

Present:

Mr. Justice Md. Mostafizur Rahman

And

Mr. Justice S.M. Masud Hossain Dolon

Death Reference No. 26 of 2017

The State.

... Petitioner

-Versus-

Md. Abdul Ali and Others.

... Convict- Accuseds.

With

Criminal Appeal No. 6928 of 2017.

(Arising out of Jail Appeal No.102/2017)

Md. Abdul Ali

..... Appellant.

-Versus-

The State

..... Respondent.

with

Jail Appeal No. 228 of 2019

Sayed Ali

..... Appellant.

-versus-

The State

.... Respondent.

Mr. Md. Boshir Ahmed, D.A.G

Mr. Md. Zakir Hossain Masud, A.A.G

... For the State

Mr. Gouranga Chandra, Advocate

..... for the Appellant.

(in criminal appeal No. 6928 of 2017)

Mr. Md. Aminul Islam, Advocate

....for the Jail Appellant.

(in Jail Appeal No. 228 of 2019)

Ms. Hasna Begum, Advocate

... State Defence Lawyer.

Judgment on: 21.09.2022.

S.M. Masud Hossain Dolon, J:

Background Facts of the Death Reference:

The learned Additional Sessions Judge of the Habiganj Sessions has sent off this Death Reference No.26 of 2017 pursuant to Section 374 of the Code of Criminal Procedure, 1898 (hereinafter as the “Code”) for the confirmation of the Death Sentences as awarded upon the 3 Convicts, 2 of whom are Convict Appellants namely (1) Md. Abdul Ali, son of late Abdul Somed, (02) Md. Sayed Ali, son of late Morfat Ullah and (03) absconder ab initio Md. Arju Miah, son of Abdul Malik. The learned Additional Sessions Judge of the Habiganj Sessions being satisfied with the prosecution evidence pronounced and promulgated his verdict by the judgment and order dated 26.02.2017 convicted the Convict-Appellants under Sections 302/34 of the Penal Code, 1860 in Sessions Case No.289 of 2009 arising out of G.R. Case No.157 of 2008 corresponding to Bahubal Police Station Case No.13, Dated 19.08.2008 and sentenced them to suffer capital punishment i.e. Death Sentence and also imposed fine for the sum of Taka 10,000/-(Ten Thousand) each, and in default to payment of the fine, the same is to be recovered from the movable or immovable property of the Convict-Appellants including the absconding Convict.

Against the judgment and order dated 26.02.2017 passed by the learned Additional Sessions Judge of the Habiganj Sessions, the Convict-Appellant Md. Abdul Ali preferred Jail Appeal No.102 of 2017 and Criminal Appeal No.6928 of 2017 and Convict-Appellant Md. Sayed Ali preferred Jail Appeal No.228 of 2019. Since Convict Md. Arju Miah is on fleeing, no Criminal Appeal or Jail Appeal is preferred for and on his behalf. Although the Convict Md. Arju Miah is absconding as yet, his cause in the Death Reference No.26 of 2017 has been represented by Advocate Ms. Hasna Begum, the learned State Defence Lawyer(hereinafter as “SDL”). Since said death reference and appeals have been arisen out of the same judgment and order dated 26.02.2017, the said death reference and appeals are heard together and are disposed of by this judgment.

Facts of Prosecution Case:

The prosecution case, in short, is that Md. Mominul Islam, Police Sub-Inspector (hereinafter as “PSI”) of Bahubal Police Station (hereinafter as “PS”) lodged the First Information Report (hereinafter as “FIR”), as Informant, with Bahubal PS alleging, inter alia, that pursuant to G.D. No.703 dated 19.08.2008, the Informant rushed to the Place of Occurrence (hereinafter as “PO”) i.e the paddy field of Abdul Aziz and Alauddin located to

the west of house of Dulal Miah of Village-Titarkona under 6 No. Mirpur Union and discovered slaughtered corpses of two young boys who were of their tender age of 10 year and 12 year. The Informant then conducted inquests and prepared two separate inquest reports, seized garments and other articles and then took still photographs of both the victims. The Informant then stated that some unknown suspects had killed the unknown two young boys by way of slaughtering for which heads were severed from their bodies and the corpses were left at the place of recovery with a view to concealing the same corpses. The poor victims were killed anytime before 17.45 today i.e. 19.08.2008 with sharp edge weapons by unknown suspects. Many people witnessed the corpses of the young boys but could not identify them. Hence, the FIR had been lodged under Sections 302/34/201 of the Penal Code, 1860 against the unidentified suspects with the Bahubal PS.

Investigation:

PSI Abul Kalam of Bahubal PS investigated into the case as Investigation Officer (hereinafter as "IO"). After conclusion of the investigation, the IO submitted Charge Sheet bearing No.119, dated 15.09.2008 against all the three Convict-Appellants under sections 302/201/34 of the Penal Code, 1860.

**Taking of Cognizance of Offence, Framing of Charge
& Trial:**

The learned Senior Judicial Magistrate of Habiganj Sessions took cognizance of offence, and took necessary steps for paper circular pursuant to Section 339B of the Code of Criminal Procedure, 1898 for ensuring appearance absconding Convict namely Md. Arju Miah. The case was ready for trial and hence the same was transferred to the learned Sessions Judge of Habiganj Sessions for trial. On receipt of the case, it was registered as Sessions Case No.289 of 2009. The learned Sessions Judge of the Habiganj Sessions transferred the said Sessions Case No.289 of 2009 to the Court of Additional Sessions Judge of Habiganj Sessions for trial. On receiving the case, the learned Additional Sessions Judge framed charge on 28.10.2009 against the Convict-Appellants including the absconder *ab initio* Md. Arju Miah under Sections 302/34/201 of the Penal Code, 1860, and the charges were read over and explained to the Convict-Appellants who were present before the learned Court below to which both the Convict-Appellants pleaded not guilty and claimed for full-fledged trial. The Convict, *ab initio* absconder, Md. Arju Miah was tried in absentia.

During the course of trial, the Prosecution examined as many as 19 witnesses in chief out of 23 witnesses as referred to in the Charge Sheet No.119, dated 15.09.2008 in support of the allegations leveled against all the 3 Convicts. The defence also examined the Prosecution Witnesses (hereinafter as “PW” or “PWs”) under cross-examination.

Prosecution Evidence:

The evidence disclosed before the learned Trial Court below on oath through examinations, examinations-in-chief and cross-examinations, of the 19 PWs may well be set out as below:

P.W. No.01 Md. Siddik Ali is the father of two minor victim boys. P.W. No. 01 testified in his evidence in chief that the incident took place at 04:00 p.m. on 18.08.2008. He was not at home. In his absence, Abdul Ali @ A. Ali, maternal cousin of P.W. No.1, came to his house and convinced his wife and obtained the body of his two minor sons namely Ahad Ali (12) and Nuruj Ali (10) from the safe custody of P.W. No.11(Mother of the Victims) so as to attend one of his relative’s marriage ceremony at Joypur village. Since his sons did not turn up on that day, he went to the house of Abdul Ali on following day in search of his sons, but found neither Abdul Ali nor his two sons. On 20.08.2008, he heard that 2 corpses of young boys were

found at the paddy field at Titarkona village under Bahubal P.S. Having learnt that, he immediately rushed to the Bahubal PS along with his witnesses and found 2 dead bodies of his two sons. The head of Ahad Ali was found completely amputated. Nuruj Ali had substantive slaughter-cut injury in front of his throat. Prior to the incident, there was an ancient grudge $\frac{1}{2}$ years back relating to land dispute between Abdul Ali and victims' father. Later there was a compromise for which relationship seemed to have become normal for which there was regular mutual visits to each other house. He then testified that Abdul Ali took it an opportunity to obtain the bodies of his sons and then killed them brutally. He then lodged the case. Police apprehended Abdul Ali who confessed to the Police and to the learned Judge that he in connivance with Sayed Ali and Arju Miah had killed victims Ahad Ali and Nuruj Ali at the paddy field by slaughtering located at Titarkona.

In his cross-examination, he testified that there was a meeting presided over by Zitu Miah. It was decided in that meeting that the Convict-Appellant A. Ali, who obtained the bodies of his two sons, would be apprehended whenever and wherever he is found. He admitted that Convict Sayed Ali and witnesses Babul, Mubed and Yunus apprehended Abdul Ali from

a Slumdog namely Sonkhola under Srimongol PS of Moulvibazar district and they then handed him over to the IO at Kamaychora Police outpost.

He also stated under cross-examination that he was not at home when his two sons were taken by Abdul Ali and he did not see killings of his two sons. But, he heard the name of Convict-Appellant Abdul Ali from his wife and his wife asserted that his two sons were taken from his house by persuading his wife.

P.W. No.02 PSI Mominul Islam, the Informant of the case, testified in his evidence in chief that he rushed to the Place of Occurrence (hereinafter as "PO) along with companion members of his force pursuant to the GD No.703, dated 19.08.2008 and found 2 corpses of young boys, one was 10 years and the other was 12 years. They were found slaughtered with visible throat-cut injuries. He conducted the inquest proceedings and prepared 2 inquest reports at the very PO. Inquest report of victim of 12 years of age was prepared at 18.10 and inquest report of victim of 10 years of age was prepared at 18.30 in presence of the witnesses whose signature were taken immediately. Local people present at the PO could not identify the corpses. He was certain that the victims were killed by some unknown suspects and, therefore, he lodged an FIR with Bahubal PS in connection

with the murder of the two victim young boys. He seized Shirt, T-Shirt, Pants of the two victims and prepared two Seizure list and he then handed over all the evidences i.e. alamot to the IO. He also sent the corpses of the victims to the Habiganj Sador Hospital for post-mortem.

The P.W. No.02 adduced number of evidence in proof of his testimony such as FIR which was marked as exhibit No.1, his signature on FIR marked as “Exhibit No.1/1. He also adduced two inquests reports of which one was marked as Exhibit No.2 and his signature on it as “Exhibit No.2/1” and the other inquest report was marked as Exhibit No.3 and his signature on it marked as Exhibit No.3/1. He also adduced two seizure lists of which one was marked as Exhibit No.4 and his signature on it was marked as Exhibit No.4/1 and the other seizure list was marked as Exhibit No.5 and his signature on it was marked as Exhibit No.5/1.

Under cross-examination P.W No.02 testified that he on arrival at the PO found the slaughtered corpses of two young boys lying in the paddy field and he prepared two inquest reports of the two victims and also prepared two separate seizure lists for two victims for their personal belongings and articles.

P.W. No.03 Mr. Rajib Kumar Bishwas is the Senior Judicial Magistrate of the Habiganj Sessions who recorded confession of Convict-Appellant Abdul Ali @ A. Ali and PW No.03 testified in his evidence in chief that he recorded the confession on 25.08.2008 after giving 3 hours of time for refreshment to Abdul Ali using specific form. P.W No.03 in proof of his testimony adduced confessional statement as exhibit No.6 and his signatures on it as Exhibit No.6/1 (series).

Under defence cross-examination, the P.W. No.03 testified that Convict-Appellant Abdul Ali was taken to him at 10.30 on that day. He found no injury on the body of the said convict-Appellant. He recorded the confession in accordance with law and he denied that he recorded the confession beyond the scope of law.

P.W.No.4 Dr. Md. Romiz Ali was the Chairman of Mirpur Union Parishad. P.W. No. 04 testified in his evidence in chief that at 05.00 p.m. one Ful Miah of Chandrachori village called him by phone that a day labour cried aloud watching the dead bodies of two tender age boys. He stated that he called the police from Bahubal PS and he himself also rushed to the PO. He went to PO along with the Police and found a 12 years old throat-cut dead body in the paddy field and he then also found another

throat-cut dead body on isle of the paddy field. Police prepared 2 inquest reports in his presence at the PO and he signed the inquest reports. One of the inquest reports was already marked as Exhibit No.2 and he then proved his signature as Exhibit No.2/2 and the other inquest report already marked as Exhibit No.3 and he proved his signature on it as Exhibit No.3/2. He then testified that he learnt later on that distance brother of the victims' father killed the victims. Police recovered and prepared seizure lists of 1 Half-Shirt and 1 Half-Pant coupled with blood and mud in his presence in which he put his signature. The adduced seizure lists in proof which were marked consecutively as Exhibit No.4 and Exhibit No.5 and his signature on those were marked as consecutively Exhibit No.4/2 and Exhibit No.5/2. P.W. No.04 also adduced evidence in proof of his testimony 1 Black & White coloured Shirt, 1 Black-Pant and 1 Suti (Cotton) Sando Genji and Sandal were all marked as Exhibit No.1 series. 1 Green coloured Genji and 1 Ash coloured Pant was also recovered and seized on the same day and P.W. No.04 also produced those before the Court below. He asserted in testimony that both the victim boys had throat-cut injuries.

Under cross-examination, he testified that he did not see the murder incident. He went to see the dead bodies after

learning from the people and Ful Miah. He also testified that he knew Zitu, but he then denied that he knew about Zitu's meeting and Zitu's direction about apprehending Abdul Ali.

P.W. No.05 is Zitu Miah. P.W. No.05 testified in his evidence in chief that he and the police went to Abdul Ali's house on 19.08.2008. He heard about the killings of Siddik's two minor sons namely Ahad Ali and Nuruj Ali by Abdul Ali. Convict-Appellant Abdul Ali stated to him that he slaughtered two victims with a Kachi. He testified that on 26.08.2008, he went to the PO when the police arrived and Abdul Ali stated to police that the Kachi was concealed in the house of Sayed Ali and the P.W. No.5 went to the house of Sayed Ali on that day with the Police from where the Police recovered the murder weapon namely Kachi and prepared a seizure list on which he put his signature. He then adduced the seizure list in proof of his testimony which was marked as Exhibit No.7 and his signature on it was marked as exhibit No.7/1. He testified that there were three accused namely A. Ali, Sayed and Arju. When A. Ali confessed in the Police Station. He was present along with Sayed Ali and at the very moment A. Ali was trembling.

In cross-examination, the P.W. No.05 testified in his evidence that convict Sayed was with him and the police from

the beginning of the case. He and Sayed had apprehended A. Ali from Srimongol with assistance of Babul, Mubed, Yunus and Yusuf. Not known to him that Sayed was named out of grudge by A. Ali. But, A. Ali had named Sayed. The Kachi was recovered after the apprehension of A. Ali and A. Ali stated that the murder weapon namely Kachi was concealed in Sayed's house. P.W. No.05 stated in cross-examination that the Kachi which was recovered was not produced before the Court and, therefore, that was not the very Kachi which was recovered. He also stated that this sort of Kachi was available in every cultivator's house.

P.W. No. 06 is Akol Miah. P.W. 06 testified in his evidence in chief that the incident took place on 19.08.2008 at around 04.20 p.m. when he was at his shop. He saw Abdul Ali was going with Ahad (12) and Nuruj (10) who were sons of Siddik. Following day he heard that two boys were missing. From the police information was disseminated to the effect that 2 dead bodies were recovered from the paddy field of Titarkona and he then went to the Police Station and found two slaughtered dead bodies. He then identified those corpses as sons of Siddik (PW No.01). Later on, he learnt that A. Ali in connivance with Sayed and Arju had killed the victims. When police asked me

names of Sayed and Arju were not mentioned. He then stated that the villagers apprehended A. Ali and handed him over to the Police.

In cross-examination P.W. No.06 testified that in apprehending A.Ali, Sayed, Babul, Yusuf, Yunus and Mubed played vital role. Sayed informed the Police about A. Ali's location which is Lachna of Srimongol. He denied that A. Ali named Sayed since Sayed caught hold of A. Ali first so as to apprehend him. He further testified that he saw two victims with A. Ali and he denied that A. Ali and Arju were not involved in the offence of murdering the victims.

P.W. No.07 is Abu Miah who testified in his evidence in chief that the occurrence took place in 2008 corresponding to Bangla year 3rd Vadro, Monday. He came out of Joshpal Mosque after completing his Asr Prayer. Time was then 04.00 p.m. and he saw that Siddik's two sons namely Nuruj and Ahad were going with A. Ali toward northbound, later they turned to the westbound toward Bishaw-Road. Next day 08.30 am in morning, he heard that 2 minor boys were killed. Police found two dead bodies from the paddy field of Titarkhona village. He went to the police station He found that one of the child victims had cut from behind the neck and the other one had throat-cut from the front.

He heard that A. Ali named Sayed and Arju. He also testified that A. Ali killed the victims in connivance with Sayed and Arju.

The P.W. No.07 testified in cross-examination that he did not see murdering the victims and A. Ali did not mention name of any accused. Sayed played major role in apprehending of A. Ali and he informed the police about the location of A. Ali. He heard that Sayed caught hold of A. Ali first and the Police learnt about A. Ali after that event. He denied that A. Ali maliciously named Sayed since Sayed apprehended A. Ali. He also stated that he did not mention the name of Sayed and Arju while giving statement to police.

P.W. No. 08 is Dr. Showkatul Ambia who conducted the autopsies of the corpses of the two victims. P.W. No.8 testified in his evidence that he conducted the autopsies i.e post-mortems to the dead bodies of the two minor victims who were consecutively 10 year and 12 year. P.W No.08 in proof of his post-mortem adduced the two post-mortem reports as evidence one of which was marked as Exhibit No.8 and his signature on it marked as Exhibit No. 8/1 and other post mortem report was marked as Exhibit No.9 and his signature on it was marked as Exhibit No.9/1. He further testified that Dr. Pradip Kumar Das was one of the Members of the Autopsy Board.

The defence examined that P.W. No.8 under cross-examination to which he testified that the deceased persons were not known to me. Constable A. Rob brought the corpses of the victims to him. He denied the suggestion that he did not find any injuries on the bodies of the minor victims as mentioned in the post mortem reports.

P.W. No. 09 is Dr. Pradip Kumar Das who was a Member of the Autopsy Board. P.W. No.09 testified in his evidence in chief that he conducted autopsies of two minor victims who were consecutively 10 year and 12 year. He also adduced post mortem reports as evidence one of which was marked as exhibit No.8 and his signature on it was marked as Exhibit No.8/2 and the other post mortem report was marked as exhibit No.9 and his signature on it was marked as Exhibit No.9/2.

Under cross-examination, the P.W. No.09 testified that he never knew the deceased persons and he denied the suggestion that he did not find any injuries mentioned in the post-mortem reports.

Both the P.W. Nos. 8 and 9 were of their professional opinion about Ahad Ali that read as follows:

“Incised wound encircling about whole of neck, except the skin of anterior up aspect of neck. Cutting of skin.

Muscles, 3rd Cervical vertebrae vessels, Oesophagus, Trachea”

Both the PW Nos. 8 and 9 were of their professional opinion about Nuruj Ali that read as follows:

“Incised would middle of right side of neck with cutting of skin, muscle vessels, trachea, encircling about whole neck, except 2” posteriorly”

P.W. Nos.8 and 9 were of the opinion that the injuries found on the bodies of the victim boys were of anti-mortem and homicidal in nature. All the three Convict-Appellants failed pursuing any cross-examination challenging their medical findings.

P.W. No.10 is Samsul Haque who testified in his evidence in chief that on 18.08.2008, Monday during Asr Prayer he was standing in front of his own house. He then saw A. Ali, Ahad Ali and Nuruj Ali were going somewhere else. He then asked questions as to where they were up to in answer of which A. Ali replied that he was going to attend a marriage ceremony with the two victims. Later on he heard that throat-cut dead bodies of Ahad Ali and Nuruj Ali were found at the paddy field of Titarkona. He saw the dead bodies on following days. Bodies

were found in the morning. Police came to the PO and took the bodies of deceased persons.

P.W.10 also testified under cross-examination that he did not see murdering the victims. Victims were going with A. Ali in front of him on that day. He denied the suggestions that he did not see Ahad and Nuruj going with A. Ali. Ahad and Nuruj were his nephews. He did not inform parents of victims about such taking of victims by A. Ali. He informed about the matter to police but could not remember when. He denied the suggestions that he did not tell about this matter to the police.

P.W. No.11 is the biological mother of Victims. P.W. No.11 testified in her evidence in chief that the incident took place on 18.08.2008 at around 04.00 p.m. and her victim sons came back from school. A. Ali approached and requested her prepare Ahad and Nuruj so as to take them to attend a wedding ceremony at Joypur which is the house of his aunt. Initially she refused, but on fervent request, she was then prepared to send the boys with him. Thereafter, her boys as well as A. Ali disappeared. Next day dead bodies of her two sons were found on the paddy field of Titarkona and one was found dead with deadly cut-injury in front of the throat and another was found dead with cut-injuries behind neck. Police took the dead bodies

of her sons to police station. She got information about the ordeal around 11/12 during the day from her younger brother Afsar Uddin. Her own brother-in-law Shafique Ali owed money to A. Ali and A. Ali demanded return of money from her to which she replied in negative for which he killed her sons. Arju and Sayed are also involved in killing her sons. A. Ali was arrested with the help of the local people.

The P.W. No.11 testified under cross-examination that Arju and Sayed had estrangement i.e. bad feelings with the family of the victims. She denied the suggestions that Sayed and Arju were not part of the killings.

P.W. No.12 is Abdul Haque. P.W. No.12 testified in chief that he learnt about the event on 20.08.2008. He saw the dead bodies with throat-cut injuries at around 02.30p.m. at the Habigonj Sador Hospital outside the gate of hospital's morgue. He heard that A. Ali took the sons of Siddik in the name of attending a wedding ceremony and killed them by slaughtering. One was slaughtered by cutting throat and the other was slaughtered by cutting neck. Corpses were found from the paddy field of Titarkona.

P.W. No.12 testified in cross-examination that he did not see murdering the victims. He denied the suggestions that A. Ali

and Aruj were not involved in killing victims. He asserted under cross-examination that A. Ali took the boys in the name attending a wedding ceremony and these aspects of facts were affirmed by the villagers as well as by the parents of the victim.

P.W. No.13 is Afsor Uddin. P.W. No.13 testified in his evidence in chief that on 18.08.2008 he was standing on a street beside the mosque after offering his Asr Prayer. He then saw that A. Ali was heading to Bishaw-Road of Doulatpur with Ahad and Nuruj Ali. He then asked as to where he was heading with the boys to which A. Ali replied that he was about to participate a wedding ceremony to his aunt's house located at Joypur. After that the boys were disappeared. Next he heard that police found two dead bodies of young boys from the paddy field of Titarkona. He then rushed to the police station and found the victims dead bodies. One victim had cut injuries in front of his throat whereas the other victim had cut injuries from behind the neck.

P.W. No.13 testified under cross-examination that he saw the two minor victims with A. Ali. He then denied the suggestions that he did not see the victim boys of Siddik going with A. Ali. He also denied the suggestions that Arju and Sayed were not involved in killings of the victims.

P.W. No.14 is Anwar Hossian. P.W. No.14 testified in his evidence in chief that the slaughtered corpses of Ahad and Nuruj were found at the paddy field of Titarkona. He had land beside the house of Convict Sayed. He went to visit his land on 26.08.2008 where he was asked by the police to accompany them to Sayed's house to which he responded in affirmative. The police searched the house of Sayed in his presence and found the murder weapon i.e Kachi from the room located to the north and prepared a seizure list which was signed by him. He then adduced the seizure list as evidence marked as exhibit No.7 and his signature on it marked as Exhibit No.7/2.

P.W. No.14 testified under cross-examinations that he was not present the room from where the Kachi was recovered. Kachi was not recovered from the room of Sayed. It was rather recovered from another room located beside the room of Sayed. Sayed was not present when search was made and seizure list was prepared. The Kachi was recovered from the room of one Mahmud who is paternal cousin of Sayed. They live in different dwelling places. P.W. No.14 further stated under cross-examination that he did not see murdering. Victims' mother told that her sons were taken by A. Ali. He denied the suggestions that he gave false evidence.

P.W. No.15 is Dorbes Ali. P.W. No.15 testified in his evidence in chief that on 19.08.2008 while going to the market at around 10.20 a.m., he learnt that two dead bodies were found at the paddy field of Titarkona. He went to the PO and found 2 slaughtered dead bodies of minor boys. He heard that A. Ali took the 2 victim sons of Siddik in the name of attending weeding ceremony the day before the dead bodies were found. One victim had cut injuries in the front side of the throat and the other victim had cut-injuries from behind the neck.

Under cross-examination, the P.W. No.15 testified that he did not see murdering. He learnt from the relatives of the minor victims that A. Ali obtained the body of the minor victims. He denied the suggestions that he did not heard the same incident from the relatives of the minor victims.

P.W. No.16 is PSI Md. Abul Kalam and he is also the IO of the case. P.W. No.16 testified in his evidence in chief that being IO of the case he took charge of the investigation, and he prepared sketch map, index and explanation of the index. He recorded witness statements from witnesses under section 161 of the Code. He also arranged record of confessional statement of Convict Abdul Ali under section 164 of the Code. He then arrested convict-appellant A. Ali on 25.08.2008 and convict-

Appellant Sayed Ali on 26.08.2008 and recovered murder weapon namely Kachi. He then collected Post Mortem Report. Being satisfied with prima facie truthfulness of the case, he then submitted charge sheet No.119, dated 15.09.2008, U/S 302/201/34 of the Penal Code, 1860. In proof of his evidence, the P.W. No.16 adduced sketch Map as evidence which is marked as exhibit No.10 and his signature on it was marked as Exhibit No.10/1 and he also adduced Explanation of Sketch Map as evidence which is marked as Exhibit No.11 and his signature on it as Exhibit No.11/1. He also proved his signature on Seizure list (Exhibit No.7) as exhibit No.7/3 and the Kachi was adduced as material evidence which was marked as Exhibit No.III. He also took still-Photographs of two minor victims and adduced the 7 Still-Photographs in proof of his case and the photographs are marked as Exhibit Nos. 12 to 18 series. He testified that he had knowledge of the signature recording officer on the FIR and he adduced the FIR as evidence and it was marked as Exhibit No.19 and signature of the recording officer was marked as Exhibit No.19/1.

The P.W. No.16 testified under cross-examination that he denied the suggestion that he did not recover the Kachi from the Convict-Appellant Sayed. He denied the suggestion that Sayed

Ali was incriminated by A. Ali due in his confessional statement for his assistance in apprehending A.Ali. Sayed admitted that he washed the Kachi. He denied the suggestion that the photographs were not part of the CD. He denied the suggestion that although A. Ali incriminated Arju and Sayed in his confession, no other witnesses actually named them. He finally denied the suggestion that although no prima facie truth was discovered in this case during investigation against Sayed, the Charge Sheet was submitted based on fairy-tale.

P.W. 17 is Abid Ali who is the witness to the seizure list. P.W. No.17 testified in his evidence in chief that police found corpses of two minor boys from the PO and prepared the two inquest reports in his presence in which he signed. He then adduced his signatures on two inquest reports (Exhibit Nos.2 and 3) as evidence which were consecutively marked as Exhibit Nos. 2/3 and 3/3. He then also adduced the seizure list (Exhibit No.5) as evidence and his signature on it was marked as Exhibit No.5/3. He then adduced all the seized articles such as 2 half-pants, 2 half-shirts, 2 Sando Genji and 1 Pair of Sandal as material evidence which were marked as Material Exhibit No. I Series.

Under cross-examination, P.W. No. 17 testified that he signed on a white piece of paper.

P.W. No.18 is Md. Shiraj Miah Chowdhury whose house is adjacent to the PO P.W. No.18 testified in his evidence in chief that the incident took place in the place adjacent to his house. The police washed the bodies of the corpses of the victims in the pond near his house. He did not come out of his house since he heard of slaughtered corpses of victims. The victim were the sons of Siddik. The defence denied cross-examining this P.W. No.18.

P.W. No.19 is Constable A. Rob bearing Constable No.59. P.W. No.19 testified in his evidence in chief that he went to the PO with the informant and found slaughtered corpses of two minor boys at the paddy field of Titarkona under 3 No. Mirpur Union. One victim had cut injuries in front of his throat and the other victim had cut injuries behind the neck. The informant prepared two inquest reports and seized articles from the PO and also prepared seizure lists. He then took the corpses of the two minor victims by Tempo to Habiganj Sador Hospital for post mortems. After completion of post mortems of both the victims, the corpses were taken back to the Bahubal P.S. on following day the dead bodies were handed over to their relatives. He then

adduced two Challans to the Court as evidence which were marked as Exhibit Nos. 20 and 21 and his signatures on both the Challans which were marked as Exhibit Nos. 20/1 and 21/1.

Under cross-examination, the P.W. No.19 testified that he denied the suggestion that dead bodies were not cleaned and the issue of cleanings of dead bodies was not recorded in CD. He denied the suggestion that Alamot i.e. real evidence was not recovered from the PO.

Trends of Defence Case under Cross-Examination:

The defence case as transpired from the trends and tendencies of the cross-examinations pursued upon the PWs by the defence may well be set out as below:

- (I) They were no part of the offence and were completely innocent;
- (II) They did not commit the offences of murdering the minor victim boys;
- (III) They were falsely implicated in this case.

Examining the Accused persons Under Section 342 of the Code by the Court below:

After closure of prosecution evidence, the convict-appellants on dock were examined by the learned Additional Sessions Judge of Habiganj Sessions Under Section 342 of the

Code by setting out all the necessary and relevant evidence and exhibits of all the 19 P.Ws. The learned Judge of the Court below also then invited the Convict-Appellants on dock to give their evidence in defence, if they at all so desire. In response, Convict-Appellant Abdul Ali stated that he would not adduce any evidence or submit any paper in support of his defence. On the other hand, the Convict-Appellant Md. Sayed Ali expressed his desire for adducing evidence by producing three defence witnesses (DWs) and, accordingly, he produced three DWs in support of his defence. The prosecution cross-examined 2 DWs out of 3 D.Ws. Since Arju Miah was absent ab initio, the learned Court could not examine Arju Miah under Section 342 of the Code.

Evidence of Defence for and on behalf of Convict-Appellant Sayed Ali:

It transpires from the record of the Court below from Order No.65 dated 23.01.2017 that the Convict-Appellant A. Ali refused giving any defence evidence or submitting any document in his defence. But, Convict-Appellant Sayed Ali desired giving evidence in his defence. Three witnesses were examined in chief for and on behalf of Convict-Appellant Sayed Ali. Subed Ali was examined as DW No.1 and Babul Hossen were examined as D.W

No.2 on 30.01.2017 and Md. Yusuf Ali was examined as D.W. No.3 on 01.02.2017. Since Convict on flee Arju Miah was not available, no defence evidence is available for him on record.

D.W. No.01 is Subed Ali who testified in his evidence in chief that according to statement of the father of Ahad and Nuruj, whose dead bodies were found in the paddy field of Titarkona, A.Ali obtained the body of the victims for attending a wedding ceremony. A meeting was held which was presided over by Zitu who decided that A. Ali ought to have been apprehended wherever he is found. After 4/5 days of the recovery of corpses of victims, Subed Ali himself along with Shafique, Yusuf, Sayed (Convict-Appellant), Babul and others went to Lochna Slumdog under police station of Srimongol of Moulvibazar District and when they were on Rickshaw they saw A. Ali who at the sight of them attempted to run away. But, Sayed Ali caught hold of A. Ali and handed over to police at Kamaichora Police Outpost.

D.W. No.1 under cross-examination testified that Sayed ali was not with them when A. Ali was apprehended was denied. Sayed was arrested by SI Abul Kalam from the tea stall of Shahjahan located at Choumohoni of Mirpur. D.W No.1 denied that he deposed falsely to save his cousin Sayed Ali.

DW. No.2 Babul Hossen testified in chief that two minor victim died in 2008. They sat in a meeting under the leadership of village patron Jitu who emphasize to apprehend A. Ali wherever he was. They got information that A. Ali was staying at his sister's house located at Lochna Sonkhola under Srimongol Police Station. When they arrived there, A. Ali attempted to flee, when Sayed Ali apprehended him and handed him over to police at Kamaichora Police Outpost. A. Ali then threatened that he would give sayed Ali a good lesson for apprehending him. They have noticed that the learned Judge of the Trial Court below concelled evidence of this DW vide Order No.73 dated 12.02.2017.

D.W. No.3 Md. Yusuf ali testified in chief that Sayed Ali is his paternal cousin. A. Ali took the custody of the victims in the name of attending a wedding. The corpses were found ½ days after at a paddy field of Titarkona. A meeting was held under the leadership of village patron Jitu where his father and Sayed Ali were also present where it was decided to apprehend A.Ali wherever he was. He himself, Babul, Subed, Yunus and Sayed Ali went 3 K.M. to the south of hills by rickshaw. He and Sayed Ali were in first Rickshaw. Babul, Subed and Yunus were riding at second Rickshaw. They saw A. Ali coming from

opposite direction by a rickshaw. He did not see initially. Subbed cried aloud and told that A. Ali had just crossed them. Babul jumped out of the rickshaw and got hold of A. Ali and the rest followed babul and all members of the term surrounded A. Ali and restraint him A. Ali was then taken to Kamaichora Police Outpost from where the police took him to Bahubal Police Station.

Under cross-examination, D.W No.3 denied the suggestion that Sayed Ali was not with them in apprehending A. Ali DW No.3 also testified that the Kachi seized was recovered from the house of Mahmud who is cousin of Sayed Ali.

The Judgment of learned Additional Sessions Judge of Habiganj:

The learned Additional Sessions Judge of Habiganj scrutinized the prosecution evidence such as testimonial evidence of 19 PWs, exhibited documentary evidence and exhibited oral evidence on record. The learned trial court also considered the defence evidence of 3 DWs on record. The learned Judge then passed the impugned order and judgment convicting Md. Abdul Ali @ Ali, Md.Sayed Ali and Arju Mia under sections 302/34 of the Penal Code, and sentenced each of them to suffer death with fine for taka 10,000/- and against the

said judgment and order this death reference had been sent through by the learned Court and the Convict-Appellant Abdul Ali preferred Criminal Appeal No.6298 of 2017 arising out of Jail Appeal No.102 of 2017 and Convict-Appellant Sayed Ali preferred Jail Appeal No.228 of 2019.

Submissions of learned Counsel for and on behalf of Convict-Appellant A. Ali:

Mr. Gouranga Chandra, the learned Counsel, appearing for and on behalf of convict-Appellant Md. Abdul Ali @ A. Ali submitted that the confession of A. Ali was not voluntary and true. The Kachi was not recovered in consequence of his confession. The learned Counsel also submitted that father of the victims testified that he had previous grudge over a land dispute ½ years ago of the occurrence with A. Ali for which A. Ali had killed his two sons. But, in the confession, it was asserted by A. Ali that he rendered borrowings for taka 25,000/- to the father of the victims and two others which was never repaid for which a dispute ensued. The motive assigned by the prosecution in their evidence was not proved. The learned Counsel also submitted that according to confessional statement. Arju Miah and Sayed Ali asked A. Ali to kill Ahad Ali and Nuruj Ali and Arju Miah and Sayed Ali also gave A. Ali a sum of Taka 2,000/= for killing

the victims. A. Ali refused to work for money at which arju miah and sayed Ali became furious and threatened Sayed Ali to kill. The learned Counsel further submitted that all the witnesses of the prosecution testified that they had only heard the occurrence and their evidence was, therefore, hearsay only. The learned Counsel also submitted that the prosecution hearsay evidence was not corroborated from any other credible evidence. The learned Counsel for A. Ali further submitted that the case of A. Ali is fundamentally based on last scene doctrine which is hopelessly uncorroborated. Conviction and sentence to death based on such uncorroborated last scene doctrine is bad in law for which the same judgment and order needs be set aside to secure the ends of justice. Mr. Gouranga Chandra, the learned Counsel, further submitted that although the prosecution failed proving the case beyond reasonable doubt, the judgment and sentence convicting A. Ali and sentencing him to suffer death is based on failing to apply judicial mind. He then submitted that the Convict-Appellant A. Ali has been suffering tarnishing jail custody since 25.08.2008. He also submitted that A. Ali has been suffering custody in condemned cell more than 5(five) years. Accordingly, the learned Counsel humbly submitted that the death sentence may kindly be reduced to imprisonment for life.

Submissions of learned Counsel for and on behalf of Convict-Appellant Md. Sayed Ali:

Mr. Md. Aminul Islam, the learned counsel appearing for and on behalf of convict-Appellant Md. Sayed Ali submitted that the sole basis of judgment and order of conviction and sentence to death against Md. Sayed Ali is confession of Co-accused A. Ali and no other corroborating evidence was brought against him in connection with killing of the minor victim boys. No prosecution witnesses bring any evidence against Sayed Ali to show that he had any ancient grudge or disputes leading to motive for killing the victims, and further that none of 19 prosecution witnesses had testified that he or she had seen Sayed Ali with the victim minors on the fateful day. The learned Counsel then submitted that it is only the Convict-Appellant A. Ali who falsely incriminated Sayed Ali in the confession so as to materialize his grudge and enmity arising out of fact that A. Ali was apprehended and handed over to the police by Sayed Ali. The learned Counsel then drew our attention in his submissions that PW No.16 (the "IO") testified that the murder weapon Kachi was recovered from his house, but the seizure list witness PW No.14 testified the Kachi was not recovered from the house of Sayed Ali but from the house of one Mahmud.

Mr. Md. Aminaul Islam, the learned Counsel, further submitted that P.W No.5 Jitu Miah testified that when A. Ali was arrested and was taken to Bahubal Police Station A. Ali gave statement to the Police, and Sayed Ali was present at the Police Station instead of being a truant accused. The learned Counsel then submitted that sayed Ali was arrested on 26.08.2008 and he was granted ad-interim bail on 20.01.2011. The learned Counsel last of all submitted that since the prosecution failed proving the charges against Sayed Ali beyond reasonable doubt, Sayed Ali may kindly be acquitted by setting aside the impugned judgment and order to secure the ends of justice.

Submissions of learned Counsel for and on behalf of Convict-Appellant Arju Miah:

Mrs. Hasina begum, the learned State Defence Lawyer (SDL), appearing for and on behalf of absconder Arju Miah submits that Arju Miah is in no way connected with the killing of two minor victims and there is no incriminating evidence on record, whatsoever, from the end of prosecution against Arju Miah. The learned SDL also submits that it is only the Convict-Appellant A. Ali who incriminated him by way of confessional statement. A. Ali in his confession stated that Arju Miah was present at the time of murdering the minor victims, but then A.

Ali hopelessly failed attributing any specific overt act in the confession against him. The SDL lastly submitted that the prosecution hopelessly failed proving any count of allegation against Arju Miah beyond reasonable doubt by adducing any admissible and legal evidence and as such Arju Miah may kindly be acquitted by setting aside the impugned judgment and order of conviction and sentence of death and fine for ends of justice.

Submissions of learned Counsels for and on behalf of the State:

Mr. Md. Boshir Ahmed, the learned Deputy Attorney General (DAG), along with Md. Zakir Hossain Masud, the learned Assistant Attorney General (AAG), appearing for and on behalf of the State submits that judgment and order of conviction and sentences of death against all the convicts are well founded since the death sentences are based relevant, admissible and credible evidence on record of Trial Court below. Mr. Boshir Ahmed submits that the confession on record is true and voluntary. It is also inculpatory in nature. It can, therefore, be sole basis for conviction. The learned Magistrate (PW No.3) recorded in compliances of all the relevant laws, rules and directives and none of the convicts had challenged the truthfulness and genuineness of the confession under cross-

examination. There are strong circumstantial evidence on record of the Court below that established connection of the convicts with the murders of two minor victims. PW Nos.11 had affirmatively established that her minor sons were taken by the Convict-appellant A. Ali on 18.08.2008 at 04.00 p.m. and this was further strongly corroborated by the evidence of PW Nos. 6,7,10 and 13 and these PWs are eyewitness who saw A. Ali while taking the two victims with him under the cloak of attending a wedding at Joypur. The learned DAG further submits that it was not practically possible to kill two young boys of 10 years and 12 years by one man, and Arju Miah and Sayed Ali were all active participants in the commission of horrible murder of two minor victims. The learned DAG finally submits that the learned Court below rightly and correctly found convict-Appellants and Convict on flee guilty of murder of two victims and accordingly, the learned Court below passed the order of conviction and sentence against them.

Points for Determination before Us:

Now, in this homicide case, we are compelled examining and determining that:

- (I) As to whether the impugned judgment and order of conviction and sentence of death and fine of Taka 10,000/- each is tenable in law;
- (II) As to whether the prosecution has been able to prove the case by adducing legal evidence against the condemned prisoners and convict on flee;
- (III) As to whether the prosecution case was proved beyond reasonable doubt;

The Victims:

Before examining the evidence of the prosecution against the Convict-Appellants and a Convict on flee, it is pertinent to discuss about the victims. We have two victims in this case. One is Ahad Ali, who was a poor minor victim of 12 years of his tender age, and the other one is Nuruj Ali, who was a poor minor victim of 10 years of his tender age. The two victims were full brothers to each other. Both the victims are sons of PW No.1(Md. Siddique Ali and PW No.11 (Jaheda Khatun). These two minor victims, unknown to them, were accompanied by their killer A. Ali, who was pretender befriend to them with a vicious intent in mind to kill. The pretender A. Ali took the custody of the bodies of the victims Ahad Ali and Nuruj Ali from the safe

custody of their mother on the fateful day and after that the minor victims were found dead.

Minor Victim Ahad Ali was found at the place of occurrence with incised wound and circling about whole neck except the skin of interior up aspect of neck cutting of skin, muscles 3rd Cervical Vertebra, Vessels, Oesophagus and Trachea, and these aspects of injuries are supported and corroborated by inquest report dated 19.08.2008(Exhibit No.2) and also by post mortem report No.83 dated 20.08.2008(Exhibit NO.9). Minor victim Nuruj Ali was found at the place of occurrence with incised wound middle of right side of neck with cutting of skin, muscles, vessels, trachea and circling about whole of neck except 2 posteriorly which are supported and corroborated by inquest report dated 19.08.2008 (Exhibit No.3) and also by post mortem report No.82 dated 20.08.2008 (Exhibit No.8). The killings of the two minor victims are evident on records of trial Court as contemplated in the contents of Exhibit Nos.2,3,9 and 8. These aspects of the victims' injuries revealed that they were poor victims of brutal, calculated and culpable homicide amounting to murder.

Prosecution's Evidence Against Convict Appellant Md. Abdul Ali @ A. Ali:

***Prosecution's Neat and intact Circumstantial Evidence Against
A. Ali***

Let us examine the evidence and proof against Abdul Ali @ A. Ali in connection with culpable homicide amounting to murder in respect of the two minor victims namely Ahad Ali and Nuruj Ali to start with. The first convincing evidence comes from the very biological mother i.e. the PW No.11 who affirmatively testified that Convict-Appellant A. Ali was the very person who approached her on the fateful day i.e. 18.08.2008 (Monday) to obtain the bodies of the poor minor victims namely Ahad Ali and Nuruj Ali from the safe custody of the PW No.11. In the words of the poor mother (PW No.11) “আমি মৃতদের মা। ২০০৮ ইং সালের ১৮.০৮ তারিখে সোমবার বিকাল অনুমান ৪.০০ ঘটিকায় আমার ছেলে আহাদ ও নুরুজ আলী স্কুল হতে আসে। এর পর আসামী আঃ আলী আমার বাড়িতে এসে বলে যে, ভাবী তোমার ছেলেদের আহাদ ও নুরুজ কে আমার সাথে জয়পুর আসামী আঃ আলীর খালার বাড়িতে বিয়ে খাওয়ার জন্য প্রস্তুত করে দিতে। তখন আমি না করি কিন্তু সে জোরাজোরি করে, রাজী হয়ে আমার বাচ্চাদের রেডি করে দিই। এর পর আহাদ ও নুরুজদের খবর নাই। আঃ আলীকেও পাই না খুজতে থাকি পরের দিন মঙ্গলবার মিরপুরের তিতারকোনা বন্ধে ধানখ্যাতে আমার ২ ছেলের গলা একজনের সামনে ও একজনের পিছনে কাটা লাশ পায় সকালে” the evidence of PW No.11 was supported and corroborated by PW No.1 (the husband of PW No.11 and father of two minor victims). PW No.1 testifies that “

ঘটনা গত খ্রি:১৮.৮.০৮ তাং রোজ সোমবার বিকাল অনুমান ৪ ঘটিকায় আমি বাড়িতে না থাকার সুযোগে আমার স্ত্রীর নিকট হইতে আমার ২ টি ছেলে (১) আহাদ আলী (১২) ও (২) নুরমজ আলী (১০) দেয়কে আসামী আ: আলী (আমার মামাতো ভাই) তার আত্মীয় বাড়ি জয়পুর গ্রামে বিয়ের কথা বলে নিয়ে যায়.....” From the evidence of PW Nos. 1 and 11 it is well founded that these two PWs established procurement of the custody of the bodies of the minor victims by Convict-Appellant A. Ali and Convict-Appellant Al Ali did not deny or challenge under cross-examination his presence at the house of the victims and taking the custody of the bodies of the minor victims from the safe custody of their mother on the fateful day on 18.08.2008 at 4 p.m (afternoon). This means that A. Ali, in effect, by not denouncing his presence at the parental house of the victims had admitted his presence and also admitted securing the custody of the bodies of the poor minor victims and after such custody the victims were found killed brutally. A. Ali also never raised any question under cross-examination that he was not the very person who obtained the bodies of the minor victims from their mother PW No.11 right before their bodies were found.

What PW No.11 brought in evidence is the taking custody of the bodies of the minor victims by A. Ali and this aspect of fact was further uninhibitedly supported and corroborated by PW

Nos.6,7,10 and 13 in that all these witnesses in their evidence affirmed that they all had seen positively the two poor minor victims namely Ahad Ali and Nuruj Ali with Convict-Appellant A. Ali on the fateful day at 04.00 p.m (afternoon). In this regard, the P.W No.6 (Akol Miah) testified that on the fateful afternoon he saw the victims with A. Ali from his shop located based the house of the victims. PW No.7 (Abu Miah) testified that he saw on the fateful afternoon the two victims Nuruj and Ahad going with A. Ali to the north bound direction and then to the west bound direction leading to Bishwaroad and it was affirmed by PW No.7 that he saw the two victims with A. Ali while he was waiting after Asr prayer in front of “Joshpal Mosque”. PW No.10 (Shamshul Haque) testified that on the fateful afternoon he was waiting outside his house at the time of Asr prayer when he saw Convict-Appellant A. Ali with Ahad Ali and Nuruj Ali. PW No.10 then asked A. Ali as to where he was heading to in answer of which A. Ali replied that he was going to attend a wedding ceremony with the two boys (Victims). P.W No.13 (Afsor Uddin) testified that after offering Asr prayer on the fateful afternoon he came out of the Mosque and was waiting in front of the Mosque, he then saw A. Ali was going towards Bishwa Road of Daulatpur with the two victims namely Ahad and Nuruj. PW.

No.13 then asked A. Ali as to where he was going to with the boys (victims) to which A. Ali replied to PW No.13 that he was going to his Aunt's house at Joypur to attend a wedding ceremony with the two boys i.e. victims. It is crystal clear that the evidence of PW Nos. 6,7, 10 and 13 beyond reasonable doubt affirmed the testimony of P.W No.11 (mother of victims) in that the custody of the bodies of the victims were taken by A. Ali and the victims Ahad Ali and Nuruj Ali were seen by the PW Nos.6,7,10 and 13 on the fateful afternoon and further that in answer of queries, made by PW Nos.10 and 13, A. Ali asserted that he was taking the boys (victims) to Joypur village to his aunt's house so as to attend a wedding ceremony and these evidence matched with the evidence of PW No.11(victims' mother).

That all these PWs namely PW Nos.6,7,10 and 13 had seen and asked the Convict-Appellant A. Ali where he was up to with the two poor minor victims namely Ahad Ali and Nuruj Ali, and in answer of the question asked by all the said witnesses, Convict-Appellant A. Ali stated that he was about to attend a wedding ceremony at his aunt's house located at Joypur village and A. Ali also affirmed that the victim boys were also going to the wedding ceremony with him. These aspects of prosecution

evidence were not denied by the Convict-Appellant A. Ali under cross-examination, it was rather admitted by not denying those facts by A. Ali we are of the view that from the prodigious and convincing prosecution evidence the entire circumstances with regard to the taking custody of the minor victims from their mother's custody prior to the recovery of corpses of minor victims are attracted under the doctrine of "Special Fact Circumstances" under Section 106(a) of the Evidence Act, 1872 which suggests that if any fact is specially within the knowledge of any person, the burden of proof or onus of such special fact circumstances lie upon the head of such person who has such special knowledge relation to such "Special Fact Circumstances". Section 106(a) of the Evidence Act, 1872 states as follows:

"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him"

Again, Section 103 (a) of the Evidence Act, 1872 refers the doctrine of shifting of burden of proof to a person in view of attending facts and circumstances, and in the words of the very section 103 of the Evidence Act, 1872:

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence,

unless it is provided by any law that the proof of that fact shall lie on any particular person.”

In this regard, their Lordships of our Apex Court in Anisur Rahman and others Vs. The State, BLD (1986), AD.79 held that the parents of the victim son were the most material natural witness. The victim was called away by the Appellants from his house and the victim was not found until his dead body was recovered from the sugarcane field next day. In absence of any reasonable explanation as to the safe escape from the company of the Appellants after the Appellant had called away the victim from his house, no conclusion other than the guilt can be drawn against the appellants and in our view this surely is a classic example of shifting of burden of proof in the respect of “Special Fact Circumstances”. In this case, the victims’ parents namely PW No.1(father) and PW No.11 (mother) were very influential, trustworthy, natural and material witnesses who successfully established custody of the victims under Convict-Appellant A. Ali at the fateful day i.e. material point of time as well as the motives behind the killings of the minor victims by Convict-Appellant A. Ali. The Convict-Appellant could destroy the credibility of the evidence of the victims’ parents rendering the onus of proof shifted upon Convict-Appellant A. Ali.

In another renowned case namely Mainul Haque (Md) and Another Vs. The State, 56 DLR (2004) AD P.81 (which is most popularly known as “Yasmin Murder Case”), the victim Yasmin was taken under custody by three police personnel on the fateful night and this aspect of incriminating circumstance was confirmed by PW Nos.4,6,7,9,12 and 13. The defence had taken a plea by suggesting that PW No.6 had sexual intimacy with the victim Yasmin while on journey from Dahak Gabtoli to Dinajpur. The attempt of incriminating the PW No.6 by besmirching his character by the 3 police personnel was a desperate but an utter vain bidding to save their skin. Their Lordships of the Appellate Division held that circumstances that appear from prosecution evidence are extremely incriminating in nature that are incompatible with the innocence of the accused persons and that the accused persons cannot take the benefits of such incriminating circumstances at all, but the same incriminating circumstances shall be construed against him. In the present double murder case of Ahad Ali and Nuruj Ali, it is evident that the convict-Appellant A. Ali failed denying the prosecution evidence as to the taking custody of the bodies of the poor minor victims from the safe custody of their mother (PW No.11) prior to recovery of their corpses, and that this particular

aspect of fact was overwhelmingly corroborated by PW Nos.6,7,10 and 13 who in their testimonies asserted that they positively had seen and identified Convict-Appellant A. Ali who was accompanied by two poor minor victims on the fateful day, but unfortunately the following day the poor minor victim boys were found slaughtered dead at the paddy field of Titarkona under 6 No. Mirpur Union, Bahubal PS of the District Habiganj and that this aspects of facts, we are of the view that, constitute “Special Facts circumstances” as a result of which the onus is shifted on the shoulder of the convict-Appellant A. Ali to show that the two poor victim minor boys were safely released to their mother’s (PW No.11) custody from his custody, but the convict-Appellant A. Ali failed showing or proving these special facts circumstances for which his innocence is incompatible with the evidence and attended circumstances as proved by PW No.11 and PW Ns. 6,7,10 and 13.

In order to convict an accused person in a case in absence of direct evidence, there are certain preconditions to be met by the trial court below and the preconditions were enunciated in the case namely *The State Vs. Amjad ali*, 72 DLR (2020),AD,113, Their Lordships of the Appellate Division held that:

- I. In absence of direct evidence, the Trial Court below may convict an accused person based on circumstantial evidence and such circumstantial evidence must be cogently and coherent establish;
- II. The circumstantial evidence must be definite having definite tendency pointing towards the guilt of the accused and in their totality circumstantial evidence must unerringly let to the conclusion that within all human probability the accused and none else but the accused had committed the offences;
- III. The circumstances should be consistence only with the guilt of the accused and several circumstances relied upon by the prosecution are established beyond doubt that the incriminating facts are such as to be incompatible with the innocence of the accused and incapable of explanation of any reasonable hypothesis other than that of the accused person's guilt;
- IV. The prosecution must establish the various chain of links by evidence and it must be such as to rule out any reasonable likelihood of the innocence of the accused person;

In another case namely Haji Mahmud Ali Londoni and Another Vs. The state and another, 5 SCOB92015) AD102, it was held by our Apex Court in respect of circumstantial evidence that:

“It is settled principle that where inference of guilt of an accused is to be drawn from the circumstantial evidence only those circumstances must, in the first place be cogently establish. Further, those circumstances should be of a definite tendency pointing toward the guilt of the accused, in their totality, must be unerringly let to the conclusion that within all human probability the offence was committed by the accused excluding any other hypothesis”

We find that the circumstances as to convict-Appellant A. Ali’s act of procuring the bodies of the victim minor boys from their mother (PW No.11) on 18.08.2008, the circumstances as to witnessing the victim boys with A. Ali by PW Nos.6,7,10 and 13 and subsequent discovery corpses from a paddy field are strong and well-founded incriminating circumstances which have definite tendency pointing toward the guilt of Convict-Appellant A. Ali. The strong incriminating circumstances, as proved by PW Nos.1,6,7, 10,11 and 13 against the Convict Appellant A. Ali, in

their totality unerringly lead to the conclusion that within all human probability the offence of killings two minor victim brothers namely Ahad Ali and Nuruj Ali (who are sons of PW Nos. 1 and 11) were committed murder by Convict-Appellant A. Ali excluding any other hypothesis.

Further that we found no evidence on record of the trial court below to the effect that the Convict-Appellant A. Ali safely released the two victim sons of the PW Nos. 1 and 11 and that the minor victims were released at some point of time from the custody of the Convict-Appellant A. Ali and, therefore, A. Ali is not guilty of the offence of killings of the poor victims. Since prosecution successfully established series of convincing facts to the effect that the Convict-Appellant A. Ali was complete control and custody of the poor minor victims and that the prosecution also successfully and beyond reasonable doubt proved incriminating circumstances that A. Ali was the last person who was seen with the minor victims just before the recovery of the corpses of the two victim minor boys. Further that the Convict-appellant A. Ali failed bringing any facts by his cross examination or by way of giving evidence in defence that he was not the last person to have the custody and control over the bodies of the victims, the mere suggestions by the Convict-

Appellant A. Ali that he is innocent is of no use as a defence in this case pursuant to section 103 Illustration (a) as well as Section 106 Illustration (a) of the Evidence Act, 1872. Further we found that since the onus of proof has already been shifted upon the Convict-Appellant A. Ali to furnish explanation during the trial in his defence that he was not the killer and that the victims were released safe and sound from his custody to the custody of the mother of the victims, the Convict-Appellant A. Ali cannot just avoid the criminal liability of murdering the two poor victim minor boys by making mere denial as to his involvement.

Prosecution proved previous Grudge & Motive of A. Ali in Murdering the Minor Victims:

In the instant case, we further notice from the evidence of PWs that the Convict-Appellant had ancient grudge over the land dispute as proved by PW No.1 (father of victims) as well as post monetary transaction with the father of the minor victims as proved by PW. No.11 (mother of victims). A. Ali was the very person who fostered bitter relation with victims' father, but then the Convict-Appellant A. Ali showed his aptness of mastery in staging and maintaining friendly disposition by suppressing his grudge against the parents of the victims and was on a constant

vicious mission to take vengeance, and in this connection, A. Ali maintained continuous and frequent visits to the house of the victims' parents as evident from the evidence of the PWs.

Convict-Appellant A. Ali on the fateful day of occurrence cunningly obtained the body of the poor minor victims from the safe custody of the PW No.11(Mother) and in absence of the PW. No.1 (Father) under the cloak of the distortion that he (A. Ali) was very pleased to attend the wedding ceremony at his Aunt's house with the two sons of PW Nos. 1 and 11 to the Joypur village. The obtaining of the bodies of the victims under the cloak of attendance at the marriage ceremony at Joypur village, in our opinion, is the first point of execution of A. Ali's vicious scheme so as to facilitate the bodies of the victims from the safe custody of their parents so as to execute the ultimate objectives i.e the culpable homicide amounting to the murders of the poor minor victims. Previous grudge arising out of past monetary transactions and dispute over land with father of the victims played vital motivating factors in taking revenge by Convict-Appellant A. Ali and in this regard, in case Nausher Ali Vs. The State, 39 DLR (1987), A.D.194 and in another Case Yasin Rahman @ Rahman Yasin @ Titu Vs. The State, 19 BLC (2014), A.D., 8, their Lordships of the Appellant Division held

that when motive is established by prosecution is a case, it would be corroborative circumstances leading to the complicity of the accused in the commission of the offence.

In another leading case Md. Humayun Kabir Vs. The State, 15 SCOB (2021), AD, 76, our Apex Court held that the proof of motive helps the Court in reaching to a correct conclusion when there is no eyewitness of the occurrence of the case. It is true that the failure to establish the motive for the crime does not necessarily over throw the entire prosecution case, but it casts a duty upon the Court to scrutinize other evidence with greater care, and this is because, motive acts as a motivating factor for a man to do a particular act and the same is relevant fact behind a crime.

The prosecution, in this case, successfully assigned two circumstances as to motives and one of the motives was admitted by A.Ali himself in his confession stated that "আমি, শফিক, ছিদ্দিক আলী ও সুরুজ আলীর কাছে প্রায় ২৫ হাজার টাকা পেতাম। এই টাকা আমি খুজলে তারা আমাকে দেয়নি। আমি আর খুজিনি" and this part of confession is corroborated by the evidence of PW No.11 (Mother of victims) and in her words "আমার আপন দেবর শফিক আলীর আছে আ: আলী টাকা পেত। টাকা নিয়ে তাদের মধ্যে ঝামেলা হয়। তখন আ: আলী আমার কাছে ঐ টাকা চায় যেহেতু আমার দেবর টাকা দিচ্ছে না, তখন আমি টাকা দিতে রাজি হই না, তখন সে

আমার ছেলেদের মারে।” Although the learned Counsel for A. Ali submitted that the prosecution failed proving motive, the prosecution brought under the surveillance of evidence of two specific motives such as:

- (I) Dispute over claim for share of land between PW No.1 (father of victims) with Convict-Appellant A. Ali as evident in the PW No.1’s testimony and veracity of this testimony was not challenged under cross examination by A. Ali: and
- (II) Dispute over monetary transaction and this motive was corroborated by the confession (Exhibit No.6) of Convict-Appellant A. Ali by the evidence in chief of PW No.11(Mother of victims).

We, therefore, find the submissions of learned Counsel for A. Ali as to “no motive was proved by prosecution” completely unfounded and baseless. We rather find substantive evidence on record of the learned Court below as to well establish motive of A. Ali for the killings of the minor victims in this case.

Convict-Appellant A. Ali’s Inculpatory confession:

Now, let us consider another aspect of prosecution evidence against the Convict-Appellant A. Ali which is confessional statement dated 25.08.2008 (Exhibit No.6). The

Convict-Appellant A. Ali made a confession which reads as:

“আমি শফিক, সিদ্দিক আলী ও সুরুজ আলীর কাছে প্রায় ২৫ হাজার টাকা পেতাম। এই টাকা আমি খুজলে তারা আমাকে দেয়নি। আমি আর খুজিনি। আমার সাথে এদের আর কোন কথা হয়নি। আরজু মিয়া আর সায়েদ মিয়া আমাকে সুরুজ আলী ও আহাদ আলীকে খুন করতে বলে। আমাকে এরা এ কাজের জন্য ২ হাজার টাকা দিচ্ছে। আমি টাকা নিয়ে কাজ করতে অস্বীকার করি। এতে খিণ্ড হয়ে আরজু মিয়া ও সায়েদ মিয়া আমাকে কাজ করে না দিলে খুন করবে বলে হুমকি দেয়। পরে ১৮ তারিখ সোমবার আমি নুরুজ আলী ও আহাদ আলীকে মিরপুর নিয়ে যায়। এরপর তাদের দুইজনকে রাস্তায় দাড়া করিয়ে বিস্কুট আনতে যায়। এসে দেখি তাদের দুইজনকে আরজু আর সায়েদ নিয়ে যাচ্ছে। আমিও তাদের পিছন পিছন যায়। এরপর সুরুজ আলী ও আহাদ আলীকে সায়েদ আলী চেপে ধরে। ঐ সময় আরজুও সেখানে উপস্থিত ছিল। আমি কাচি দিয়ে নুরুজ আলী ও আহাদ আলীকে নিজে জবাই করি। লাশগুলো ওখানেই আমরা রেখে আশি। এরপর আরজু ও সায়েদ আমাকে হুমকি দেয় যে যদি আমি কাউকে বলি তবে তারা আমাকে খুন করবে। খুন করা কাচিও সেখানে ফেলে আসি। আমি আর কিছু জানিনা। এই আমার জবানবন্দী।”

PW No.3 (Sr. Judicial Magistrate, Rajib Kumar Biswas) recorded the confession and placed the confession on oath before the learned Trial Court below. The PW No.3 adduced the confession as Exhibit No.6 and PW No.3's signature as Exhibit No.6/1 Series. The confession was never challenged by the two Convict-Appellants and the Convict Absconder. PW No.16 (SI

Abul Kalam Azad & I.O. of the case) testified that he arranged record of confession by the learned Senior Judicial Magistrate on 25.08.2008, and this PW No.16 was cross-examined by all the 3 Convicts, but none of them, Convict-Appellant A. Ali in particular, challenged the PW No.16 under cross examination that the confession was recorded taking recourse to threats, tortures and ill-treatments.

This confessional statement (Exhibit No.6) of A. Ali, we are of the view meets certain legal preconditions as enunciated by our Honourable Apex Court in number cases and the preconditions are as follows:

- (I) It is consistent to the prosecution story as enunciated in Mizazul Islam @ Dablu Vs. The State, 41 DLR (1989) A.D, 157
- (II) The confession is inculpatory in nature as enunciated in Major Md. Bazlul Huda, Artillery and Others Vs. The State, 18 BLT(2010, Ad, 3
- (III) This confessional statement has not been retracted by A. Ali and as such it is true and voluntary as enunciated in Islam Uddin (Md.)@ Din Islam Vs. The State, 13 BLC(2008), A.D, P.81 and Monir Ahmed Vs. The State 16SCOB(2022), A.D.51

It is evident from the record of the Court below that no suggestion was at all made to PW No.3 (Confession Recording Magistrate) and PW No.16 (I.O. of the case) under cross-examination to rebut the voluntariness of the confession by suggesting that it was obtained by recourse to threats, tortures and ill-treatments.

We further carefully observed from the evidence that the confessional statement of A.Ali cannot be said to be an isolated evidence, since this confessional statement stands against A. Ali in collaboration with strong, neat and undeniable circumstantial evidence as propagated by PW Nos.1,6,7,10, 11 and 13 and as such the confessional statement (Exhibit No.6) of A. Ali in collaboration with the circumstantial evidence of said PWs firmly established circumstances of guilt against the Convict-Appellant A. Ali, which, we hold, is inconsistent with the plea of innocence of the Convict-appellant A. Ali.

We also find that the confession is further corroborated by the medical evidence in that convict-Appellant A. Ali stated that he slaughtered the minor victims with Kachi and in his own language “আমি কাচি দিয়ে নুরমজ আলী ও আহাদ আলীকে নিজে জবাই করি।” and this part of Convict-Appellant A. Ali’s confessional statements is corroborated by the Post Mortem Report No.83 of

Ahad Ali (Exhibit No.9) and by the Post Mortem Report No.82 of Nuruj Ali (Exhibit No.8). Both the post mortem reports matched the cut injuries of both the victims which were caused with sharp edge weapon namely Kachi.

We find from the record of the court below that the confession is corroborated by several strong, neat and impeccable circumstantial evidence they are as follows:

- (I) Convict-Appellant A. Ali was the vary person who obtained the bodies of the victim boys from the safe custody of the PW No.1 (mother of victims) as evident in the testimony of PW No.01;
- (II) The issue of having control and custody of the bodies of minor victims on the fateful day was further corroborated by the PW Nos. 1,6,7,10,11 and 13 who saw the minor victims with A. Ali as evident from the testimonies of the said PW Nos.1,6,7,10,11 and 13.
- (III) Convict-Appellant confessed (Exhibit No.6) that he killed the victim boys with a Kachi and the Post mortem report No.83 of Ahad Ali marked as Exhibit No.9 and Post Mortem Report No.82 of Nuruj Ali

marked as Exhibit No.8 correspond the injuries found on the neck and throat of the victims;

- (IV) The Convict-Appellant A. Ali's confession also corroborated by the testimony of the PW No.11 (mother of victims) as to the motive of killings for disputes relating to monetary transaction;
- (V) The confession of A. Ali revealed that he was in touch with the victim boys and he was the only one person who slaughtered the boys with Kachi and the admitted control and custody of the victim boys was corroborated by the testimonies of the PW Nos.1,6,7,10,11 and 13.
- (VI) The confession revealed that A. Ali killed himself the minor victim boys with Kachi, and necks and throats of both the minor victim boys were badly cut with Kachi and the said injuries were substantive and operative cause of death which were confirmed by the medical evidence namely the Post Mortem Report No.83 of Ahad Ali (Exhibit No.9) and the post Mortem Report No.82 of Nuruj Ali (Exhibit No.8).

We also find that the confession of A. Ali in collaboration with circumstances established against A. Ali by prosecution evidence that A. Ali was in full and complete control and custody of the bodies of the victims on the fateful day essentially shifted a duty of burden of proof upon the Convict-Appellant A. Ali under section 103(a) and 106(a) of the Evidence act, 1872 to show that the minor victims were released to the mother (PW No.11) of the victims from the custody of the A. Ali, but no such attempt was at all made from the end of Convict-Appellant A. Ali to rebut such inculpatory confession and well-established circumstantial facts evidence of the prosecution rendering the prosecution case proved beyond reasonable doubt.

Convict-Appellant A. Ali's Prayer for Life Sentence instead of Death Sentence:

During the hearing the learned Counsel for Convict-Appellant A. Ali prayed for reducing the death sentence to that of life sentence. In order to decide as to reducing death sentence to life sentence, it is settled judicial principle of sentencing that balance must be stricken between the aggravating factors and the mitigating factors of the case. The jurisprudence of considering life sentence instead of death sentence has been excellently explicated in Dr. Miah Md. Mohiuddin & Others Vs. The State &

Others, 17 SCOB[2023], AD,1 (Paragraph No.67), and in the words of his Lordship Mr. Justice Hasan Foez Siddique, the Honourable CJ:

“The principles governing the sentencing policy in our criminal jurisprudence have more or less been consistent. While awarding punishment, the Court is expected to keep in mind the facts and circumstances of the case, the legislative intent expressed in the statute in determining the appropriate punishment and the impact of the punishment awarded. Before awarding punishment a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight age and a just balance has to be struck between the aggravating and mitigating circumstances. Considering the depraved and shameful manner in which the offence has been committed, the mitigating factor would not outweigh the aggravating factors. In this case, there was no provocation and the manner in which the crime was committed was brutal. It is the legal obligation of the court to award a punishment that is just and fair by administering justice tempered with such mercy not only

as the criminal may justly deserve but also the right of the victim of the crime to have the assailant appropriately punished is protected. It also needs to meet the society's reasonable expectation from court for appropriate deterrent punishment conforming to the gravity of offence and consistent with the public abhorrence for the heinous offence committed by the convicts."

In Shahid Ullah @ Shahid & Others Vs. The State, 4SCOB(2015), A.D.,11 as well as *BLAST & Another Vs. Bangladesh & others, 7 SCOB (2016), A.D.42*, our Honourable Apex Court held that culpability of the offence and aggravated characters as disclosed from the facts and circumstances of the case are to be meticulously examined before considering conversion of death sentence to life sentence. Side by side the mitigating factors in the case also need be examined thoroughly. We are, therefore, obliged examining here in this case as to whether there are any mitigating factors in comparison with the aggravating factors on record of the trial court below so as to take lenient view for Convict-Appellant A. Ali. Such examination of aggravating factors and mitigating factors helps deciding whether a lenient view while imposing punishment upon Convict-Appellant A. Ali can be taken or not. We have

observed from the evidence of the Prosecution witnesses certain culpable characters and aggravating factors in the commission of the offence by Convict-Appellant A. Ali and the culpability of the offence and aggravating factors are catalogues as follows:

- (I) Convict-Appellant A. Ali showed his mastery in concealing his vicious criminal intent under the cloak of befriending with the parents of the victim minor boys so as to secure the bodies of the victim boys in order to materialise his criminal enterprise of killing the victim boys.
- (II) Convict-Appellant A. Ali carried out his vicious murderous scheme for a long period of time rendering his acts as pre-mediated criminal enterprise and he was looking for a perfect opportunity like an astute Reynard to obtain bodies of the poor victim boys.
- (III) Convict-Appellant A. Ali obtained the bodies of the victim boys from the safe custody of their mother on the fateful day and then killed the victim boys mercilessly by slaughtering both of them.
- (IV) Convict-Appellant A. Ali did not show any mercy at all while he slaughtered the minor victim boys to

death at their tender age and that victim Ahad Ali was only 12 years and victim Nuruj Ali who was only 10 years of their tender age.

- (V) Convict-Appellant A. Ali had clear criminal specific intent to kill the innocent and sinless minor victim boys and his criminal specific intent was active throughout the material point of time.
- (VI) We have also observed that the Convict-Appellant A. Ali had confessed before the learned Senior Judicial Magistrate and he never challenged the genuineness and involuntariness of the confession under cross-examination.
- (VII) Convict-Appellant A. Ali never surrendered voluntarily to the law enforcement agency, but was on flee so as to evade arrest, it was the Convict Sayed A. Ali, Babul, Mubed, yousef and Yunus who apprehended him and handed him over to the Police.
- (VIII) Convict-Appellant A. Ali did not give any evidence to rebut prosecution proven facts about his direct custody of the victim boys and his involvement in the killing of the victim boys whereas onus of proof

of innocence had already been shifted upon him under section 103 (a) and 106(a) of the Evidence Act, 1872 relating to the fact that the victim boys were released safely from his vicious clutch.

(IX) Convict-Appellant A. Ali rather carried out his criminal act by falsely incriminating Sayed in the confessional statement, since Sayed played vital role in detecting and apprehending him.

(X) Finally, we observed that the Convict-Appellant A. Ali's offence is the most heinous offence culpable homicide amounting to murder, and he claimed two lives of minor victims for which he never showed true remorse.

Now, let us examine what mitigating factors the Convict-Appellant A. Ali has on record of the trial court below. From submissions of the learned Counsel for Convict-Appellant A. Ali, we found that;

(I) The Convict-Appellant A. Ali was arrested on 25.08.2008. The judgment of conviction and sentence had been promulgated on 26.02.2017.

- (II) We have also considered records of the court below and we found that Convict-Appellant was never granted bail.
- (III) The Convict-Appellant A. Ali has been tarnishing in condemned cell for more then last 5 years.
- (IV) The learned counsel for Convict-Appellant A. Ali tried his best to persuade us to consider his long term jail period and above 5 years of gruesome living in the condemned cell as mitigating factors.

We have considered these submissions and records of the court below but comparing the aggravating factors in comparison with the mitigating factors, catalogued as above, we are of the view the long term jail period and living above 5 years in the condemned cell do not outweigh aggravating factors available on record of the case. Moreover we also are of the view that the unpitying premeditated and ruthlessly brutal killings of two poor minor victims by convict-Appellant A. Ali by way of snatching their safe custody from their poor victim mother themselves are such aggravating factors that only the highest corporeal sentence of death is justified approach in this case. Moreover, Convict-Appellant A. Ali admittedly (confession marked as Exhibit No. 6) slaughtered the minor victim boys with Kachi and he did not

show any mercy upon the minor victim boys while carrying out such ruthlessly brutal killings. We find that the aggravating factors as disclosed from the prosecution evidence and the culpability of the offence outweigh the mitigating factors. We therefore, do not find any substance in the submissions of learned counsel for Convict-Appellant A. Ali for reducing the death sentence of life sentence and as such this prayer is outright rejected.

Evidence Against Convict-Appellant Sayed Ali:

We are compelled considering and determining three vital points in respect of Convict-Appellant Sayed Ali and they are as follows:-

Firstly: As to whether Sayed Ali played pivotal role in apprehending the principal accused Convict-Appellant A. Ali.

Secondly: As to whether the murder weapon was recovered from the house of Sayed Ali.

Thirdly: As to whether the confession of A. Ali can be relied upon to connect Sayed Ali with the offence of murdering the minor victims in conjunction with other evidence on record.

Let us now consider the evidence against Sayed Ali.

The first point, we would like to consider, is the apprehension of A. Ali by Sayed Ali. It is evident from the

evidence of PW Nos. 5, 6, 7, 11 and 16 that they asserted that Convict-Appellant Sayed Ali played pivotal role in apprehending the Convict-Appellant A. Ali. From the prosecution evidence it is evident that Sayed Ali was present at the meeting held under leadership of local village patron Zitu Mia (PW No. 5) for the apprehension of A. Ali. It is also evident from the prosecution evidence as well as from the evidence of three (3) DWs that Sayed Ali was present at the place in order to apprehend A. Ali. PW No. 2 Zitu Miah also testified that Sayed Ali was present at the Bahubal Police Station where A. Ali gave statement to the police. it is apparent that Sayed Ali acted like a good and dutiful citizen in the discharge of his duty as entrusted under Section 59 (*Arrest by private person without a warrant in respect of a non-bailable & cognizable offence*) of the Code of Criminal Procedure, 1898 in apprehending Convict-Appellant A. Ali.

The second point is the recovery of Kachi (Sickle) from the house of Sayed Ali and, in this regard the vital witness P W No. 5 (Jitu Miah) testified in chief that the Kachi was recovered from the house of Sayed Ali, but under cross-examination PW No. 5 denounced recovery of the Kachi by stating that “এ কাঁচিটা আজকে আদালতে নেই। এ কাঁচিটা জব্দ হয়নি। যারা কৃষি কাজ করে সবার ঘরে ঘরে এ রকম কাঁচি আছে।”. PW No. 14 (Md. Anowar Hossain), witness to the

Seizure List (Exhibit No. 7) testified he was present at Sayed Ali's house when the Kachi was recovered and seized, but under cross examination PW No. 14 clearly testified that “ ছায়েদের পক্ষে-যে ঘর হতে কাচি উদ্ধার হয় সে ঘরে আমি যাইনি। আসামী ছায়েদের ঘর হতে কাচি উদ্ধার হয়নি। তার ঘরের পাশে ১টি রুম হতে উদ্ধার হয়। কাচি উদ্ধার হওয়ার সময়ে ছায়েদ উপস্থিত ছিলনা। যে ঘরটা হতে কাচি উদ্ধার হয় তার মালিক মাহমুদ। সে ছায়েদের চাচাতো ভাই। তারা পৃথক পৃথক ঘরে বসবাস করে।”। The testimonies of PW Nos. 5 and 14 cast reasonable doubt as to the truthfulness of recovery of the Kachi from the house of Convict-Appellant Md. Sayed. We further notice that the learned Counsel for the Convict-Appellant Md. Sayed rightly suggested during cross examination of the PW's that Convict-Appellant A. Ali. named Sayed Ali out of grudge and enmity, since A. Ali was apprehended and handed over to the police by Md. Sayed and we find it credible and believable that A. Ali incriminated Md. Sayed just to take vengeance out of grudge and malice and this means that referring the name of Md. Sayed by A. Ali in his confession is not credible and based on which conviction and sentence against Md. Sayed cannot be just and safe in law.

The third point is the admissibility and use of confession of Co-Accused A. Ali against Sayed Ali. In this regard, the scheme of law in respect of use of confessional statement against

other co-accused in Bangladesh is that a co-accused is a “competent witness” against another co-accused and the term “competent witness” is that legal dicta under Section 133 of the Evidence Act, 1872. Section 133 of the Evidence Act, 1872 reads as follows:

‘An accomplice shall be a competent witness against an accused person: and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.’

It transpires from the provision of section 133 of the Evidence Act, 1872 that an accomplice or co-accused is ‘Competent Witness’ against another accused person. This means that a co-accused can be declared to be a competent witness and his testimony can be used as admissible evidence in that trial in which the accused and the co-accused were jointly under same trial. Now, question is how a co-accused the legal scheme of Bangladesh suggests that such an accused must be declared to be a competent witness and law suggest that the accused who can be produced as competent witness against another co-accused must be declared as an ‘Approver’. In order to make a co-accused as an approver against another co-accused or other co-accused, the provision of section 337 or 338 of the

Code of Criminal Procedure, 1898 must be deployed. The provision of section 337 of the code of Criminal Procedure empowers senior Judicial Magistrate or other Judicial Magistrates to offer pardon and to record the statement of co-accused as an approver's statement. Section 338 of the Code of Criminal Procedure, 1898 empowers the Judges of the court of sessions to direct CJM or CMM, as the case may be, to record statement of an accused as approver's statement in exchange of offer of pardon. There are certain legal tests as propagated under section 337 and 338 of the Code of Criminal Procedure, 1898 read with Sections 30 and 114 (b) of the Evidence Act, 1872 in order to use confession of a co-accused against another co-accused and they are as follows:-

- (1) Where a case hopelessly fails procuring a credible eye witness, but there is or are confessional statements that apparently reveal commission of gruesome and brutal offences;
- (II) The Trial Court below is satisfied that the confessional statement of the confessing accused discloses active participation in the commission of the offence by himself and by other co-accused persons who are jointly charged under same trial;

- (III) Such a case should be supported by evidence of the approver and the confessing co-accused should be offered pardon in exchange of full and true disclosure of commissions of the offence.

Once the statement of such co-accused is recorded either under Section 337 or 338, the approver's recorded statement can be used as evidence against other co-accused. The settled principle of law is that if a confession of a co-accused is to be used against another co-accused, there must be independent corroborative evidence on record and the confession of co-accused in such a case can be used to lend assurance to the corroborative evidence on record. In this regard, *in Lutfun Nahar Begum Vs. The State, 27 DLR (1975).AD, 29* their Lordships of the Appellate Division held that confession of an accused cannot be treated as substantive piece of evidence against another co-accused but can only be used to render assurance to other evidence. We have carefully perused the orders of Court below, but we could not find any order to the effect that the Court below had directed to record the statement of A. Ali as an Approver for the State, and, therefore, we find it difficult to allow the use of the confessional statement of A. Ali against Md. Sayed Ali.

There is one further legal requirement of using confessional statement against another Co-Accused which is once the approver's evidence is secured and the approver is offered to be prosecution witnesses before the Court of Trial, the Co-accused shall have right to cross examine the previous recorded statement as well as veracity of evidence pursuant to sections 145 and 146 of the Evidence Act, 1872. Now, that there is one further legal condition in using confessional statement against other co-accused which is Section 114 Illustration (b) of the Evidence act, 1872 which provides that "*That an accomplice is unworthy of credit, unless he is corroborated in material particulars*" This means that the confessional statement of a co-accused legally turned into approver's evidence must be corroborated in material particulars in order to make safe use of it.

We also found that we have two categories of convicts before us. The first category is confession accused namely A. Ali. The second category is non-confessing accused namely Md. Sayed Ali. These categorizations were enunciated in an age old leading case namely *Bhuboni Sahu Vs. The King* 51 BOMLR (1949) P.995 and a large bench comprising five judges of the Bombay High Court excellently explicated the jurisprudence of

use of co-accused confessional statement by creating the two categories of accused. In this case, their Lordships held that the confession is not defined as evidence in the Evidence Act. Further that the confessional statement is not recorded on oath neither it is produced before the trial court by the maker of it on oath, and, therefore, it does not come within the terms and definition of evidence thereby making it a very type of evidence. Their Lordships also opined that even if it is accepted as evidence the confession itself does not amount to proof of the guilt of the co-accused in question. It is worth mentioning that the act of incriminating Convict-Appellant Sayed Ali by Convict-Appellant A. Ali by referring his name in the confession stands in isolation of all testimonial evidence of prosecution's witnesses as well as real evidence such as Kachi, and, therefore, there is no corroboration on record as required under Section 114(b) of the Evidence act, 1872, and it is settled principle of law pursuant to Majid Sheikh @ Majid and others Vs. The state, 11 BLC (2006). A.D.149 That confessional statement of a co-accused cannot be basis of safe conviction against another co-accused in absence of other independent and corroborative evidence. We have considered the evidence of vital witnesses such as PW No.1 (Father), PW No.2 (Informant), PW No.3

(Confession Recording Magistrate), PW No.5 (Jitu Miah, the leading person to apprehend A. Ali) PW No.6 (Md. Akul Miah, the shopkeeper who saw Md. A. Ali with the two minor victims), PW No.7 (Abu Miah, who saw Md. A. Ali with the two minor victims) PW No.10 (Samsul Haque who saw Md. A. Ali with the two minor victims) and PW No.11 (Mother of victims) and that none of these vital prosecution witnesses named Sayed Ali at all to incriminate him with the killings of two minor victims in this case. This means that confession (Exhibit No.6) of A. Ali in which Sayed Ali was incriminated stands in isolation of other prosecutorial evidence on record, and since the confession of co-accused A. Ali is not substantive evidence against Sayed Ali, the conviction and sentence against Sayed Ali based on uncorroborated and solitary confessional statement of A. Ali cannot be sustained in law. We, therefore, are of the view that the learned Judge of the trial court below wrongly and erroneously convicted and sentenced Sayd Ali which invariably warrants intervention.

Issue of Exclusion of Evidence of DW No.2 Babul Hossain

We have noticed that the learned Trial Court below passed an order of cancellation (বাতিল) of evidence of DW No.2 Babul Hossain by Order No.73 12.02.2017. The reason for such

exclusion by way of cancellation of evidence is that D.W No.2 Babul Hossain never turned up after giving evidence in chief before the court, and as a result of which the prosecution could not cross-examine him. It is settled law pursuant to Section 146 (1),(2) and (3) of the Evidence Act, 1872 that when a party to a case produces witness to give evidence in chief, the other party becomes legally entitled to cross-examine the witness relating to veracity of its testimony, to discover what is the position of witness in life and to shake the credit of the witness and his testimony. DW No.2 appeared before the court below and give evidence in chief, but he (DW No.2) did not turn up before the Court to allow the prosecution to examine DW No.2's testimony under cross-examination. This we believe is unashamedly unfair conduct displayed by the DW No.2 causing grave prejudice to the prosecution. But, the question as to whether such unfair conduct of DW No.2 allows the Trial Court below to cancel the defence evidence by passing an order to this effect.

We have considered the rules of evidence as enshrined in the Evidence Act, 1872. There are rules of exclusion as to evidence if such evidence is inadmissible in law and if such evidence is illegal pursuant to operation of law. Sections 24, 25 and 26 of the evidence Act, 1872 allow the Court to exclude the

use of confessional evidence for its inadmissibility in law. Evidence of a witness may be excluded from consideration if such evidence in chief is taken by leading question by the witness producing party pursuant to sections 141 and 142 of the Evidence Act, 1872. Exclusion of evidence to contradict answers to questions testing veracity is allowed pursuant to Section 153 of the Evidence Act, 1872. Evidence can be excluded by impeaching witness as hostile witness pursuant to Section 155 of the Evidence Act, 1872, and so on. There are also rules of exclusion of evidence taken from the accused by police by means of tortures pursuant to Sections 163(1) and 343 of the Code of Criminal Procedure, 1898. Evidence can also be excluded for consideration if it offends provisions of Article 35(4) and 35(5) of the Bangladesh Constitution. But, we could not find any provision of law in the Evidence Act, 1872 or other laws that allows the learned Trial Court below to exclude any evidence by way of cancellation of such evidence. The learned trial Court below is very much at liberty not to consider any evidence which is attracted under the exclusionary rule, or which is inadmissible or which is not lawfully obtained, but the learned Trial Court below does not have any power in law to cancel evidence by passing an order to that effect. Here, in this case, we find that the

DW No. 2 Babul Hossain did not turn up before the Court below and compelled the prosecution to suffer failure to cross-examine the veracity of testimony of DW No. 2, the learned Court below was very much empowered not to consider in this evidence on this ground, but the learned Court cannot cancel evidence by passing an order. However, we conclude that the cancellation order of the Trial Court below bearing Order No. 73 dated 12.02.2017 is set aside and that the evidence of DW No. 2 is very much part of the record of the Court below, but since DW No. 2 deliberately failed to appear before the Court without assigning any reason as to this absence for which prosecution could not cross-examine the testimony of DW No. 2, the Court below was at liberty not to consider the evidence DW No. 2 for not allowing the prosecution to cross-examine.

Admissibility of Confession of A. Ali Against Arju Miah:

Now, let us examine prosecution evidence of confessional statement against Convict Md. Arju Miah(Absconder an initio) of A. Ali. The only evidence against Convict absconder Arju Mia is the confession of A. Ali. We refer to our analogies relating to confessional statement as pronounced in respect of Convict Appellant-Sayed Ali that are applicable in respect of Convict Appellant-Arju Miah.

We have carefully perused evidence of 19 PWs with particular reference to evidence of PW No. 1 (Father), PW No. 2 (Informant), PW No. 3 (Confession Recording Magistrate), PW No. 5 (Jitu Miah, the leading person to apprehend A. Ali), PW No. 6 (Md. Akul Miah, the shopkeeper who saw Md. A. Ali with the two minor victims), PW No. 7 (Abu Miah, who saw Md. A. Ali with the two minor victims), P.W. No. 10 (Samsul Haque, who saw Md. A. Ali with the two minor victims) and PW No. 11 (Mother of victims), and we found that all these vital witnesses referred to in their evidence the name of Convict-Appellant A. Ali, but the Convict Md. Arju Miah was never referred to in their evidence. Although Convict Arju Miah was incriminated in the confession (Exhibit No. 6) by Convict-Appellant A. Ali, but there is no iota of any corroborative evidence on record of the Court below from the end of Prosecution which in collaboration with the confession of Convict-Appellant A. Ali could connect Convict Arju Miah with killings of two minor victims beyond reasonable doubt. We, therefore, are of the view that mere reference of the name of Convict Arju Miah by Convict-Appellant A. Ali is not good enough to convict Arju Miah in law. We are of the view based on evidence on record that the prosecution hopelessly and miserably failed bringing any iota of

evidence to record safe and legal conviction and sentence against Convict Arju Miah. We also would like to record that the mere fact that Arju Miah was an *absconder ab initio* i.e. he was on flee from the beginning till the end of the trial, this is not good enough to suggest that he is guilty as charged. The prosecution was duty bound to prove nexus of Arju Miah with the killings of the minor victim boys by adducing piles of evidence beyond reasonable doubt, but we do not find any such evidence on record.

There was the issue of murder weapon which is a Kachi. It transpires from the prosecution evidence that no issues of the Kachi such as procuring the Kachi, use of Kachi from murdering the victims boys, concealing the Kachi after the murders, and recovery of the Kachi had no nexus with Convict absconder Arju Miah. No prosecution witness referred the Kachi connecting Arju Miah. Neither the prosecution witnesses had brought in evidence the issue that they had seen Arju Miah with the minor victim boys before or at the time of or after the killings of the victims. The prosecution witnesses even could not make any suggestions in their evidence that they had heard of the name of Arju Miah in connection with the killings of the minor victims boys.

We have only found on evidence the reference of the name of Arju Miah in the confession only which is not even corroborated by any iota of other independent any corroborating evidence, and it is the scheme of law and settled principle of criminal justice system of our soil pursuant to Sections 133 and 30 read with Section 114(b) of the Evidence Act, 1872 that a confession of a co-accused is not worthy of any credit against another co-accused unless it is supported and corroborated by any other corroborating evidence in material particulars. Since the confession of A. Ali incriminating Arju Miah stands in isolation and since the Prosecution also failed bringing any corroborative evidence on record against Arju Miah, we find no complicity of Arju Miah in the killings of the victim boys, and we, therefore, are of the view that the learned Judge of the trial court below wrongly and erroneously convicted and sentenced Arju Miah which warrants intervention.

Our Conclusion:

In view of the appreciations of prosecution evidence discussions we have made, hereinabove, we are of the view that the prosecution hopelessly and miserably failed proving the charge brought against the Convict-Appellant Md. Sayed Ali and the Convict *absconder ab initio* Arju Miah.

The prosecution successfully proved the Convict-Appellant was the one who obtained the body of the minor victim boys prior to the recovery of their corpses and that A. Ali had motives for killings the victim boys. The prosecution also successfully proved that the confession of A. Ali was consistent to prosecution case, inculpatory, voluntary and true and that the murders of the victim boys by A. Ali were premeditated, calculated, brutal and ruthlessly carried out, and as such we found that convicting and sentencing A. Ali by the trial court below was justified in view of facts, circumstances and evidence on record.

In the result, the death reference so far as it relates to condemned Convict-Appellant A. Ali is accepted. His conviction and sentence is hereby upheld. A. Ali's Criminal Appeal No. 6928 of 2017 and Jail Appeal No. 102 of 2017 are dismissed.

Sayed Ali's Jail Appeal No. 228 of 2019 is allowed. The conviction and sentence dated 26.02.2017 passed by the learned Additional Sessions Judge, Habiganj in Sessions Case No. 289 corresponding to GR Case No. 157 of 2008 arising out of Bahubal PS Case No. 13 dated 19.08.2008 so far as it relates to the condemned prisoner Sayed Ali and Convict absconder *ab initio* Md. Arju Miah are hereby set-aside. the condemned

prisoner Sayed Ali, son of late Marfot Ullah, of village-Joshpal (Kunagaon), Police Station Bahubal, District-Habigonj and Convict absconder ab initio Md. Arju Miah, son of late Abdul Malik of Village-Joshpal (Kunagaon), Police Station Bahubal, District-Habigonj are acquitted of the charge. Condemned prisoner Md. Sayed Ali be released forthwith if he is not wanted in connection with any other cases.

Send down the subordinate Court records along with a copy of this judgment to the court below at one.

Md. Mostafizure Rahman, J.

I agree