

7 SCOB [2016] HCD 84**High Court Division**

Death Reference No.18 of 2010.

Mr. M.A. Mannan Mohon, D.A.G with
Mr. Md. Aminur Rahman Chowdhury and
Mr. Kazi Bazlur Rashid, A.A.Gs
... For the State

The State

Versus

Julhash and others.

.....Condemned-Prisoners.

Mrs. Hasna Begum, Advocate
... For the State Defence.

With

Criminal Appeal No.5458 of 2011

Julhash and another

.....Appellants.

Mr. Khandaker Aminul Haque, Advocate
...For the appellants (in Crl. A.
No.5458/11)

Versus

The State

.....Respondent

Mrs. Hasna Begum, Advocate
... For the appellants (in Jail A.
No.367/10 & Jail A. No.368/10)

With

Jail Appeal No.367 of 2010

Md. Julhash

.....Appellant.

Heard On: 28.07.15, 29.07.15 &
30.07.2015.

Versus

And

The State

.....Respondent

Judgment on: 30.07.2015 & 02.08.2015

With

Jail Appeal No.368 of 2010

Hashmat @ Hasu

.....Appellant.

Versus

The State

.....Respondent

Present:**Mr. Justice Soumendra Sarker****And****Mr. Justice A.N.M. Bashir Ullah****Code of Criminal Procedure, 1898****Section 164****Confessional Statement:**

The spirit of law on confession under section 164 of the Code of Criminal Procedure with regard to the confessional statement of a accused is such that a confession is a direct piece of evidence which is substantial and such statement of any accused can be relied upon for the purpose of conviction and no further corroboration is necessary if it relates to the confessing accused himself; provided it is voluntary and also free. A free and voluntary confession under the purview of this section deserves highest credit,

because it is presumed to flow from highest sense of guilt. If the court believes that the confession is voluntary and free, there is no legal embargo on the court for ordering conviction. If it is found that the Magistrate appears to have recorded his satisfaction as to the voluntariness and spontaneous nature of the confession of the accused, in that case; such confession cannot be vitiated from illegality and this type of confession alone is enough to convict the confessing accused. ... (Para 37)

Judgment

Soumendra Sarker, J:

1. This Death Reference No.18 of 2010 has been referred under section 374 of the Code of Criminal Procedure by the learned Additional Sessions Judge, 1st Court, Gazipur for confirmation of the death sentence passed by the learned trial court in Sessions Case No.240 of 2003 dated 22.03.2010 wherein the condemned-prisoners Julhash, son of Abdul Berek and Hashmot alias Hasu, son of Hazrat Ali along with the condemned-convict Babul, son of Jalil were convicted and sentenced under sections 302/201/34 of the Penal Code sentencing them to death.

2. The prosecution case as made out in the ejahar in a nutshell can be stated thus, one Ajufa Begum wife of late Joinuddin of village Mariali, Police Station-Joydebpur under Gazipur District lodged an ejahar with the Officer-in-Charge of Joydebpur Police Station on 12.06.2003 contending *inter alia* that her son Billal Hossain (19) was a lineman of Gazipur Bus terminal. During his service the condemned-prisoner namely Julhash threatened him on different occasions and that matter was informed to the local elite persons. On the date of occurrence i.e. on 22.05.2003 in the evening at about 7.30 p.m. the condemned-prisoner Hasmal Ali alias Hasu of the informant's same village requested Billal to accompany him for the residence of his father-in-law. The condemned-prisoner Hasu since was previously known to the informant and her son, she did not resist the deceased Billal to go with Hasu. At night the informant's son Billal Hossain did not return back to his residence and as a result of that the informant informed the matter of taking away her son Billal by the condemned-prisoner Hasmal alias Hasu in the evening of 22.05.2003 A.D. The informant along with her villagers thereafter started to search the deceased Billal and at a stage of that one of the neighbor of the informant Hazi Alkas Ali Mia lodged a missing information to the local police station on which a G.D. entry being No.1468 dated 23.05.2003 was made. On the following day at about 1.00 a.m. the informant came to learn that a dead body is floating in the water of nearby west Bhurulia Chellai canal. After getting that information the informant went there and found the dead body. She could recognize the dead body as of her son 'Billal Hossain'. Subsequently; police sent that dead body to nearby hospital for autopsy. Thereafter, the informant came to know that; out of previous enmity the condemned-prisoners Julhas and Hasmal alias Hasu along with the condemned-convict Babul jointly with some unknown 3/4 persons killed her son brutally beside "Chillai Khal" of their locality, which is situated to the northern side of her residence and they concealed the dead body under the water of that canal. On the said ejahar Joydebpur Police Station Case No.31 dated 12.06.2003 was started under section 302/201/34 of the Penal Code.

3. The case was investigated by Joydebpur police station and Sub-inspector Md. Alauddin was entrusted the charge of investigation who during his investigation visited the place of occurrence and prepared sketch map along with index. During his investigation the investigating officer seized some alamats and examined the witnesses under section 161 of

the Code of Criminal Procedure. The condemned-prisoners Julhash and Hasmot along with their companion of the occurrence of killing the other condemned-convict Babul after their apprehension by police, confessed their guilt of killing the victim Billal Hossain. The investigating officer thereafter produced them before Magistrate, 1st Class, for recording their statements under section 164 of the Code of Criminal Procedure and the learned Magistrate recorded the confessional statements of the condemned-convicts under the aforesaid section of law. After the close of investigation while the charge of killing the victim Billal Hossain was proved, the investigating officer submitted charge sheet No.393 dated 05.07.2003 against all the 03 (three) condemned-persons namely Julhash, Hashmat @ Hasu and Babul Sarder under sections 302/201/34 of the Penal Code.

4. Subsequent to that, for trial the case was sent to the Court of learned Sessions Judge, Gazipur, who subsequently transmitted the same to the learned Additional Sessions Judge, 1st Court, Gazipur. The learned trial court during trial of the case framed charge against all the three condemned-convicts under the aforesaid sections of law which was read over and explained to them in Bengali, at which they pleaded not guilty and claimed to be tried. The learned trial court *viz.* the Additional Sessions Judge, 1st Court thereafter examined 13 witnesses and defence cross-examined them.

5. During trial taking advantage of bail the condemned-convicts absconded and due to their absconson they could not be examined under section 342 of the Code of Criminal Procedure and treating them fugitive the learned trial court after evaluation of the evidence on record both oral and documentary, passed the impugned judgment and order of conviction and sentence on 22.03.2010.

6. During hearing of this death reference along with Criminal Appeal and Jail Appeals Mr. M.A. Mannan Mohon, learned Deputy Attorney General with Mr. Md. Aminur Rahman Chowdhury and Mr. Kazi Bazlur Rashid, the learned Assistant Attorney Generals appeared on behalf of the State while Mr. Khandaker Aminul Haque, the learned Advocate appeared on behalf of the condemned-prisoners Julhas and Hasmat @ Hasu and Ms. Hasna Begum the learned State Defence lawyer appeared on behalf of the fugitive condemned-convict Babul Sardar.

7. Mr. Khandaker Aminul Haque, the learned Advocate appearing on behalf of the condemned-prisoners Julhash and Hasmat @ Hasu submits that the prosecution in the case could not able to discharge their onus in proving the prosecution case beyond shadow of doubt but inspite of that the learned trial judge convicted and sentenced the condemned-convicts being guided by surmise and conjecture. The learned Advocate Mr. Khandaker Aminul Haque further submits that the date of occurrence of this case while was 22.05.2003 the FIR has been lodged on 12.06.2003. The learned Advocate also submits that the postmortem done doctor during autopsy of the dead body could not find any injury in the testis of the deceased Billal Hossain which is a defect on the face of the record to hold such a view that the prosecution case as it appears is proved. Furthermore; in the inquest report there is no injury in the testis and the P.C. & P.R. of the condemned-prisoners Julhash and Hasu is nil. The learned Advocate argued that the confessional statements of the condemned-convicts are not true and voluntary and these are not consistent with the prosecution case. The G.D. entry was not given by the informant immediate after the occurrence but a third person going to the police station lodged the G.D. entry being No.1468 dated 23.05.2003 and in the G.D. entry there is no mention that any of the accused prior to the occurrence took away or called away the victim Billal Hossain from his residence. The learned Advocate lastly submits that

the confessional statements of the condemned-convicts which are the basis of the conviction are not true and voluntary and the entire judgment and order of conviction and sentence is without any legal evidence which is liable to be set aside and as such the condemned-convicts are entitled to get an order of acquittal. In the conclusion; the learned Advocate on behalf of the defence argued that all the condemned-convicts are tender boys and they are not habitual offender and both the two condemned-prisoners are suffering a lot within the condemned-cell and as a result of that they deserve compassionate consideration of this Court.

8. Mrs. Hasna Begum the learned State defence lawyer appearing on behalf of the absconding accused Babul Hossain adopted the argument advanced from the side of the learned counsel who was engaged on behalf of condemned-prisoners Julhash and Hasmat @ Hasu. The learned State defence lawyer in her concluding submission submits that the condemned-convict Babul Hossain is not habitual offender and he is a young boy and considering all these facts and circumstances of the case the death sentence should be commuted.

9. As against the aforesaid submissions of the learned Advocates for the convict-appellants and State defence lawyer the learned Deputy Attorney General on behalf of the State in support of the prosecution case submits that there are as many as 03(three) confessional statement of all the three condemned-convicts namely, Julhash, Hashmat @ Hasu and Babul which were recorded by the learned Magistrates, 1st Class, under section 164 of the Code of Criminal Procedure and during recording the confessional statement of the condemned-convicts all the requirements under sections 164 and 364 of the Code of Criminal Procedure were duly complied with. The learned Deputy Attorney General further submits that the confessional statements of the condemned-convicts are true and voluntary which are very much consistent with the prosecution case and by these confessional statements the condemned-convicts directly involved themselves within the occurrence of killing the victim Billal Hossain. Besides this; the money bag which was taken away from the pocket of the victim Billal Hossain by the condemned-convicts during the occurrence, was recovered and seized by the investigating officer and accordingly the seizure list was prepared and that money bag was recovered at the instance of the condemned-convict Hashmat @ Hasu which is a convincing incriminating evidence to connect the condemned-convicts with the offence of killing the victim Billal Hossain apart from their confessions. The learned Deputy Attorney General also submits that the investigating officer, Sub-Inspector Alauddin as witness No.10 of the prosecution proved the seizure list who prepared the same. It is the positive case of the prosecution that on the date of occurrence the informant Ajufa Begum who happens to be the mother of the victim handed over Taka 27,000/- to her son Billal Hossain and asked him to deposit the same in the local bank but Billal being failed to deposit the same within time; kept the money in his pocket which was known to the condemned-convict Hashmat @ Hasu and for getting the said money amounting to Taka 27,000/- Hashmat @ Hasu along with his co-condemned-convicts Julhash and Babul in a pre-planned way killing the victim Billal snatched away that money. The learned Deputy Attorney General submits that, this is a cool-headed murder and the victim Billal Hossain being innocent was brutally killed by the condemned-convicts and the victim could not resist the assailants to commit the offence on the date of occurrence. The witness No. 03 and 07 of the prosecution during their testimony testified that before the occurrence they have seen the condemned-prisoner Hashmat @ Hasu with Billal Hossain in a 'Rikshaw' and at their interrogation the condemned-convict Hasu told them that for making 'shirt-pant' from a local Tailoring Shop they are going to that tailoring house. The learned Deputy Attorney General lastly submits that in fact there is no delay in lodging the FIR despite; it is within the face of the ejahar (Exhibit-1) that after 21 days of the occurrence

the ejahar was lodged on 12.06.2003. To substantiate this sort of submission the learned Deputy Attorney General argued, prior to FIR there was a G.D. entry with regard to missing of the victim Billal Hossain by one Hajee Alkas Ali Mia because of the ailing condition of the informant (deceased's mother) Azufa Begum who could not lodge the FIR after the occurrence, which is within the body of the ejahar and that fact; not at all denied from the side of the defence. Apart from this; the aforesaid G.D. entry bearing the missing information of Billal Hossain was at the instance of the informant Azufa Begum. As to the reason of delay in lodging the FIR, the learned Deputy Attorney General argued that, it is within evidence and not challenged from the side of the defence that the informant who is the widow mother of the victim Billal, was very much sick after missing of her only son and as she was in a very ailing condition; she could not go to the police station to lodge the FIR. Hence; the delay which was caused or occurred; was natural and likely. The learned trial judge viz. the Additional Sessions Judge, Gazipur after holding trial rightly assessed the evidence on record in its true perspective and evaluating the evidence both oral and documentary including the most vital piece of evidence which are the confessional statements of the condemned-convicts rightly decided the fate of the case against all the three condemned-convicts namely, Julhash, Hashmat @ Hasu and Babul Sarder and there exist no illegality or infirmity in passing the impugned judgment and order of conviction and death sentence which was awarded by the learned trial judge.

10. Heard the learned Advocates of both sides. Considering the submissions of the learned Advocates of both the sides and on perusal of the FIR, charge sheet, evidence adduced from the side of the prosecution and the confessional statement of the condemned-convicts which were recorded by a Magistrate, 1st Class, under section 164 of the Code of Criminal Procedure along with the exhibited documents, materials on record etc. in view of the respective cases of the parties consulting the judgment and order of conviction and sentence let us now scan and evaluate the evidence as adduced from the side of the parties to the case.

11. Here in this case, prosecution have made out a charge against the condemned-convicts that on 22.05.2003 for want of money amounting to Taka 27,000/- all the three accused persons collusively and conjointly calling the victim Billal Hossain from his residence at about 7.30 p.m. committed the murder. Against the condemned-convicts charge under sections 302/201/34 of the Penal Code was framed. To substantiate the aforesaid charge prosecution in this case have examined as many as 13 witnesses. Out of the aforesaid number of witnesses, P.W.1 Ajufa Begum is the informant as well as mother of the victim-boy Billal Hossain, the witness No.2 of the case Hajee Alkas Ali Miah is a co-villager of the informant who gave the missing information immediately on the following day of the occurrence to the local police station upon which a G.D. entry having No.1468 dated 23.05.2003 was entered. The witness No.3 Amjad Hossain is a villager who has seen the victim Billal Hossain on the date of occurrence in a 'Rikshaw' with the accused Hasu. The witness No.4 Md. Bahauddin is an employee of a tailoring house, in where the deceased put his order to prepare his 'shirt-pant'. P.W.5 Forhad Hossain is the Cutting Master of the aforesaid tailoring house viz. 'Dhaka Tailors'. P.W.6 Lutfor Rahman is the Manager of the above mentioned 'Dhaka Tailors'. P.W.7 Abdul Aziz is a villager of the place of occurrence village who also on the date of occurrence found the victim Billal Hossain with the accused Hasu. The prosecution witness No.8 Md. Abdul Hamid Zamadder is a Magistrate, 1st Class, who recorded the confessional statement of one accused Md. Julhash under section 164 of the Code of Criminal Procedure. The witness No.9 Doctor Md. Salman was a Resident Medical Officer of Gazipur Sadar Hospital, Gazipur, who did the autopsy of the deceased Billal Hossain's dead body on

24.05.2003 at 4.15 p.m. The witness No.10 is the first investigating officer of the case Sub-Inspector Md. Alauddin. The witness No.11 is the second investigating officer Sub-Inspector Md. Sultan Uddin who submitted charge sheet against the condemned-convicts. The witness No.12 Md. Mizanul Hoque Chowdhury is a Magistrate, 1st Class, who recorded the confessional statement of a accused Babul Sarder under section 164 of the Code of Criminal Procedure on 16.06.2003 while he was Magistrate, 1st Class, in Gazipur. The last witness of this case P.W.13 Momena Khatun is another Magistrate, 1st Class, who recorded the confessional statement of another condemned-convict Hashmat @ Hasu on 15.06.2003 under section 164 of the Code of Criminal Procedure.

12. The informant of this case P.W.1 Ajufa Begum during her testimony before the trial court testified that on the date of occurrence she handed over some money to her son Billal Hossain to deposit the same in bank account. The amount of money was Taka 27,000/-. She identified two accused of this case namely Hasu and Julhash in the accused's dock. The informant in her deposition testified that the accused Hasu at the time of giving money to Billal witnessed that handing over of the money prior to the occurrence. The informant subsequently came to learn that Billal could not deposit that money to the bank. Subsequent to that, in the evening the accused Hasu and Julhash coming to the residence of the informant took away Billal Hossain in a 'Rikshaw' towards bazar. Thereafter, her son Billal Hossain while did not return back to the residence, the informant along with her villagers started to search Billal but could not get him. Thereafter, the informant informed about the missing of her son to Hajee Alkas and Amjad. Hajee Alkas after getting that information lodged the G.D. entry with the local police station. The informant in her testimony further submits that out of greed of the money the condemned-convicts Julhash, Hasu and Babul killed her son Billal Hossain and subsequent to the occurrence she was very much sick and after her recovery from the ailing condition she went to the police station and lodged the ejahar which was identified by her. The ejahar has been marked as Exhibit-1. The informant also identified her signature therein which has been marked as Exhibit-1/1.

13. During cross-examination from the side of the defence in a reply to a question the informant testified that she cannot recollect the date in which she lodged the ejahar. In reply to another question from the side of the defence the informant testified that she herself collected that sum of Taka 27,000/- and that very amount was given by her to Billal Hossain for depositing the same in bank account, but Billal could not deposit that amount on the date. The informant denied that she has deposed falsely before the court and the accused of the case are innocent. At a stage of cross-examination the informant most empathetically asserted that the condemned-convicts namely Julhash, Hasu and Babul for want of the aforesaid money killed her son Billal Hossain on the date of occurrence. In the last portion of cross-examination the informant testifies that there was no enmity with Hasu and Babul prior to the date of occurrence and after the occurrence she came to learn that the condemned-convicts jointly killed her son Billal and subsequent to that she lodged the ejahar.

14. P.W.2 Hajee Alkas Ali Miah in his deposition testified that he is a witness of this case and after getting information of missing he went to the local police station and lodged a G.D. entry. He was also present at the time of inquest report of the dead body. He put his signature therein. This witness identified the inquest report of the dead body and his signature therein which has been marked as Exhibits-2 and 2/1 respectively.

15. P.W.3 Amzad Hossain in his testimony testified that he knows the condemned-convicts and on 22.05.2003 he found the deceased Billal Hossain in a 'Rikshaw' with the

accused Hasu. Billal in his (P.W.3) query replied that they are going to a tailoring shop for making his wearing apparels. This witness in his reply to a question during his cross-examination testified that Billal and Julhash are uncle and nephew (brother's son) with each other. He also testified that he did not find the occurrence but found the dead body after the occurrence.

16. P.W.4 Md. Bahauddin in his deposition states that on 22.05.2003 Billal Hossain who is the victim of this case went to their tailoring shop for making shirt, pant and after giving that order he left the tailoring house. During cross-examination this witness testifies at a stage that he could not know Billal prior to the occurrence and he did not receive the cloths or the measurement of shirt-pant.

17. P.W.5, Forhad Hossain testified that he serves as 'cutting master.' On 22.05.2003 Billal Hossain went to their tailoring shop to give an order for making his shirt-pant. In a reply to a question during cross-examination P.W.5 testifies that he does not know the deceased Billal Hossain.

18. P.W.6 Lutfor Rahman states that he is the Manager of Dhaka Tailoring House. On 22.05.2003 Billal gave an order to their tailoring shop for making his shirt-pant therefrom and he (P.W.6) took that order which is in the serial No.1068. Police seized that order-book during investigation and prepared seizure list after going to their tailoring house. This witness put his signature in the seizure list which was identified by him and his signature has been marked as Exhibit-3/2.

19. P.W.7 Abdul Aziz in his testimony testified that about three years back the occurrence took place and he knows the informant of this case. On the date of occurrence while he was returning to his residence from Joydebpur he found Billal Hossain with Hasu in front of a Primary School and in his question Billal replied that, they are going to bazar for making his wearing apparels. In reply to a question in the cross-examination this witness (P.W.7) testified at a stage that at about 6.00 p.m. he found Billal Hossain with Hasu in a 'Rikshaw'.

20. P.W.8 of this case Md. Abdul Hamid Zamadder, who was a Magistrate, 1st Class, at the relevant time testified that on 14.06.2003 while he was posted at Gazipur Collectorate as a Magistrate, 1st Class, on that date in connection with Joydebpur Police Station Case No.31(6)03 under section 302/201/34 of the Penal Code one accused of this case namely Julhash was brought before him and he recorded the confessional statement of Julhash under section 164 of the Code of Criminal Procedure. Magistrate Abdul Hamid in his deposition identified that confession and his five signatures in the confessional statement of the condemned prisoner Julhash which has been marked as Exhibits No.-4, 4(1)-4(5). In a reply to a question during cross-examination P.W.8 Abdul Hamid Zamadder testifies that the accused was produced before him on 11.00 a.m. and he gave three hours time to the accused for his mental reflection and after three hours he recorded the confessional statement of the accused person namely Julhash in his Court's chamber. This witness further testified that after compliance of all legal formalities he recorded the confessional statement of Julhash. He denied the suggestion of the defence that at the instance of police he recorded the statement.

21. P.W.9 of the prosecution Dr. Md. Salman in his deposition testified that while he was serving as Resident Medical Officer on 24.05.2003 in the Sadar Hospital of Gazipur, at 4.15 p.m. the dead body of the deceased Billal Hossain, aged about 18 years was brought before him for postmortem examination and a Medical Board consist of three members did the

postmortem of the deceased and he (P.W.9) was the Chairman of that board. After postmortem the opinion of that medical board reads as follows :

“মির্জা ইঞ্জি এনামা রমজ রম. Present both limbs. Eyes open decomposed; Nose decomposed frothy clear, decomposed, NB-decomposed, Mouth partially open, tongue bite 2 cm. Anus-clear decomposed.

জখম হচ্ছে নিম্নরূপঃ- One continuous ligature mark around the neck, breadth 1", patch mentigation-present. On dissection: Clotted blood seen under surface of the skin over upper chest.

Cause of death:

Due to asphyxia followed by strangulation which was anti mortem and homicidal in nature.”

22. This witness identified his signature along with the signatures of other members of the Board in the postmortem Report and the postmortem report with the signatures has been marked as Exhibits. That report is Exhibit-5.

23. During cross-examination the postmortem done doctor Md. Salman testified at a stage of his reply to a question from the side of the defence that during autopsy they did not find any injury in the testis of the dead body, on which the defence argued much.

24. P.W.10, Sub-Inspector Md. Alauddin testifies before the Court that on 22.05.2003 he was Sub-Inspector, Joydebpur Police Station and on that date he was entrusted investigation of this case by the Officer-in-Charge of Joydebpur Police Station. After taking investigation he went to the place of occurrence, prepared sketch map and index. He identified the sketch map and index of the place of occurrence which has been marked as Exhibits-6 and 7. The investigating officer Sub-Inspector Alauddin further testified that during his investigation he arrested all the three accused of this case namely Hashmat, Julhash and Babul those who confessed their guilt before him and as a result of that he produced them before the Magistrates for recording their confessional statement under section 164 of the Code of Criminal Procedure. The accused of this case in their confessional statement admitted frankly that they have killed the victim of this case namely Billal Hossain. During his investigation he examined 10 witnesses under section 161 of the Code of Criminal Procedure. The accused Hashmat disclosed before him (P.W.10) that taking money from the money bag of the victim Billal he has thrown the empty bag to a bush which is nearer to local “Brulia Bridge”. Thereafter, with the accused Hashmat he (P.W.10) went there and recovered the money bag which was seized by him. This witness prepared the seizure list of that money bag and identified the same which has been marked as Exhibit-8. He also identified the accused Hashmat and Babul in the dock.

25. During cross-examination from the side of the defence the investigating officer Sub-Inspector Alauddin testified at a stage that there was a G.D. entry being No. 1468 dated 23.05.2003 and that G.D. entry was in connection of missing of the victim Billal Hossain and one Alkas lodged that G.D. and in that G.D. there was no mention about the accused of this case and during his (P.W.10) investigation getting materials he apprehended the accused of this case after the occurrence. On 12.06.2003 Hashmat @ Hasu was arrested and on 14.06.2003 Julhash was arrested and lastly on 17.06.2003 Babul was arrested from Madaripur District. This witness testified that during his investigation he did not find any enmity between the victim and the accused of this case.

26. P.W.11 Sub-Inspector Md. Sultan Uddin as second investigating officer of this case testified that on 21.06.2003 he obtained investigation of this case and going through the case docket he sought for permission to file charge-sheet against the accused persons and after getting permission from the concerned Police Super, he submitted charge-sheet No.393 under sections 302/201/34 of the Penal Code on 05.07.2003.

27. P.W.12 of this case Md. Mizanul Hoque Chowdhury in his deposition deposed that on 16.06.2003 he was Magistrate, 1st Class in Gazipur. On that date one of the accused of this case Babul Sarder was produced before him for recording his confessional statement and rendering all legal opportunity for reflection of Babul Sarder after compliance of the legal formalities he recorded the confessional statement of the accused Babul Sarder under section 164 of the Code of Criminal Procedure. This witness identified that confessional statement and his four signatures therein which were marked as Exhibits-10, 10/1-10/4 respectively.

28. During cross-examination in a reply the witness No.12 Magistrate Mizanul Hoque Chowdhury testified at a stage that there was no mark of injury in the person of the accused Babul and three hours time was given to the accused prior to recording of the confession. P.w.12 denied the suggestion of the defence that he did not comply with the legal formalities as provided in section 364 of the Code of Criminal Procedure prior to recording of the confession of the condemned-convict Babul Hossain.

29. The last witness of this case P.W.13 Momena Khatun testified that on 15.06.2003 she was Magistrate, 1st Class in Gazipur district and on that date one of the accused of this case Hashmat @ Hasu was produced before her for recording his confessional statement under section 164 of the Code of Criminal Procedure. This witness has given three hours time to the accused Hashmat for his reflection and thereafter, on compliance of all legal formalities at 5.30 p.m. she recorded the confessional statement of the condemned-prisoner Hashmat @ Hasu. P.W. 13 identified the confessional statement of Hashmat and her signatures therein which has been marked as Exhibits-11 and 11/1-11/6.

30. During cross-examination from the side of the defence P.W.13 Magistrate Momena Khatun categorically replied to a question of defence that the accused Hashmat was given enough time for his reflection and there was no mark of injury in the person of the accused. This witness specifically denied at a stage of cross-examination that the confessional statement of the accused Hashmat was not voluntary.

31. In the instant case as we have come across-from the deposition of the witnesses that there is no eye-witness of the occurrence and on perusal of the impugned judgment and order of conviction and sentence passed by the learned trial Judge it is evident that the learned Additional Sessions Judge on the basis of confessional statements of the condemned-convicts awarded the conviction and sentence. Hence; the incriminating evidence as it transpires are the confessional statements of the condemned-convicts Julhash, Hashmat @ Hasu and Babul Sarder.

32. Having gone through the confessional statement of the condemned-convicts it appears that the condemned-prisoner Julhash on very date of his apprehension confessing his guilt before the learned Magistrate, 1st Class made his confessional statement (Ext.4) which was recorded under section 164 of the Code of Criminal Procedure by that Magistrate which reads as follows:

“হাসু বিল্লালকে মেয়ের কথা বলে জয়দেবপুর বাসস্ট্যাণ্ড থেকে নিয়ে যায়। বৃহস্পতিবার রাত ৮ টায় বাসস্ট্যাণ্ডে নেয়। আমি জুলহাস, বিল্লাল আমার চাচা। হাসু আমাকে ও বাবুলকে বিমান বাহিনীর চালায় বসাইয়া রাইখা যায়। বিল্লাল আসার পর হাসুকে জিজ্ঞাসা করে কিরে মাইয়া কই। হাসু বিল্লালকে বলে যে বস এখনই আসবে মাইয়া। বিল্লাল ততবে বসে থাকে ৫/৭ মিনিট। পরে বিল্লাল বলে যে আশ্মা তারে খুজবে চল যাইগা। তারপর ৫/৭ পা আইগাতেছি যাওয়ার জন্য তখন হঠাৎ করে হাসু বিল্লালের পিছন থেকে গলায় ধরে ফেল্ল এবং শোয়াইয়া ফেলল। বাবুল উর পায়ে বসে প্যান্টের চেইন খুলে ফেলে। দুইটি বিচি গালাইয়া ফেলে বাবুল। ভাবছে যে মারা গেছে। তখন ছাইরা দেয়। আবার শুনে যে গলা দিয়ে শব্দ হচ্ছে। তখন আমাকে বাবুল ও হাসু বলে যে, তুই যদি না ধর তোরে মাইরা ফালামু। তারপর আমি ওর হাত ধরলাম। হাসু বিল্লালকে গলা চিপাইয়া মাইরা ফালাইল। আমি ডান হাত, হাসু বাম হাত এবং বাবুল পা ধরে আঙ্গিয়ে নিয়ে খালে ফালাইয়া দিল। খালে ব্যালেনচার ভীতরে বাবুলে ঢুকাইয়া দিছে। হাসু টাকা। জন্য বিল্লালকে মেরে ফেলে। বাবুল ২৭০০০/- টাকা পেয়েছে এবং ৩০০০/- টাকা হাসু পায়। আমি একটাকাও পাইনি। আমি হাসুর সাথে ছোট বেলা থেকে চলাফেরা করি। ও যে এত ডেনজার জানতে পারিনি। হাসু আমাকে ওখানে ডেকে নিয়ে যায়। জীবনে একবার মাইয়া লাগাইছি। তখনও হাসু, বিল্লাল ও আমি একত্রে ঐ জায়গায় লাগাই। হাসু মাইয়া নিয়া আছিল। ঘটনার দিনও আমরা মাইয়া লাগানোর জন্য যাই।”

33. The second confessional statement (Exhibit-10) is of the condemned-convict Babul Sarder who also on the date of his apprehension produced before the learned Magistrate, 1st Class, for recording his confessional statement and on that date i.e. on 18.06.2003 he confessed his guilt in the following way, (quote):

“Ove;l tce pãj 7-৭/৩০ জুলহাস আমাকে ঘটনাঙ্কলে নিয়ে যায়। ৫/৭ মিনিট পর হাসু বিল্লালকে ঘটনাঙ্কলে নিয়ে আসে। হাসু আমাকে এবং জুলহাসকে বলে ck বিল্লাল এর নিকট টাকা আছে, তাকে মেরে ফেলতে হবে বললে হাসু বিল্লালের গলায় হাত দিয়ে চাপ দিয়ে ধরে। আর জুলহাস বিল্লালের গলায় চাপ দিয়ে ধরে। a;lfl Btj বিল্লালের গলায় চাপ দিয়ে ধরি। জুলহাস বিল্লালের হাত ধরে এবং আমি বিল্লালের পায়ে ধরে পানির নিকট নিয়ে যাই। এ সময় হাসু বিল্লালের গলায় চাপ দিয়ে ধরে। জুলহাস এবং আমি বিল্লালের ২টি বিচিতে চাপ দেই। এর সাথে সাথেই বিল্লাল Ove;lUllই মারা যায়। তারপর বিল্লালের পকেট থেকে আমি টাকা বের করে নিয়ে আসিZ এ অবস্থায় মৃত বিল্লালকে পানির কাছে রেখে আমরা তিনজন মাঠে চলে আসি। আমি হাসুকে টাকা দিয়ে দেই। এর পর আমি বাসায় চলে আসি। ২ ঘন্টা পর জুলহাস বাজারে এসে আমাকে ৮৮০/- V;l; “Cuz”

34. The third confessional statement of this case (Exhibit-11) is of the remaining condemned-prisoner Hashmat @ Hasu, who in his confessional statement before the Magistrate, 1st Class, Momena Khatun (P.W.13) confessed his guilt in the following way (quote):

“বিল্লাল অনুমান মাস খানেক আগে মারা গেছে। মারা যাওয়ার দিন ছিল বৃহস্পতিবার। বৃহস্পতিবারের আগের দিন thLjm Qhm; Btj জুলহাস ও বাবুল প্রোগ্রাম করি। আমরা প্লান করি এই মর্মে যে, আমি বিল্লালকে জয়দেবপুর বাসস্ট্যাণ্ড থেকে ডেকে ওয়াপদা অফিসের পিছনে মাঠে নিয়ে যাব। বিল্লাল টাঙ্গাইলের ও সাভারের গাড়ীর সুপার ভাইজার ছিল। বিল্লালের কাছে সব সময় টাকা থাকত। আমাদের এলাকাতেই বিল্লালের বাড়ী। প্লান মত Btj বৃহস্পতিবার সন্ধ্যা ৭টার দিকে জয়দেবপুর বাসস্ট্যাণ্ডে আসলাম। এসে বিল্লালকে মিথ্যা মিথ্যা জানাই Qk, Ju;fC; মাঠে একটি মেয়ে আনবে জুলহাস ও বাবুল। মেয়ের কথা না বললে বিল্লাল আসবে না তাই এই মিথ্যা বলা। বিল্লালকে মেয়ের কথা বলতে বিল্লাল যেতে রাজী হয়। বিল্লালের কাপড় বানাতে আমি বিল্লালের সাথে ঢাকা টেইলার্সে গিয়ে কাপড় বানাতে দেই। বিল্লালের একটা প্যান্ট ও একটা শার্ট বানাতে দেই। সেখানে কাজ সেরে সুরমা হোস্টেলের উত্তর পার্শ্বের বেকারী থেকে c&Se @LL M;C। তারপর রিক্সা নিয়ে B.R.T.C. ব্রীজের ওপারে রেল লাইনে নেমে হেটে Ju;fC; j;ঠে যাC। ঐ মাঠ টাকে কেউ কেউ পুন বাড়ীর চালা বলে। ঐ মাঠে কথা মত জুলহাস ও বাবুলকে বসা AhUjU @Cখে। আমাদের প্ল্যান ছিল আমি ও বিল্লাল আগেই গিয়ে বসে থাকবো এবং জুলহাস ও বাবুল পিছন থেকে গিয়ে লাঠি মেরে অজ্ঞান করে বিল্লালের কাছ থেকে টাকা নিয়ে নিব। কিন্তু প্ল্যান উল্টে যায়। আমাদের আগেই জুলহাস ও বাবুল সেখানে হাজির হয়ে যায়। Bjl; সেখানে গিয়ে ওদের সাথে কথা বলি। জুলহাস বাবুলের সাথে বিল্লালকে বসিয়ে রেখে আমাকে দূরে নিয়ে যাU। দূরে নিয়ে আমাকে জানায় বিল্লালকে মেরে ফেলবে। আমি প্রতিবাদ জানাCZ জুলহাস বলে বিল্লালকে মেরে ফেলবো। মেরে ফেলার পর তুই শশুর বাড়ী চলে যাবি। আমি কিভাবে ধরবো তা জুলহাস দেখিয়ে দেয়। আমাকে গলার দিকে এমন ভাবে ধরার জন্য জুলহাস বলে যাতে বিল্লাল কথা না বলতে পারে। জুলহাস হাত ধরবে এবং বাবুল প্যান্টের চেইন খুলে অভকোষে চিপ দিয়ে মেরে ফেলবে। এই প্রোগ্রাম করে আবার বাবুল ও বিল্লালের কাছে গেলাম। বিল্লাল চলে যেতে চাচ্ছিল। আমাদেরকে পিছনে রেখে বিল্লাল সামনে পেশাব করতে বসেছিল। তখন আমাকে বাবুল ধা, j দিয়ে দেখানো মতে ধরতে বলে। আমি সাহস পাইনি। বিল্লাল পেশাব করে উঠে যায়। চলে

যাওয়ার জন্য বিল্লাল হাঁটা শুরু করে। বাবুল ও জুলহাস আমাকে ধরতে বললে আমি হেটে গিয়ে বিল্লালের গলায় ধরি, জুলহাস হাত ধরলো এবং বাবুল চেইন খুলে অভ কোষ চেপে ধরলো। বিল্লাল পড়ে গেলে তাকে একটা পার্শ্ববর্তী খালের মধ্যে শুইয়ে ফেলি। তখন জুলহাস বিল্লালের গলায় চিপ দিয়ে ধরে পানিতে চিপ দিয়ে ধরে। আমিও গলা ছেড়ে দিয়ে বিল্লালের মাথা চেপে ধরে রাখি। বাবুল টাকা পয়সা নেয়। বাবুল পরে ৩৬০০/- টাকা আমাদেরকে দিয়েছে। পানিতে অনুমান ৭/৮ মিনিট চিপে ধরে রাখার পর বিল্লাল নিস্তক হয়ে যায়। তারপর আমি ও জুলহাস পানি থেকে উপরে উঠে k।C। বাবুল বিল্লালকে কচুরী পানার নীচে লুকিয়ে রাখে। তিনজন চলে যাওয়ার পথে হঠাৎ বাবুল বলে তার স্যাভেল খালের মধ্যে রয়ে গেছে। বাবুল শার্ট খুলে জুলহাসের কাছে দিয়ে স্যাভেল আনতে যায়। বেশ কিছুক্ষণ হয়ে গেলেও সে আসে না। না আসাতে আবার জুলহাসকে নিয়ে আমরা সেখানে যাই। সেখানে বাবুল বা লাশ কিছু না দেখে বাবুল বাবুল বলে জুলহাস ডাক দেয়। কোন সাড়া শব্দ না পেয়ে চলে আসি। বাবুলের দেওয়া টাকা নিয়ে আমরা বিআইটি এর সামনে k।C। বিল্লালের মানিব্যাগ থেকে টাকা বের করে নিয়ে BADC ক্রীজের কাছে মানিব্যাগটা ফেলে দিয়ে আসি। আমি ভয়ে চিটাগাং চলে যাCz helh। f।nn Bj।কে ধরে।”

35. With regard to all these 03(three) confessional statements of the condemned-convicts which has been marked as Exhibits-4, 10 and 11 respectively it has come to our notice after it's scrutiny as well as from through close reading from beginning to the end of these confessional statements that the learned Magistrates, who recorded the confessional statements of the condemned-convicts under section 164 of the Code of Criminal Procedure observed all the mandatory legal formalities incorporated in section 364 of the Code of Criminal Procedure and it is obvious to note that the learned Magistrates who are P.Ws. 8, 12 and 13 respectively during recording of the statements of the condemned-convicts gave sufficient caution to the accused persons that they are not bound to confess their guilt before the Magistrate. The Magistrates also were satisfied that the condemned-convicts prior to their confession were not influenced, induced or tortured in any way by the Law enforcing Agencies. In a voice all the recording Magistrates testified that the confessions of the condemned-convicts are true and voluntary.

36. Going through the confessional statements of the condemned-convicts we find that the questions which were put forward by the learned Magistrates before recording of the statements to the confessing accused prior to recording the confessional statements are very much within the ambit of law on confession and they have carefully complied with the provisions laid down in sections 164 and 364 of the Code of Criminal Procedure and being satisfied that the confessional statements are true and voluntary recorded the same under section 164 of the Code of Criminal Procedure.

37. The spirit of law on confession under section 164 of the Code of Criminal Procedure with regard to the confessional statement of a accused is such that a confession is a direct piece of evidence which is substantial and such statement of any accused can be relied upon for the purpose of conviction and no further corroboration is necessary if it relates to the confessing accused himself; provided it is voluntary and also free. A free and voluntary confession under the purview of this section deserves highest credit, because it is presumed to flow from highest sense of guilt. If the court believes that the confession is voluntary and free, there is no legal embargo on the court for ordering conviction. If it is found that the Magistrate appears to have recorded his satisfaction as to the voluntariness and spontaneous nature of the confession of the accused, in that case; such confession cannot be vitiated from illegality and this type of confession alone is enough to convict the confessing accused.

38. On perusal of the confessional statements of the condemned-convicts Julhash, Hashmat @ Hasu and Babul Sarder in comparison with the material evidence on records including the ejahar, charge sheet and the seizure list, we find that; except some minor discrepancies no such material contradiction, omission or discrepancy is noticed within their

confessional statement, from which it can be held that the confessional statements of the confessing accused are not true and voluntary, rather it can be easily held from the facts and circumstances of the case along with the connected evidence on record that the confessional statements are quite consistent with the prosecution case which are identical and not tutored. From plain reading of these confessional statements it appears that the statements are sound and cogent. In this context; the chain of events leading to killing the victim have been well proved by these consistent substantial evidence which is transpired within the statements of confession of the condemned-convicts and inasmuch as during trial of the case the trial court assessed and appreciated the evidence on record rightly in the total approach within the ambit of sections 164 and 364 of the Code of Criminal Procedure we have the reason to draw such inference that due to the existence of true and voluntary confessional statements the court can well form the basis of conviction on the solitary evidence of these confessional statement of the condemned-convicts namely Julhash, Hasmat @ Hasu and Babul Sarder.

39. Let us now draw our attention on the submission advanced from the side of the defence with regard to delay in lodging the FIR as agitated from the side of the learned Advocate Mr. Khandaker Aminul Haque appearing on behalf of the condemned-prisoner Julhash and Hashmat @ Hasu it appears from the records that the date of occurrence of this case is on 22.05.2003 and the ejahar was lodged on 12.06.2003 and the delay which occurred; is 21 days and in this context; the learned Advocate argued that for the said delay it can be easily held that the prosecution case is manipulated. In this context; law enjoins that an information to the police with commission of a cognizable offence is guided under section 154 of the Code of Criminal Procedure. The word "information" in this connection means something in the nature of a complaint or acquisition, or at least information of a crime, given with the object of putting the police in order to investigate. The word "First Information" is not mentioned in the Code. It is that information which is given to the police first in point of time on the basis of which the investigation commences.

40. In the instant case; we find from the case records that a G.D. entry with regard to missing of Billal Hossain was lodged and this G.D. entry being No.1463 was given immediately on the next following day of the occurrence i.e. on 23.05.2003 by the witness No.2. The witness No. 2 Hajee Alkas Ali Miah on the basis of telephonic conversation from Azufa Begum, the informant of this case lodged this G.D. entry. It further appears from the testimony of the informant that she was very much sick after the occurrence and while she was in the know about her son's death and obtained the dead body of her son Billal Hossain, she could not move and prior to that after the missing of her son Billal investigation was started by police and over mobile phone she informed about the missing of her son immediately after the occurrence to P.W.2 Hazi Alkas Ali Miah. Therefore, it is well within record that P.W.2 Hazi Alkas Ali Miah while lodged the G.D. entry, was not in the know about the occurrence of killing. Accordingly, only a missing information was given by him to the police and on this information, pursuant to that, practically investigation was started. From the evidence of first investigating officer P.W.10 Sub-Inspector Md. Alauddin we find the aforesaid factual aspects of this case. Subsequent to that; the mother of the deceased lodged the ejahar which is not a substantive piece of evidence under the purview of section 154 of the Code of Criminal Procedure. In the case of *Md. Shamsuddin-vs.-The State* 40 DLR(AD) 69 it is decided by their lordships that, mere delay in lodging the ejahar is not a

ground to disbelieve the prosecution case. There may be circumstances in which lodging of a F.I.R. as to commission of an offence may be delayed – as the instant case be. It is to be remembered here that the positive contention of the prosecution that the informant Ajufa Begum after the occurrence was very much in an ailing condition, is not challenged from the side of the defence. There is not even a suggestion from the side of the defence as to the sickness of the informant Ajufa Begum who is a widow woman having only son Billal Hossain was not sick. Besides this; we have already spelt out earlier that the FIR is not a substantive piece of evidence and it is used as a means for corroborating or contradicting the statement of the informant [Ref: 8 BCR (AD) 141, 8 BLD (AD) 109.

41. Mr. Khandaker Aminul Haque, the learned Advocate for the convict-appellant contended that, absence of injury in the testis of the deceased Billal Hossain is fatal for the prosecution when he was examined by the doctors and this has cast a doubt. Kepping ahead the above submissions on perusal of the evidence we are constrained to hold such a view that it is very much likely in consultation with the case records specially the evidence of the P.Ws. that the P.M. done doctor P.W.9 Dr. Md. Salman during autopsy of the dead boy of victim Billal Hossain could not find any injury in the testis inasmuch as two days after the occurrence the P.M. was held by the doctor when the dead body was admittedly decomposed. It is also within record and well within the testimony of the P.W.3 Amjad Hossain that two days after the occurrence i.e. on 24.05.2003 the dead body of the victim was found in a floating condition on the water of a canal which is commonly known as “Chilai Khal”. It is also apparent from the evidence of the concerned doctor Salman (P.W.9) that when he examined the dead body, at that time “mijrV i ipj je J Ntma tRmz” Hence; it is quite natural that the doctor could not found any injury in the testis of the victim Billal Hossain.

42. The learned Advocate, who has preferred appeal on behalf of the condemned-prisoners Julhash and Hashmat @ Hasu at a stage of his submissions also submits that the prosecution witnesses who are thirteen in number since not ocular witness of the occurrence; the prosecution has failed to prove the charge of murder which is brought against the convict-appellants and that’s why the accused are liable to be acquitted and consequently the Death Reference would be rejected. In the last portion of argument the learned Advocate has drawn our attention regarding commutation of death sentence stating that the condemned-prisoners are in condemned-cell for a considerable period and they are suffering from mental agony of death within the death-cell.

43. Having regard the aforesaid submissions of the learned counsel for the appellants, scrutinizing the relevant papers on record, especially the evidence led from the side of the prosecution and the materials on record including the confessional statements of the condemned-convicts as to the facts and circumstances of the case, we have every reason to hold such a view that to ensure complete justice it would be justified in convicting the sentencing convict-appellants under section 302 of the Penal Code relying upon the

confessional statements of all the three condemned-convicts which are fully corroborated by other evidence on record and these are oral, documentary and circumstantial.

44. Before parting, however, we must observe that on careful scrutiny and assessment of oral and documentary evidence and also taking into consideration of the present status of the condemned-prisoners in the death-cell we are of the view that the prosecution inasmuch as has been able to prove the charge of murder against the condemned-convicts beyond all reasonable doubt, the learned Additional Sessions Judge, Gazipur was legal and justified in passing the impugned judgment and order of conviction and sentence.

45. In view of the facts and circumstances of the case and also having regard to the submissions put forward from the side of the learned counsels of the defence we are of the considerate decision that, ends of justice would be sufficiently met, if the sentence of death imposed upon the condemned-convicts (1) Julhash, son of Abdul Barek and (2) Hashmot alias Hasu, son of Hazrat Ali along with the condemned-accused (3) Babul, son of Jalil be commuted to the imprisonment for life instead of death sentence.

46. Consequently, the order of conviction and sentence passed by the learned Additional Sessions Judge, Gazipur against the condemned-convicts is altered from death sentence to imprisonment for life.

47. In the result, the Death Reference No.18 of 2010 is rejected with modification of sentence from death to imprisonment for life.

48. The impugned judgment and order of conviction and sentence dated 22.03.2010 passed by the learned Additional Sessions Judge, First Court, Gazipur in Sessions Case No.240 of 2003 is hereby upheld in the modified form.

49. The condemned-convicts Julhash, Hashmot alias Hasu and Babul Sarder are hereby found guilty under section 302 of the Penal Code and are convicted and sentenced thereunder to suffer imprisonment for life and to pay a fine of Taka 20,000/- in default to suffer rigorous imprisonment for 03(three) months more.

50. The condemned-prisoners Md. Julhash and Hashmat @ Hasu be immediately shifted from the condemned-cell and be kept in custody with other convicted persons in accordance with law. The period of custody of the condemned-prisoners shall be deducted from the term of imprisonment as per provision of section 35A of the Code of Criminal Procedure.

51. Issue modified conviction warrant at once.

52. Consequently, the Criminal Appeal No.5458 of 2011 and Jail Appeals No.367 of 2010 and 368 of 2010 stands dismissed.

53. Send down the lower Court's record at once along with the copy of this judgment and order to the trial court concerned immediately for information and necessary action.