witness but he had deposed in the Court as eye witness and PW 5 Alamgir Hossain stated that he Alamgir and Kanak had been roaming and chatting near the bridge at the time of occurrence. So I find that Alamgir is also another eye witness of this case. The evidence of the eye witnesses namely PWs 2, 3, 4 and 5 appear to be very much unblemished and gorgeous in nature and by their such evidence it has been proved beyond all reasonable doubt that nobody else but Kalam had inflicted the dagger blow on the throat of the deceased Sohel.

41. In this case apart from those eye witnesses there appears a dying declaration of the deceased Sohel. PW 1 Azizul Haque, the full brother of the deceased testified in the following ways:

“কয়েক মিনিটের মধ্যেই তাহারা আমার জখমী ভাইকে আনিলে আমিও রিকশার সংগে হাসপাতালের দিকে যাইতে থাকি। আমি ভাই সোহেলকে জিজ্ঞাসা করি যে কে তাহাকে মারিয়াছে। তখন সে আমাকে জানায় যে, আসামী কালাম ছোরা দিয়া তাহার গলার পিছনে পার দিয়াছে।”

42. This evidence relating to the dying declaration of the deceased has been corroborated by PW 3 Mokhles. Mokhles in his evidence testified in the following ways:

“হাসপাতালের পথে জজ মিয়া জিজ্ঞাসা করে তোরে কেডা মেরেছে তখন সোহেল বলে কালাম তারে ছুড়ি দিয়ে পাড় দিয়েছে।”

43. PW 4 Rabi in his evidence regarding the dying declaration stated in the following ways:

“এমন সময় সোহেলকে নিয়ে আমরা পাকুন্দিয়া পৌছি। জজ মিয়া সোহেলকে জিজ্ঞাসা করলে সোহেল বলে কালাম ছুড়ি দিয়ে তার গলায় পার মোরেছে।”

44. PW 5 Alamgir Hossain on the said subject matter stated in the following ways:

“জজ মিয়া বের হলেই দেখে আমরা সোহেলকে হাসপাতালে নিতেছি। জজ মিয়া তার ভাই সোহেলকে জিজ্ঞাসা করিলে বলে কালাম ছুরি দিয়ে তার গলায় পার দিয়েছে।”

45. From the above noted evidence of PW 3 Moksed, PW 4 Rabi and PW 5 Alamgir it appears that they very consistently testified in the trial Court that deceased Sohel Mia in their presence had told the name of accused to PW 1 as striking offender but Rabi and Alamgir were examined by the Magistrate during the investigation and from the said statements it appears that they did not tell anything about the dying declaration of the deceased. So we are not inclined to place any reliance on the evidence of PWs 4 and 5 regarding the dying declaration.

46. However, in the case of Hafiz Uddin Vs. State 42 DLR 397 it has been held by this Court in the following way:

“Dying Declaration is admitted in evidence under section 32 of the Evidence Act and it stands on the same footing as other evidence on record. Before acting upon any Dying Declaration, it should be looked at from

several stand points. Firstly, the Court is to see whether the victim had the physical capability of making such declaration. Secondly, whether the witnesses who heard the deceased making the statement, heard it correctly or not and whether they have reproduced the names of the assailants correctly in Court. Thirdly, the Court is to see whether the maker of the Dying Declaration had any opportunity to recognise the assailants.”

47. Now From the evidence of PWs 1 and 3 it is found that they heard the name of accused Kalam correctly as assailant and reproduced the same before the Court. It also further appears that immediate after occurrence and immediate before the death of the deceased he had told the name of the accused. So it reveals that he had physical capacity to say the name of the accused at the relevant time.

48. In this particular case the dying declaration of the deceased Soheli was not recorded by any person and the dying declaration appears to be a oral dying declaration. In the case of Salim (Md.) Vs State 54 DLR 359 it has been held by this Court that the law on dying declaration is fairly well settled now as it has been held by consistent judicial pronouncement that a dying declaration, whether written or oral, if accepted by the Court unhesitatingly, can itself provide a strong basis for convicting an accused.

49. As we have found from the case in our hands that dying declaration of the deceased Soheli is very much consistent with the evidence of the eye witnesses. So we are of the opinion that the deceased Soheli Mia had given a real version of the occurrence naming the real perpetrator to his brother PW 1 Azizul Haque. So, the dying declaration of the deceased appears to be very much fair, legal and corroborative along with the evidence of the eye witnesses of this case.

50. Learned state defence lawyer very empathically argued before us that at the time of altercation between deceased and accused, the accused had inflicted a single dagger blow on the throat of the deceased. So the same ultimately reveals that he had no any motive or intention to murder the deceased. She also categorically tried to establish that since the accused had no any motive to murder the deceased, the accused should have not been convicted under section 302 of the Penal Code.

51. In answering the argument of the learned state defence lawyer, the learned DAG submits that this is not a case that during the altercation between the deceased and the accused, the accused had inflicted any wooden blow or hand blow to the deceased rather the facts of the case will go to show that the accused had inflicted a dagger blow on the throat of the deceased and throat is one of the vital organ of human being and the medical evidence will go to show that for the single dagger blow the trachea along with its adjacent structure of the deceased were cut.

52. It is known to us that the life of the human being runs through the trachea and when any creature is forbidden to take breath the ultimate result is death. The accused leaving all the parts of the deceased had inflicted dagger blow on the throat cutting the trachea of the deceased which reveals that he had the only intention to quit the life of the deceased. Had the accused no intention to murder the deceased he could have assaulted the victim on any other parts of the deceased. So it is difficult to hold that the accused had no any intention to murder

the deceased. As such we are unable to accept the arguments of the state defence lawyer that the accused had no intention to murder of the deceased.

53. Over and again, in a murder case like this where the occurrence appears to be proved by the direct evidence of the eye witnesses, the proof of motive is always immaterial. When the proof of any grave offence depends upon the circumstantial evidence, the motive is one of the component to find the accused guilty and the same view has been taken the numerous cases including the case of State Vs Giasuddin 51 DLR (AD) 103. In this reported case Appellate Division held in the following manner:

“What can we say about the view taken by the High Court Division about the motive of the accused party? The prosecution is not bound to prove motive. Yet the High Court Division insisted on the proof of motive. There are as many as 10 eye witnesses to the murder of 4 persons. Where there is sufficient direct evidence to prove an offence, motive is immaterial and has no vital importance. While trying a case under section 302 of the Penal Code or hearing an appeal involving that section, the Court must not consider first the motive for the murder, which the High Court Division has erringly done in the present case, because motive is a matter of speculation and it rests in the mind and special knowledge of the accused persons. Motive is not a necessary ingredient of an offence under section 302 of the Penal Code. The Court will see if sufficient direct evidence is there or not. If not, motive may be a matter for consideration, specially, when the case is based on circumstantial evidence.” (Para 22 of the judgment)

54. In the case of State Vs Lalu Mia 39 DLR (AD)117 the Appellate Division also held in the following manner:

“It is true that in criminal trial the question of motive is of very little importance when there is direct and reliable evidence to prove the crime. But in a case that depends solely on circumstantial evidence, as in this case, the proof of motive would form one of the links, the first link in the chain of circumstantial evidence, and an absence of reliable proof as to motive itself becomes a relevant factor in considering the evidence relating incriminating circumstances alleged against the accused.”

(Para 52 of the judgment, page-141)

55. Thus it can safely be said relying upon the above decisions of the Appellate Division that in a criminal trial, question of motive has a very little importance when there is direct and reliable evidence to prove the crime. What have been found in this particular case that the occurrence of murder of Sohel was witnessed by at least 04 eye witnesses who have given evidence in the Court as eye witnesses and in their cross examination their such evidence have not been shaken away in any way. So the proof of motive of the accused is immaterial in such a case.

56. In this case the sole accused Kalam appears to be a fugitive accused from the date of occurrence that is after the commission of the offence he was never found in his locality. The trial was held in his absentia and the Death Reference has also been heard in his absence although he has been defended by the state defence lawyer at every stage of the proceeding.

57. In the case of Abul Kashem-vs-State 56 DLR 133 it was held that absconion of the accused itself is not an incriminating material against an accused inasmuch as even an

innocent person implicated in a serious crime sometimes absconds during the investigation to avoid repression by the police.

58. It is fact that the absconsion of an accused is not the conclusive proof of his guilt and sometimes to avoid the police harassment an accused may abscond. But the record is going to show that immediately after occurrence accused Kalam had fled away and thereafter he was never found in the locality till now The above facts indicate that when the local people had found accused Kalam to inflict dagger blow on the deceased he perceiving the consequence of his involvement with the gruesome murder of Sohel fled away before the recording of the case.

59. Thus, we find that the trial of this case was held in the absentia of convict Kalam from the very early stage of the case and at present there is no whereabouts of him. Such abscondence of convict Kalam is considered to be a corroborating evidence against them (PLD 1969 SC 89, Gul Hassan and another-Vs-the State).

60. In the case of Nizam Hazari-Vs-State, 53 DLR 475 it was held in the following ways:  
“No inflexible rule can be laid down on abscondence. Abscondence of an accused will be judged in the light of the facts and circumstances of the case. Abscondence of accused, sometimes furnishes corroboration of prosecution evidence. But abscondence by itself may not afford corroboration to the interested testimony yet in the body of the evidence it has its own significance.”(para 23 fo the judgment)

61. From the materials on record we find that soon after the occurrence convict Kalam had fled away and remained absconding during the trial and trial was held in his absentia. Such abscondence of the accused is an incriminating circumstances connecting him in the offence and conduct of a person in abscondence after commission of crime is an evidence to show that he is concerned in the offence.

62. In the case of Mabrak Hossain-Vs-State, 1981 BLD 286 it was held that abscondence of accused is a relevant fact under section 9 of the Evidence Act and unless accused explains his conduct, abscondence may indicate guilt of the accused.

63. Taking into account, the absconsion of the convict Kalam soon after the occurrence and before starting of the case furnishes sufficient corroboration in the commission of crime and if all the materials are taken culminatively, points to the only hypothesis of the guilt of the convict and not towards his innocence.

64. In the case of Zakir Hossain and another-Vs-State 55 DLR 137 wherein it is held in the following ways:

“It is obvious that accused appellant remained absconding with clear cut guilty knowledge about his overt act in the occurrence resulting in murder of the son of informant, PW 1 Moslem and, as such, his absconsion will create adverse opinion against him. It is true that sometimes absconsion takes place due to apprehension of police harassment and threat but when absconsion takes place by anyone with guilty knowledge he cannot take any plea of police harassment.”(para 49 of the judgment)

65. The above view has also been reflected in the case of State-Vs-Lalu Miah reported in 39 DLR(AD) 117 wherein it was held that absconsion by itself has no fault as it may be due to apprehension of police harassment, but absconsion with guilty knowledge will be an offence and it will be used against the absconder.

66. From the case in our hands we have found that convicts Kalam had remained absconding during trial of the case being quite aware of the proceeding against him with the guilty knowledge as to his direct participation in the offence about murder of the deceased Sohel. Therefore, in the light of above decisions, the absconsion of Kalam with his above guilty knowledge will operate against him and it was not an absconsion for mere apprehension of police harassment or for any other reason.

67. Having regards to the above decisions, the preponderant views emerged that an accused absconds immediate after occurrence when he did not find any physical and mental courage to face the trial for the allegation of the crime is undoubtedly a strong corroboration to his guilt. As it has been found that the eye witnesses found the accused to inflict the dagger blow on the deceased thereafter he had fled away successfully and from then he was never found in the locality as a result police could not even arrest him. So his such absconsion also a strong corroboration to his guilt.

68. Having regards to the facts and discussions made above we are of the view that the convict Kalam had inflicted dagger blow on the throat of the deceased which is considered as most vital part of a human being causing the murder of the deceased and considering the direct evidence and other materials on record the trial Court rightly found Kalam guilty under section 302 of the Penal Code and considering the gravity of the offence and involvement of the accused with the occurrence of the murder of the deceased Sohel sentenced him to death. We find no extenuating circumstances to commute his such sentence from death to any other sentence.

69. In the result, the death reference is accepted and the death sentence of the convict Kalam alias Abul Kalam will be executed whenever he surrenders or being arrested by the law forcing agency in the terms and condition as given by the trial Court.

70. Let a copy of this judgment and order be communicated to the concerned Court for necessary action along with the lower Court's record at once.