

Present:

Mr. Justice S.M. Emdadul Hoque
and
Mr. Justice Bhishmadev Chakraborty

Death Reference No.68 of 2015 with
Jail Appeal No. 147 of 2015.

The State

..... Petitioner.

-Versus-

Md. Poshor Ali.

.....Condemned-prisoner.

Mr. Md. Ruhul Amin, A.A.G. with

Ms. Sabina Perven, A.A.G

..... for the State.

Ms. Nargish Akter, Advocate appointed as
State Defence Lawyer.

..... for the condemned-prisoner.

Heard on: 14.09.2020 and Judgment on: 17.09.2020.

S.M. Emdadul Hoque, J:

This death reference under Section 374 of the Code of Criminal Procedure has been made by the learned Additional District and Sessions Judge, Netrokona for confirmation of the sentence of death imposed upon the condemned prisoner Poshor Ali under Section 302 of the Penal Code in Sessions

Case No. 59 of 2006 arising out of Kalmakanda P.S. Case No. 2(11)/2005 corresponding to G.R. No. 431 (02) 2005.

The prosecution case as made out by the informant Md. Moti Miah P.W-1 the elder son of deceased Halima Khatun and Condemned-prisoner Md. Poshor Ali in short, is that, the occurrence took place at the midnight of Ramadan at about 2:00 AM while he along with his 5 (five) brothers and one sister and parents were sleeping in their dwelling house. On hearing scream they wake up from sleep and saw three cut injury on the right side of the neck and on the skull i.e. above the ear and on the forehead of her mother and they took hold her but she died instantly. The informant also saw a blood stained axe nearby and on hearing hue and cry the neighbours namely Sujon Miah, Md. Mouze Ali Khan, Shahabuddin, Siddique Miah and others came to the place of occurrence and thereafter he lodged the verbal Ejahar and police officer wrote the Ejahar and he put in his signature in the Ejahar. Hence Kalmakanda P.S. Case No. 2 dated 02.11.2005 has been started.

The case was investigated by the P.W.9 Md. Giash Uddin, a Sub-inspector of Kalmakanda Police Station who

visited to the place of occurrence, conducted the inquest of a dead body and found 3 (three) sharp cutting injuries on the person of the deceased and prepared the inquest report, sent the dead body to the morgue for autopsy. Thereafter he visited the place of occurrence and prepared the sketch map along with index, prepared two seizure lists including the blood stained axe and blood stained wearing cloths of the deceased. He examined 25 (twenty five) witnesses and recorded their statements under section 161 of the code of criminal procedure, arrested the accused Md. Poshor Ali and brought him to the Magistrate for recording his confessional statements under section 164 of the code of criminal procedure and after completing all the formalities found prima-facie case against the condemned-prisoner Md. Poshor Ali and submitted the charge sheet being No. 165 dated 31.12.2005 under section 302 of the Panel Code.

The case record ultimately transmitted to the learned Sessions Judge, Netrokona, who took cognizance and framed charge against the condemned-prisoner Md. Poshor Ali under

section 302 of the Panel Code which was read over to him to which he pleaded not guilty and claimed to be tried.

To prove the case the prosecution side examined as many as 11 (eleven) witnesses among 29 charge sheeted witnesses. But the defence examined none.

The condemned-prisoner were examined under section 342 of the code of criminal procedure, which was read over to him to which he claimed his innocence again.

The defence case as could be gathered from the trend of cross examination of the prosecution witnesses and the examination under section 342 is total denial of the prosecution case and claimed to be innocent and he is not the offender and which may be done by unknown person.

The trial court on consideration of the evidence on record and the arguments as advanced by both the sides found the condemned-prisoner guilty of the charge leveled against him under section 302 of the Penal Code and sentencing him to death by its judgment and order dated 17.08.2015.

Thereafter, the learned Judge sent the record to this court for reference provided under section 374 of the code of criminal procedure.

Thereafter, the condemned-prisoner also preferred a Jail Appeal through the concerned authority being Jail Appeal No. 147 of 2015.

Ms. Sabina Perven, the learned Assistant Attorney General along with Mr. Md. Ruhul Amin, A.A.G. takes us through the Ejahar, the charge sheet, the inquest report, the post mortem report, the seizure list, the evidence of the witnesses and the impugned judgment and submits that the prosecution successfully proved the charge leveled against the condemned-prisoner. She further submits that though in the instant case the informant and the other witnesses did not depose as per the statements made in the Ejahar but ultimately the place, time and manner of the case has been proved and the trial court rightly found the guilty of the condemned-prisoner. She further submits that the informant since the Son of the accused and to save his father may deposed in obligatory nature but the said evidence also should

be considered relying upon the confessional statements of the condemned-prisoner and the confessional statements may be treated as part of the prosecution case relying upon the decision of an unreported case of Akbar Ali Lalu alias Roni - versus- The State, widely known as Khalaf Mohammad's murder case. She further submits that the 164 statement of the condemned prisoner is true and voluntarily even no retraction of the same, in such a case the court may convict the accused only relying upon the confessional statements against its maker. She further submits that in wife killing case if it is found that the victim was killed in the house of the husband, in such a case it should be considered that the death of the deceased was within the special knowledge of the accused, relying upon the decisions reported in 62 DLR (AD)-406 and the 67 DLR (AD)-54. The learned Assistant Attorney General further submits that the condemned-prisoner was in the house at the time of commission of offence but immediately after the occurrence he fled away from the house and the accused was arrested long after one month of the occurrence which clearly proves the guilt mind of the

condemned-prisoner, since his wife was killed in his house in such a case he had obligation to make the funeral of the victim but fled away, so, the trial court rightly found the guilty of the condemned-prisoner. She prayed for acceptance of the Death Reference.

On the contrary Ms. Nargish Akter, the learned State Defence Lawyer, submits that the judgment of the trial court based on without considering any evidence on record. She further submits that the F.I.R. is the foundation of the prosecution case and subsequent embellishment of the same clearly indicates that the prosecution failed to prove the case relying upon the decision reported in 41 DLR (AD)-157. She further submits that the prosecution should prove his case by adducing reliable and sufficient evidence and in the instant case, the only alleged eye witness the P.W.1 is the informant of this case who in his deposition categorically stated that he wake up before the condemned-prisoner on hearing scream, from where it may be presumed that the prosecution failed to proved that the condemned-prisoner has any involvement at the alleged offence. She further submits that on close reading

of the deposition of the P.W.1, P.W.2 and the P.W.3 they are the sons and daughter of the victim but they did not corroborate the prosecution case. One cross examination of the P.W.1 it may be presumed that they suspected one of his neighbour namely Mortuz Ali for commission of offence in such a case the benefit always goes in favour of the accused relying upon the decision reported in 16 DLR(S.C.)-127. Her next argument is that the incriminating evidence must be brought to the notice of accused on the examination under section 342 but on close reading of 342 examination it is found that the incriminating evidence such as the confessional statement made by the accused that he himself dealt axe blow on the vital part of the deceased has not been brought to him, which prejudiced the condemned-prisoner and he may get benefit of doubt, relying upon the decisions reported in 11 BLD(AD)-108, 45 DLR(AD)-60 and 22 BLC(HD)-452. She also cited the decisions reported in 47 DLR(AD)-92 and 48 DLR(HD)-149 and 3 BLT(AD) (1995)-115. She prayed for rejection of the Death Reference and for acquittal of the condemned-prisoner, in alternative she prayed for commuting the sentence.

Before considering the material facts of the case let us discussed the evidence of the prosecution witnesses.

P.W.1 Md. Moti Miah the informant of this case and the elder son of victim and condemned-prisoner, in his deposition he stated that he could not memorize the date of occurrence but which was happened on the month of Ramadan at the mid-night at about 2:00 AM. He deposed that he along with his parents and his 5(five) brothers and one sister were sleeping on their eastern Bhati Ghar and hearing scream he wake up from sleeping and saw the cut injuries in the right side of the neck, above the Ear and on the forehead of his mother and then he took hold her but she died instantly. He further deposed that he saw a blood-stained axe laying nearby the cot and on hue and cry the neighbours namely Sujon Miah, Md. Mouz Ali Khan, Shahabuddin, Siddique Miah and others rushed to the place of occurrence and saw the incident. Thereafter he lodged the verbal Ejahar to one police officer which was written by said Police Officer and he put his signature in the said Ejahar. He proved the said Ejahar and his signature present therein as Exhibit No. 1 and 1(1) respectively.

In cross examination of the defence this witness disclosed that he did not see who killed his mother but saw that an unknown person fled away from the open door but he could not recognize the said person and he woke up before his father and he along with his brothers and sister took hold of his mother but she could not say anything. In cross examination he also stated that there was a good relation between their father and mother and also disclosed that they have no axe and his father is a man of simple nature. In cross examination he also stated that a villager namely Mortuz Ali talked with his mother often, for which he and his father forbidden said Mortuz Ali but he did not make any response but also threatened them. In cross he also stated that his mother also forbidden said Mortuz Ali. In cross he further stated that his father was severely tortured while he was in police custody and he lodged the Ejaher with the request of the villagers.

P.W.2 Abdul Hannan, aged about 13 years also a son of the deceased and condemned-prisoner Md. Poshor Ali. In his deposition he stated that the occurrence took place on 28th

Ramadan at about 2:00 AM and the incident took place in their dwelling house and he along with his parents and brothers and sister were sleeping in their house and on hearing hue and cry of his elder brother Md. Moti Miah he wake up and saw cut injuries one the person of his mother and she died instantly. He further deposed that long before the occurrence his father tried to deal a Daw blow on his mother and at that time his father was about to insane. He also deposed that at the time of commission of offence his father had craziness and after the death of his mother on apprehension that he may be tortured by the Police he fled away and on their hue and cry the neighbours rushed to the place of occurrence and he was examined by the police.

In cross examination of the defence this witness stated that he was not a witness to see who killed his mother and they were at the same house at the time of offence. In cross he further stated that his father was staying in the house till noon or mid-day and thereafter he went away. In cross he further stated that there was a good relation between their parents.

P.W.3 Marzina Khatun, aged about 19 years the daughter of the victim and condemned-prisoner. In her deposition she only stated that she did not know nothing about the incident. The defence declined to cross examine her.

P.W.4, Abu Shama, aged about 18 years another son of the victim and condemned-prisoner was tendered. The defence declined to cross examination him.

P.W.5, Shahabuddin is one of the neighbour of the informant. In his deposition he stated that the incident took place about 8 years back on 28th Ramadan at mid-night and his house is adjacent to the house of the accused. He deposed that after performing Tarabi Namaz they went to sleep and on hearing hue and cry they rushed to the place of occurrence and saw bleeding injuries of a dead body of a woman and he could not memorize the name of the victim and he was not a witness to see who killed her. The defence declined to cross examine him.

P.W.6, Siddique is also a neighbour of the informant. He deposed that the occurrence took place at the mid-night at 28th Ramadan at the house of Md. Poshor Ali at Gobindrapur.

He further deposed that on hearing hue and cry he rushed the place of occurrence and saw the dead body of a woman and none disclosed who killed the victim. He further deposed that he made statement before the Police. The defence also declined to cross examine him.

P.W.7 Sujon Miah was tendered by prosecution and defence declined to cross examine him.

P.W.8 Mouz Ali was also tendered by the prosecution and the defence declined to cross examine him.

P.W.9 Md. Giash Uddin, a Sub-Inspector of Jamalpur Police Station who investigated the case in his deposition he stated that on 02.11.2005 he was attached to the Kalmakanda Police Station and on receiving verbal Ejahar, the then Officer-in-Charge of Kalmakanda Police Station Mr. Md. Abdul Hakim wrote the Ejahar. He proved the said Ejahar and deposed that he knew the signature of the said recording officer. He proved the Ejahar form and the signature of the recording officer as Exhibit No. 2 and 2(1) respectively. He deposed that he was entrusted to investigate the case and went to the house of the informant and found the dead body of the victim Halima

Khatun on the dwelling house of the informant Md. Moti Miah and he conducted the inquest of the dead body and found 3 (three) injuries in the blow of the Ear and all are grievous injury. He proved the said inquest report and his signature therein as Exhibit-3 and 3(1) respectively. Thereafter he sent the dead body to the morgue for holding autopsy. He further deposed that he visited the place of occurrence and prepared the sketch map along with index, he proved the said sketch map and index and his signatures therein as Exhibit No. 4, 4(1), 5, and 5(1) respectively. He further deposed that he seized one blood stained axe measuring 7" made by wooden haft measuring 24" length. He also seized a black color wearing patty cot and a shari and prepared the seizure list. He proved the two seizure lists and his signatures therein as Exhibit No. 6, 6(1), 7 and 7(1) respectively. He further deposed that he examined 25 (twenty five) witnesses and recorded their statements under section 161 of the code of criminal procedure. He arrested the accused namely Md. Poshor Ali and brought him before the Magistrate for recording his confessional statement under section 164 of the code of

criminal procedure and thereafter he collected the post mortem report. He further deposed that after completing all the formalities of the investigation he found prima-facie case against the condemned-prisoner Md. Poshor Ali and submitted the charge sheet being No. 105 dated 31.12.2005 under section 302 of the Penal Code.

This witness was cross-examined by the defence. He denied the defence suggestion that it is not a fact that his investigation is perfunctory and he submitted a false and fabricated charge sheet.

P.W.10 Mr. Goutam Chandra Pal, a First Class Magistrate of Netrokona Magistracy. In his deposition he stated that on 03.12.2005 he was attached as a Magistrate of Netrokona and on the said day the investigation officer brought the accused Md. Poshor Ali son of late Samser Ali in connection with Kalmakanda Police Station case No. 2(11)/05 for recording his confession. He further deposed that he recorded the confessional statement of the said accused following the procedure under section 164 and 364 of the code of criminal procedure. He proved the said 164 statement containing 3

(three) pages and proved the said confessional statement and his 7 (seven) signatures present in the said 164 statement as Exhibit No. 8 and 8(1) respectively.

In cross examination of the defence he deposed that he recorded the statement of the accused as he disclosed. He denied the defence suggestion that it is not a fact that he recorded the passionate /being an emotional confession. He denied the defence suggestion that accused did not make the confessional statement.

P.W.11, Doctor Ali Akbar, who held the autopsy of the dead body and prepared the post mortem report, deposed that on 03.11.2005 he was attached with the Sadar Hospital, Netrokona and at about 10:30 AM he held the autopsy of the corpse of victim Halima Khatun and filled up all the column. He proved the post mortem report and his signature therein as Exhibit No. 9 and 9(1) respectively.

In cross examination of the defence he stated that he held the autopsy on 03.11.2005 and the age of the deceased was about 45 years. He denied the defence suggestion that the

deceased was not succumbed to her injuries as mentioned in the post mortem report.

These all are the evidence on record as adduced by the prosecution.

We would like to code the 164 statement made by accused Md. Poshor Ali which as under:
A v g t i v t h , A v g i - w j g v l z b G i m ú K A v t " A v g Z v K e w j ,
A v g i # \$ e % v j v M " Z y g G m e t ! t (v * Z y g + v j t h v) " - A v g
g b y t K e w j " - A v t i v / 0 t h v " t m G m e ! v t e b v e t j " A v g i t ! t j i
v b K t m e t j , A z v i e e v w j t t M t " e v t t K t e i K t i t (" - A v g t K
1 y & K t e t j " Z v b v t j A v g t K t 2 . K t i t 3 j t e " A v g - t K g v i t h v "
Z l b t ! t j i v e t j A v g w l j " Z v i v w 3 i v " 4 b v i 5 6 7 8 9 w (b A v t M A v g i -
A v g t K g y M : e v K t i L v) , v t t (, A v g i t ! t j A v g t K : w i , v K v e i v t i
v b K v b t h v " Z v e :) ; . < t (, " e v t t A v m " g t v A v j i m v t A v g i
- m ú K " Z v i v (y b . ' h > K t i A v g t K t g t i t 3 j t e A v g : v t t w i " A v g
- t K e w j , A y A v g t K g w i m b v - A v g e v v t i t M t j g t v A v j e t j h v + v j
j v M L v) , v i : b % A v g i g t b + , t K h v , t h A v g t K A v t g t i t 3 j t e "
A v g Z v K t b v i (t e v v b t A v m " g t v A v j g t b g t b w e i w e i K t i e t j
K v v v m i v t w (t t e " A v g A v i) + , t t h v " g t v A v j e t j Z v i t K b v
g v A v g t (i t K v b t t t t " A v g g v e v t t v b t A v m " - g v i v b A K t i "
A v g i v L v) , v (v) , v K w i " A v g Z v i v b K / g v t t t e w j , A y A v g t K g v i

bV - etj z vi gib kv v t m " Z v Z yg Ggb Avi BK t t v t t t t
 ej t j , t m etj Av g ivew z Av " z v g v k g vi z vi te bV Av gi - , Av g
 4 v t j Av g v k ev v n (Z " Av g 4 y t v t j Z vi i C t D M t g v v Av j i
 m v k 2 w i i K m u K K i z " G K w (b i v z Av gi 4 y t t m hv " t t m Av g
 t i v * Av gi 2 i t i g v t i K v v ev z L t v bV Av gi - t t w G v n v
 K w i G me w k " t m etj 1 y K t i H t & k " Z vi K t K w (b i Z v i v Av g v k g v i
 # t t b " Av g ! 3 K i z & v k " t i i w (b t t j i m v k et j ev z K K z
 hv " t t t t e w j , z v gi g v g v v Av j t t w t t & v k " 4 b v i w (b L M 9 vi
 mg , Av g ev v t i hv " m J % t e j v ev v i z Av n v i Av gi - et j * Av
 G K v w k ! y t e " Av g Z vi : b % G K w M : vi g v Av b " Av g - t t w G v n v
 K i t j t m et j g : v K t i t m et j t t Av G K v w k ! y t e " t m et j Av g v k
 g v i te bV Av g ! 3 K i z & v k " 4 t i ev t i K i z & v k " i z 55 M 9 vi
 mg , Av g D r K t i 4 t i G t m t hv " 4 y t w " D r t t t t i w i r K v i
 H t t t m C v D " t t j i v e t j 4 t i t K G t m t " t K 4 i z t e i t t m j " Av g
 - t t w G v n v K w i " t m etj 1 y K t i & v k z " t m) 4 i z t e i t t hv " v
 w k ! y \$ i w 3 t i Av t m " Av gi w (t t t v e ' K t i i w K i z & v k " Z vi i
 i w i v m K t i Av gi - 4 y t t t " t m h l b ev t i t e w i t t m t w j Z L b Av g
 t g !) ev z L t v w b " Z vi i Z vi ev j t i w b 1 t t t g ! v " Av g 4 t i
 ev t i ! y t y K i z & v k " Av gi g v i t e t A v C) , vi g z v t t v A J K v i
 t (L z & v k " Av gi G v v i v t t hv " Av g Av gi - t t t t i w k b v e v b v
 t g t i w k b v Z vi t , v j b v " Z vi i Av g v j t b (vi t t hv " Av gi

তি তি ইব্রাহিম কবি কবি ঠাণ্ডা গা ক তি তি তি তি - ডাক্তার ইব্রাহিম হা আও
 তি (এ বিজ্ঞ হব" আও: এডি + তি বিজ্ঞ হব" আও ডিবি নতুন আও বি -
নতুন কবি ক আ- ডিবি ডাক্তার ডাক্তার ডাক্তার, বি বি" আও তি তি ইব
 আও ক <ডি গ + তি বিজ্ঞ তি তি বিজ্ঞ" আও আবি কবি" আও + যি
 কবি" -

We heard the learned Assistant General and the learned State Defence Lawyer, perused the Ejaher, the charge sheet, the inquest report, the seizure list, the post mortem report, the 164 statement of the condemned-prisoner and the impugned judgment and order.

The facts are that on the mid-night i.e. 2:00 AM on 02.11.2005 corresponding to 28th Ramadan the incident took place in the dwelling house of the condemned-prisoner Md. Poshor Ali. The informant is the elder son of convict and also the victim Halima Khatun. This is admitted fact that the victim Halima Khatun died immediately after the occurrence and it is also admitted that the accused Md. Poshor Ali was in the said dwelling house at the time of commission of offence. As per Ejahar version he fled away immediately after the occurrence but on deposition the P.W.1 and P.W.2 disclosed that he fled

away at the noon. It is also admitted that immediately after the occurrence the informant Md. Moti Miah the elder son of the victim as well as the condemned-prisoner lodged a verbal Ejahar and which was written by the police officer and he put his signature in the Ejahar.

It also appears that the accused was apprehended after 1 (one) month of occurrence and on the next day he brought before the Magistrate and made the confessional statement disclosing that he himself killed his wife.

We have perused the confessional statement made by the accused Md. Poshor Ali from where it is found that the concerned Magistrate after completing all the formalities recorded the confessional statement. It is also found that no retraction of the said confessional statement by the condemned-prisoner.

Eleven prosecution witnesses were examined among them the P.W.9, P.W.10 and P.W.11 are formal witnesses. The P.W.9 is the investigation officer who after completing all the formalities of the investigation submitted the charged sheet. The P.W.10 the Magistrate, 1st Class who recorded the

confessional statement of condemned-prisoner Poshor Ali who also proved the said confessional statement. The P.W.11 namely Doctor Ali Akbar who held the autopsy of corpse and prepared the post mortem report of the deceased and proved the same.

The said post mortem report indicates the injuries which as under: g-Ae⁻ϕ AKvi ibt (1) One cut injury on the posterior aspect of right Ear 2" x 1/2,

(2) One cut injury below right Ear 1 1/2" x 1/2 x 1"

(3) One cut injury below and anterior, aspect of right Ear 1 1/2" x 1/2" 1

And the opinion of the Doctor as under: *"In my opinion cause of death was due to shock and haemorrhage resulting from above mentioned injury which was antemortem & homicidal in nature."*

It appears that P.W.1, P.W.2, P.W.3 and P.W.4 are the sons and daughter of victim as well as the condemned-prisoner. The P.W.1 the informant though deposed but ultimately deposed contrary with F.I.R. story and did not accuse his father with the alleged offence.

P.W.7 and P.W.8 were tendered. But the defence declined to cross examine them.

From the aforesaid evidence of the witnesses it is found that none of the witnesses disclosed that Md. Poshor Ali the condemned-prisoner killed his wife. And as such no eye witness in the instant case.

But from the evidence it is found that the prosecution succeed to prove the date, time and place of occurrence. It is also admitted that victim died on her dwelling house at mid-night. Though in the Ejahar the informant implicated his father the condemned-prisoner for commission of offence. But ultimately he diverted from the said facts and specifically stated that on hearing of scream he awake up from sleep and saw that his father asleep in the cot and found cut injury on the person of the victim and also saw that one unknown person run away from their dwelling hut. Though P.W.2 deposed that long before the occurrence his father once tried to deal a blow upon his mother. But ultimately he did not disclose that his father chopped her mother, so, from the evidence of the prosecution witnesses it could not be

presumed that prosecution succeed to prove the case by adducing oral evidence.

But in the instant case it is found that Md. Poshor Ali made confessional statement under section 164 of the Code of Criminal Procedure immediately after his apprehension by the police though he was arrested long after 1 (one) month of the incident. And he was produced before the Magistrate on the next day and he made a confessional statement which presumed to be inculpatory in nature and on perusal of the statement it is found that on suspicion that he may be killed by his wife since she had bad affairs with one Mortuz Ali as such he killed his wife.

We have also considered the 164 statement of the condemned-petitioner and it is found that the learned Magistrate after completing all the formalities and on filling up the column recorded the confessional statement and also following all the formalities provided under section 164 and 364 of the code of criminal procedure. It also appears that no subsequent retraction by the condemned-prisoner.

In criminal trial the prosecution case should be considered on the basis of the evidence of the informant. But on perusal of the evidence of P.W.1 it is found that though he stated the details of occurrence but ultimately did not accuse the condemned-prisoner for the offence. In such a case the confessional statement of the accused may be treated as a part of the prosecution case. In an unreported case of Akbar Ali Lalu alias Roni widely known as Mr. Khalaph Mohammad case who was a high official of Saudi Embassy being Death Reference No. 02 of 2013, wherein their lordship held: *“However, the confessional statements of the accused Al Amin and Lalu made under Section 164 of the Code of Criminal Procedure have formed a part of the prosecution version of the case.”* this judgment upheld by our Apex Court.

So, considering the aforesaid facts of the case it is our view that though the informant subsequently deviated from the main part of F.I.R. story and though it was the duty of the Public Prosecutor to decline him hostile, however, since the condemned-prisoner himself made an inculpatory confessional statement involving him to kill his wife and no further

retraction by the said condemned-prisoner, in such a fact we may consider the said 164 statement as a part of the prosecution case.

We have already considered that the confessional statements of the condemned-prisoner is true and voluntary, and in such a case the conviction may be based solely on the voluntary confessional statement against its maker. In the case of The State –versus- Banu Miah, reported in 63 DLR(AD)-10, wherein the principle laid down that: “if the magistrate did not fill-up all the column and not write the same on its own hand the said confessional statement should not be considered as evidence for convicting any accused. In the said case our Apex Court acquitted the accused. But in the instant case we have already considered that the confessional statement of the accused is true and voluntary. In the case of Mobarak Hossain –versus- The State, reported in 1 BLD(HC)-286 the principle laid down that: *“confession of an accused though not a substantive evidence this court may take such confession into consideration and can use the same to let assurance to other evidence from the purpose for conviction of the accused.”*

The case cited by the State Defence Lawyer reported in 5 MLR (HCD)-133, wherein the principle is that: *“In order to amount confession the statement of the accused must be inculpatory implicating himself with the commission of the offence and admitting his guilt unless the maker implicated himself with the commission of murder admitting his guilt the statement made otherwise cannot be a confession with the meaning of section 164 of the code of criminal procedure and thus also cannot alone from the death in the conviction.”*

But on perusal of the confessional statement made by the accused we have already decided that which is true, voluntarily and inculpatory in nature, in such circumstances of the facts it is our view that there is no bar to convict the accused on the basis of the said confessional statement though the vital witnesses did not corroborate the initial case as made in the F.I.R.

We have already code the said confessional statement, from where it is found that lastly he disclosed that he himself killed his wife on suspicion that he may be killed by his wife

with the help of one Mortuz Ali since he made suspicion that they have illicit connection.

It is now well settled principle that if the confessional statement is found to be true and voluntary can form the sole basis of conviction as against its maker. This principle supported by the decision of the case of Islamuddin (Md.) alias Din Islam Vs. State reported in 13 BLC (AD)-81-27 BLD (AD)-37.

Where in their lordships held:

“It is now the settled principle of law that judicial confession if it is found to be true and voluntary can form the sole basis of conviction as against the maker of the same”

Similar view has been taken in the case of Shamim Beg alias Md. Shamim Beg Vs. The State reported in 27 BLD (AD)-74.

Furthermore, this is a wife killing case, in such a case it is the duty of the husband to explain how his wife was killed in his bed room. In the case of The State -versus- Md. Shafiqul Islam alias Rafique and another, reported in 43 DLR (AD)-92, wherein our lordship held: *“Where it is proved that the wife*

died of assault in the house of her husband, there would be strong suspicion against the husband that at his hands his wife died. To make the husband liable.”

And in the case of Gourango Kumar Saha- versus- The State, reported in 2 BLC (AD)-126, wherein our Apex Court held: *“The defence plea of alibi having been discarded and the door of the room being kept open and in the absence of any acceptable explanation as to how the wife died in the room of the husband, the only irresistible and natural conclusion will be that it is the husband alone in the circumstances of the case who is guilty of committing murder of his wife.”*

The learned Assistant Attorney General referred the case of Md. Mahbubur Sheikh alias Mahbubur –versus- The State, reported in 67 DLR(AD)-54, wherein our Apex Court held: *“It is by now a well established principle that under section 106 of the Evidence Act, when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. This principle has been applied in many cases where the wife has been found killed in the house of the husband where they reside together. In such circumstance the*

husband will have to prove by positive evidence that he was absent from the house when his wife was killed or explain by evidence how she came to meet her death."

From the aforesaid decisions and the evidence it is found that though the prosecution witnesses did not accuse the condemned-prisoner for killing the victim and the close relation try to save the accused and deposed that he was in the house till noon. It is also found that the seizure list witnesses were not examined but the P.W.9 the investigation officer proved the same and on stage of the evidence the informant P.W.1 himself stated to the effect: "The investigation officer seized the said Axe and deposed accordingly but no cross by the defence that the said Alamat was not seized from the place of occurrence."

In such circumstances of the facts it is our view that though some defect in proving the seizure list and the seized

Alamats by the independent witness but the said facts should not go in favour of the condemned-prisoner.

It is our considered view that the appellate court have power to discuss any witness if its mind set up that they may be gained over or made an obligatory statement.

Considering the aforesaid facts and circumstances of the case it is our view that in the instant case there is no eye witness but the confessional statement made under section 164 by the condemned-prisoner since found true, voluntarily and inculpatory in nature, in such a case the conviction of the accused-condemned- prisoner may be upheld.

Furthermore, this is a wife killing case and admittedly the victim killed in the bed room of the condemned-prisoner and he was in his house at the time of commission of offence.

The learned State Defence Lawyer cited the decision of the case of Jahiruddin –versus- The State, reported in 47 DLR(AD)-92. Considering the material facts of the case our Apex Court for ends of justice commuted the death sentence to one life imprisonment.

Considering the material facts and circumstances of this case and on perusal of the 164 statement of the condemned-prisoner it is our view that the convict-condemned-prisoner suspected one of his villager namely Mortuz Ali and his wife that they had bad affairs and they may be killed him and on the evidence of P.W.2 that before the occurrence his father has craziness and he was arrested after one month of occurrence and subsequently obtained bail but never misuse the privilege of bail and also in Condemn cell from 2015 and no previous bad report against him and he is not a menace of the society.

As such considering the entire material facts of the case it is our view that it is better to alter the sentence of the accused-condemned-prisoner and Justice will be sufficiently met if his sentence is reduced to imprisonment for life instead of sentence of death.

In the result, the death reference is rejected. The order of conviction of the condemned-prisoner Md. Poshor Ali under Section 302 of the Penal Code is upheld. The sentence of death is modified and is commuted to one of imprisonment for life.

Consequently, the Jail Appeal No. 147 of 2015 is dismissed.

The Jail authority is directed to replace the condemned-prisoner from condemned cell to the cell meant for the prisoner alive.

Communicate the judgment and transmit the lower Court records.

Bhishmadev Chakrabortty, J:

I agree.

M.R.