

Present:

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

Death Reference No.96 of 2015.

The State

..... The petitioner.

-Versus-

Shahab Ali (Absconding).

..... The accused-prisoner.

Abdul Kuddus and others.

.....The condemned-prisoners.

With

Criminal Appeal No. 9529 of 2015.

Abdul Kuddus and others.

.....The appellants.

-Versus-

The State

..... The respondent.

With

Jail Appeal No. 265 of 2015

Muntaj Ali @ Monta.

..... The appellant.

-Versus-

The State

..... The respondent.

With

Jail Appeal No. 266 of 2015

Abdul Mazid @ Madhu.

..... The appellant.

-Versus-

The State

..... The respondent.

With

Jail Appeal No. 267 of 2015

Md. Jewel.

..... The appellant.

-Versus-

The State

..... The respondent.

With

Jail Appeal No. 268 of 2015

Ibrahim @ Ibra.

..... The appellant.

-Versus-

The State

..... The respondent.

With

Jail Appeal No. 269 of 2015.

Abdul Kuddus.

..... The appellant.

-Versus-

The State

..... The respondent.

Mr. Harunur Rashid, D.A.G with
Mr. Kazi Bashir Ahmed, A.A.G with
Mr. Zahid Ahammad (Hero) A.A.G with
Mr. Md. Shafiquzzaman (Rana), A.A.G
.....for the State.

(In the death reference and respondents of all the appeals)

Mr. Md. Hafizur Rahman Khan, Advocate.

..... the State Defence Lawyer.

Mr. Md. Atiqul Islam, Advocate with
Mr. Md. Faruk Hossein, Advocate with
Mr. Md. Shakir Hossain, Advocate.

..... for the appellants.

(In criminal appeal and all Jail Appeals)

**Heard on: 31.10.2021, 01.11.2021, 02.11.2021,
03.11.2021, 04.11.2021, 07.11.2021 and Judgment on:
11.11.2021.**

S.M. Emdadul Hoque, J:

This death reference under Section 374 of the Code of Criminal Procedure has been made by the learned Additional Sessions Judge, 2nd Court, Mymensingh for confirmation of the

sentence of death awarded upon the accused-prisoner (1) Shahab Ali (Absconding) and condemned-prisoners (2) Abdul Kuddus, (3) Ibrahim @ Ibra, (4) Abdul Mazid @ Madhu, (5) Muntaj Ali @ Monta and (6) Md. Jewel under Sections 302/201/34 of the Penal Code in Sessions Case No. 645 of 2011 arising out of Muktagacha P.S. Case No. 06 dated 07.05.2010 corresponding to G.R. No. 67 of 2010 by its judgment and order of conviction and sentence of death with a fine of Tk. 5,000/- each dated 09.11.2015.

By the same judgment the trial court also convicting the convict-appellant Komola Khatun the wife of Abdul Kuddus under Sections 302/34 of the Penal Code and sentencing her to suffer imprisonment for life and also to pay a fine of Tk.5,000/- in default to suffer imprisonment for 3 (three) months more.

Condemned-prisoners Abdul Kuddus, Ibrahim @ Ibra, Abdul Mazid @ Madhu, Muntaj Ali @ Monta, Md. Juwel and convict-appellant Komola Khatun jointly preferred Criminal Appeal No. 9529 of 2015.

Condemned-prisoner Muntaj Ali @ Monta filed Jail Appeal No. 265 of 2015, condemned-prisoner Abdul Mazid @

Madhu filed Jail Appeal No. 266 of 2015, condemned-prisoner Md. Juwel filed Jail Appeal No. 267 of 2015, condemned-prisoner Ibrahim @ Ibra filed Jail Appeal No. 268 of 2015 and condemned-prisoner Abdul Kuddus filed Jail Appeal No. 269 of 2015 through the jail authority.

But no appeal by the condemned-convict Shahab Ali since absconding.

Since the aforesaid criminal appeal and five Jail Appeals arising out of the same judgment being heard analogously along with this death reference and disposed of by this single judgment.

The prosecution case as made out by the P.W.1 the informant Md. Ayub Ali the father of the victim Farhad (aged about 8 years) in short, is that, he was a day labourer. On 04.05.2010 at 8:00 a.m. he went to Mymensingh town for doing work and returned back his house at about 11:00 p.m. and while he was in Kheruajani Bazar after a while his younger brother Monayem met with him and informed that his son Farhad is missing and they could not trace out him. Thereafter he went to his house and his wife Fatema Begum the P.W.5

informed him that victim Farhad was going towards the house of Ibrahim @ Ibra and thereafter they could not trace out him and the informant and his relatives searched for the victim in several places and on the next day they searched for him in the local area and on 07.05.2010 at about 6:30 a fisherman of his village Akkas Ali told to his neighbour namely Badsha that a dead body was lying on the north side of a pond of Sumaiya Begum and said Badsha could identified the dead body and thereafter his daughter Latifa went there and could identified the dead body by looking the wearing pant of the victim and they found two hand of the victim was cut off but, could not find out the same and also found cut off the mouth, nose and tongue and no flesh on the mouth and found a cut injury in the waist and intestine came out and also found cut injury under the left knee and muscle and the dead body was decomposed. On getting information the police came to the place of occurrence and held the inquest of the dead body on their identification.

Further case is that they had previous enmity with their neighbour Ibrahim, Kuddus, Abul Kalam @ Kailla, Shahab Ali,

Bokul, Hanif, Momtaj Ali and others and they threatened him, for which a Salish was held but the accused-persons did not accept the decision of the said Salish, for which he filed a criminal case under sections 107/117 of the code of criminal procedure and the date was fixed on 03.05.2010 and while he was going to the court accused Kuddus threatened him that they would destroy their family and will give teach for filing case and for that reason he suspected the accused namely Shahab Ali, Kuddus, Ibrahim @ Ibra, Komola Khatun, Abdul Mazid Modhu, Montaj Ali @ Monta and Jewel suspecting that they may be killed his son and accordingly lodged the Ejahar. Hence the case.

The case was initially investigated by P.W.16 Md. Mosharaf Hossain, Sub-inspector of police of Muktagacha Police Station who visited the place of occurrence, held the inquest of a dead body 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 separate index and sized some alamats. Due to his transfer he handed over the case docate and the P.W.17 Md.

Omar Hossain Mia, Sub-Inspector of police entrusted to investigate the case. He again visited the place of occurrence, prepared the sketch map along with index and also seized some alams and prepared the seizure list, examined the witnesses and recorded their statements under section 161 of the code of criminal procedure and also produced three witnesses before the Magistrate for recording their statements under section 164 of the Code of Criminal Procedure, arrested the convict-accused Komola Khatun and brought her before the magistrate for recording her confessional statement and also sent her daughter Sharifa Akter for recording statement under section 164 of the code of criminal procedure as witness. After completing all the formalities of the investigation he found prima-facie case against the accused-persons and submitted the charge sheet being No. 76 dated 05.06.2011 under section 302/201/34 of the Panel Code.

The case record ultimately transmitted to the learned Additional Sessions Judge, 2nd Court, Mymensingh, who framed charge against the accused-persons under sections 302/201/34 of the Panel Code on 17.11.2011, which was read

over to them to which they pleaded not guilty and claimed to be tried.

The prosecution side examined as many as 18 (eighteen) witnesses out of 29 (twenty nine) charge sheeted witnesses but the defence adduced none.

After close of the evidence of the prosecution witnesses the accused-persons were examined under section 342 of the code of criminal procedure, which was read over to them to which they re-irritated their innocence again.

The trial court thereafter on consideration of the evidence on record and the facts and circumstances of the case found the accused persons guilty of the charge leveled against them and convicted them as aforesaid and made this death reference under section 374 of the code of criminal procedure for confirmation of the sentence of death and sent all the papers and documents to this court.

Mr. Md. Zahid Ahammad Hero, the learned Assistant Attorney General takes us through the impugned judgment along with the Ejahar, the charge, inquest report, post mortem

report, seizure list, the evidence of the witnesses and the papers and documents as available on the record.

Mr. Harunur Rashid, the learned Deputy Attorney General appearing on behalf of the State submits that this is the case of brutal murder of an innocent boy of 8 years old. He further submits that although no eye-witness in the instant case but the circumstantial evidence led assurance to prove the murder by the condemned-convicts. He further submits that there was bitter enmity between the parties was proved and the informant specifically stated that the condemned-prisoner Abdul Kuddus threatened him to destroy his family for filing the case against them and it has been mentioned in the F.I.R. as well as the deposition of the P.W.1. He further submits that the prosecution witnesses deposed that on the said day at afternoon the victim was going towards the house of condemned-prisoner Ibrahim @ Ibra to play and thereafter he was missing and after two days of missing the victim's dead body was recovered from a pond of the village which clearly proved that the accused-persons for the previous enmity killed

the victim boy and disappeared the dead body for escaping them from the offence.

The learned Deputy Attorney General further submits that the prosecution succeeded to prove that the victim boy was going towards the house of the accused Ibrahim @ Ibra and which supported by the P.W.4, P.W.5 and P.W.6, furthermore the condemned-prisoner Shahab Ali and Komola Khatun called the little boy to eat some litchi and the said facts also proved by the P.W.4, P.W.5 and P.W.6 and though the defence cross examined them but could not find any contrary to their evidence.

He further submits that immediately after the missing the informant side searched for the victim in the locality also in the house of the condemned-prisoners Abdul Kuddus and Ibrahim @ Ibra and the P.W.2, P.W.3, P.W.5 and P.W.6 went to the house of Abdul Kuddus and they saw the accused-persons were gathered in the said house and whispering about any matter and they asked them about the victim, in reply they told that: ~~On the night of the~~ and told to search for him

and doing making which clearly proves that the accused-persons had involvement with the alleged murder.

He further submits that circumstantial evidence is so strong that the defence could not escape away since the defence cross-examined the said witnesses but could not find any contrary to their evidence.

He further submits that though in the instant case no eye-witness but the condemned-accused Komola Khatun was arrested on 31.05.2010 and she was produced before the magistrate on the next day that is on 01.06.2010 and she made confessional statement before the magistrate implicating her along with the condemned-prisoners though she did not specifically implicate her in the commission of offence but from her conduct it is clear that she was also involved with the killing.

He further submits that section 32 of the Penal Code is applicable so far as relates to convict Komola since she disclosed the commission of offence and also disclosed that condemned-prisoner Kuddus and Ibrahim @ Ibra cut off the hands of the victim and he lost her sense and her daughter the

P.W.18 nursing her and before making confessional statement she did not disclose the said facts which indicates her involvement of the instant case. He relies upon the decision of the case of Moinul Haque (Md) and another –vs. The State, reported in 56 DLR (AD)-81.

He frankly submits that the P.W. 18 Sharifa Akter since deposed on the dock, so, her statement made under section 164 cannot be used as evidence.

He further submits that the prosecution succeed to prove the case beyond all reasonable doubt by adducing sufficient evidence and the trial court rightly found the guilty of the charge leveled against the accused-persons.

He further submits that from the evidence it is clear that immediately after the occurrence the accused-persons fled away from their house and the absconsion immediately after the occurrence proves the guilty mind of the convicts.

He further submits that the condemned-convict Shaheb Ali has not being as an absconded but a fugitive from justice and the person fugitive from justice cannot seek any redress and which proves the guilty mind of the accused and the trial

court rightly found the said facts and accordingly convicted him. He prayed for acceptance of the Death Reference and dismissal of the appeals.

On the contrary Mr. Md. Atiqul Hoque, the learned Advocate along with Mr. Md. Faruque Hossein, and Mr. Md. Shakil Hossain Advocates appearing on behalf of the convict-appellants submits that the prosecution miserably failed to prove the charge leveled against the accused-persons beyond all reasonable doubt. He further submits that in the instant case no eye-witness of the occurrence and the prosecution case based only on the circumstantial evidence and the confessional statement of the co-accused Komola Khatun but the said circumstantial evidence is not so strong that on the basis of the said circumstantial evidence the conviction can be based.

He further submits that calling out the victim boy by the accused Komola Khatun and Shahab Ali has not been proved and which is the subsequent embellishment of the prosecution case.

He further submits that the F.I.R. was lodged after three days of missing of the victim boy and the informant categorically stated that he came to know the missing of the victim boy from his wife the P.W.5 Fatema Begum and she only disclosed that at afternoon the victim boy was going towards the house of the accused Ibrahim @ Ibra for play nothing more and the P.W.1 also deposed in a similar nature and as such the facts calling away is clearly an embellishment and no reliance in the instant case.

He further submits that the P.W.2, P.W.3. P.W.5 and P.W.6 though claimed that they went to the house of the accused Abdul Kuddus and found the accused persons in the house and were whispering about any matter and showing them they were worried but the said facts also did not disclose by the P.W.1 as well as which was not mentioned in the F.I.R. whereas the F.I.R. was lodged after 3 days of the said facts.

He further submits that admittedly there was bitter enmity among the parties in such a case there is a probability of falsely implication of the accused-persons in the instant case.

He further submits that the dead body was not recovered from the house of the accused Abdul Kuddus though the convict-appellant Komola Khatun made confessional statement before the magistrate which was purely an exculpatory confession and the same cannot be the basis for conviction against other on confessing co-accused without any substantial evidence of corroboration.

He further submits that though the seizure list was made by the police but from the same it could not be presumed that the dead body was lapping by the said sack since no blood found in the said bag or not in the seized wooden box, furthermore the investigating officer rushed to the said house and seized a cot from the room but no mentioning that any blood found in the said room and the prosecution did not make any case that the blood was washing by the accused side as such the case of killing and lying the dead body under the cot of the accused Abdul Kuddus is not proved.

He further submits that since no eye-witness in the instant case and none of the witnesses disclosed that they saw the accused-persons taken away the victim boy and killed him

in such a case the facts has stated by some witnesses that the little boy was called away by the condemned-convict Shaheb Ali and Komola Khatun is not proved.

The learned Advocate of the appellants further submits that only evidence for commission of offence by the accused persons came into light from the confessional statement of convict Komola Khatun but on close reading of the confessional statement it is clear that the said confessional statement purely an exculpatory confession and the exculpatory confession of the co-accused should not be used against other non confessing co-accused. He further submits that a confession made by the co-accused in a joint trial for the same offence implicating himself then it may be taken into consideration and which led assurance to the other evidence on record and the confession of the co-accused is not evidence provided under section 3 of the Evidence Act. In support of his argument the learned Advocate cited several decisions reported in 37 DLR (AD)-139, 6 BLD (AD)-193, 41 DLR (AD)-157, 44 DLR (AD)-10, 43 DLR (AD)-203, 8 BLD (1988)-109 and 19 BLD(HCD)-268.

He further submits that the findings of the trial court is not a proper finding since the trial court in convicting the accused amulgated the confessional statement of the co-accused and also the statement of the witnesses made under section 164 of the code of criminal procedure whereas it is settled principle that when a witness deposed on the dock then his statement made under section 164 of the code of criminal procedure has no reliance to consider as evidence, in support of his argument the learned Advocate cited the decision of the case of Humayun Kabir and another -versus- The State, reported in 72 DLR(AD)-47 and 20 BLT (HCD)-109.

The learned Advocate further submits that the absconsion by itself is not a conclusive evidence either of guilt or guilty conscious though the prosecution side tried to establish that the immediately after the occurrence the accused persons fled away from the house but which is not the only ground for their guilt mind without any sufficient evidence, he relying upon the decision of the case of Alamgir Hossain and another –versus- The State, reported in 22 BLC (AD)-155, the decision of the case of Sanaullah –versus- The

State, reported in 2 BLC (HCD)-544 and the case of Pear Ali Khan alias Pear Ali –versus- The State, reported in 3 BLC (HCD)-555.

He further submits that while there is no any direct evidence the moral conviction cannot be awarded, in support of his argument he cited the decision of the case of The State – versus- Khadem Mondal, reported in 10 BLD (AD)-228.

He has prayed for rejection of the death reference and allowing the appeals.

Mr. Md. Hafizur Rahman Khan, the learned State Defence lawyer for the condemned-convict Shahab Ali (absconding) adopted the submission made by the learned Advocate Mr. Md. Atiqul Islam and further submits that calling out the victim boy by the accused Shahab Ali and his mother convict Komola Khatun was not mentioned in the F.I.R. and which is subsequent embellishment of the F.I.R. version. He further submits that since the F.I.R. was lodged after 3 days of the occurrence and the F.I.R. lodged with the consultation of the witnesses specifically the mother of the victim the P.W.5 but no reflection about the calling out of the victim boy by the

condemned-prisoners Shahab Ali and Komola Khatun whereas in deposition she stated the new facts which is nothing but a subsequent thought of the aforesaid witnesses. He further submits that the statement made by the P.W.4, P.W.5 and P.W.6 has no basis since the house of Komola and Shahab Ali is not adjacent to the house of the informant which supported from the sketch map and the said house perhaps about 100 qubit from the house of the informant and also pond and other houses in between the house of informant and the accused in such a case the said version should not be considered and may be deposed falsely due to the previous enmity among the parties.

He further submits that the confessional statement of the accused Komola Khatun if found true and genuine then no involvement of accused Shahab Ali since in the 164 statement the said accused Komola Khatun did not mention the name of the accused Shaheb Ali.

He further submits that the name of convict Shahab Ali only disclosed by the P.W.18 in her 164 statement but when the said witness deposed before the court then the statement

made under section 164 has no reliance for implicating the accused and the said statement not an evidence whereas the trial court wrongly amalgamated the two statements made under section 164 of the code of criminal procedure and passed the impugned judgment found the guilty of the accused Shaheb Ali. He further submits that there is no direct evidence of involvement of the accused then in considering the death reference the court may considered the entire facts of the case and in such a case in disposal of the death reference under section 376 of the code of criminal procedure wherein no evidence against the convict then court may pass appropriate order on the basis of the evidence on record. He relaying upon the decision of the case of Sanaullah –versus- The State, reported in 2 BLC (HCD)-544 and the case of Pear Ali Khan alias Pear Ali –versus- The State, 3 BLC (HCD)- 555.

He prayed for rejection of the death reference, so far as relates to the condemned-convict- Shahab Ali.

Let us discussed the evidence of the prosecution witnesses.

P.W.1 Md. Aiyub Ali, the father of the victim and the informant of the case in his deposition stated that he was a day laborer and on 04.05.2010 at morning he went to Mymensingh Town and returned back at about 11:00 p.m. and while he was at Kharuazani Bazar his elder brother Munayem Hossain the P.W.6 informed that they could not trace out the victim Farhad age about 8 years. Then he went to house and his wife disclosed that at afternoon Farhad went towards the house of Ibrahim @ Ibra for playing and thereafter they could not trace out him and on the said night he along with his relatives searched for the victim boy in several places but could not trace out him. On the next 2 days they did maiking in the surrounding area. He further deposed that on 01.07.2010 at about 6:30 a.m. a fisherman of his village Akkas Ali found a dead body in the north of the pond of Sumaiya Begum and he informed the said matter to his neighbour Badsha and he went there and could identify the dead body of the victim Farhad and thereafter his daughter Latifa Khatun went there and she also could identify the dead body looking the wearing pant of the victim and found that his both hands were cut off but

could not find out the said hands and also found that his mouth, nose and tongue were cut off and no flesh in the mouth and found a cut injury on the waist and intestine come out and also found a cut injury on the left knee and no muscle in the said knee and the body was decomposed. After getting information the police came to the place of occurrence and on his identification the police held the inquest of the dead body and prepared the inquest report. He proved the inquest report and his signature present in the inquest report as Exhibit No. 1, 1/1. Thereafter the dead body was sent to the Mymensingh Medical College Hospital Morgue for autopsy.

This witness further deposed that he had enmity between his neighbour Ibrahim, Kuddus, Abul Kalam @ Kailla, Shahab Ali, Bakul, Hanif and Momotaz Ali and a Salish was held but they did not accept the decision of the said Salish and thereafter he filed the case under section 107/117 of the code of criminal procedure against them and on the previous day on 03.05.2010 while he was going to the court to put Hazira then accused Abdul Kuddus threatened him and stated to the effect: ~~ÓZvi cwievi aYsm Kfi wèl gg vKivi mva g ve~~ and it was

his humble belief that the aforesaid accused persons killed the victim Farhad. Thereafter he lodged the Ejaher. He proved the said Ejaher and his signature as Exhibit No. 2, 2/1.

He further deposed that accused Ibrahim and Kuddus were his neighbour and on the said day the victim was going to the house of the accused Kuddus wherein Shaheb Ali and Juwel were bounding the litchis and the victim Farhad spoiled some litchis then Shahab Ali inflicted on the head of the victim by wooden bamboo which he felt down and thereafter they kept his body hidden under the cot of the accused Kuddus and on the said night they made consultation and cut off the dead body into pieces and packed up in a sack and hidden in the wooden box of Ibrahim. Showing the same the accused Komola lost her sense and after nursing by her daughter she regained her sense. On 07.05.2010 the accused Montaj Ali @ Monta leave the dead body on the north side of the pond and accused Komola and Sharifa made the statement before the magistrate and all the accused persons were on the dock.

In cross examination of the defence this witness stated that on 04.05.2010 he could not find out the victim. He further

stated that he lodged a case under section 107 against the accused Montaj, Ibrahim and others and distance of the house of the accused-persons about 7/8 yards in the north-west side from his house and there were several houses in the said area and the dead body was recovered after 3 days of the incident from the north of the pond of Sumaiya Begum. House of Sumaiya Begum was about 150 yards south from his house and between the house of Sumaiya and informant two houses of Nabab and Tara Miah's were situated.

In cross examination he further stated that he was a day laborer and he was working in Mymensingh town on the date of occurrence and at 11:00 p.m. his elder brother informed the matter while he was at Kheruajani Bazar which was about 500 yards from his house. They searched for the victim and also searched thereby the house of the accused-persons and he did not file any case before recovery of the dead body.

He further stated that after recovery of the dead body he sent Chowkider namely Sento to the police station and getting information police came to the place of occurrence and he filed the case at noon suspecting the accused-persons

implicating their name since quarrel was happened with them but he did not suspect the accused Komola Khatun and he could not say whether Komola Khatun was in the police custody for 3/4 days and he had no knowledge whether the police tortured her. He denied the suggestion that the accused-persons was not involved with the killing of the victim and deposed falsely.

P.W.2 Md. Gias Uddin, the brother of the informant, deposed that he did business and sold eggs and on 04.05.2010 at 10:00 AM he went to buy eggs and at 10:00 p.m. he returned back and then he came to know that victim Farhad was missing from evening and they searched for him in the surrounding houses but could not trace out him.

Thereafter he went to the house of Kuddus and saw the accused Kuddus, his son Shahab Ali, his wife Komola Khatun, Ibrahim @ Ibra, Jewel and others were present in the said house and saw that they were consulting in a matter and they were worried. He indentified them in the dock. He deposed that he asked them about the victim Farhad but they told him to the effect: *Onim gyM Nti efa iv W | Zviv gvK gBKsKiZ*

e† | He also found accused Komola was standing on the door and they did maiking for the next 2 days.

He deposed that on 07.05.2010 one Akkas Ali saw the dead body and informed the matter to his neighbour Badsha Mia and they went to the pond of Sumaiya Begum and saw the dead body of the victim Farhad and they did not see the hands of the victim, tongue of the victim and mouth was putrid also found injury on left side of belly and knee. They could identify the dead body looking the wearing pant of the victim and also found a plastic sack and wooden cot beside the dead body. The accused-persons were fled away before arrival of the police and since his brother filed the case under section 107 of the code of criminal procedure against the accused persons and due to such enmity on the previous day the accused persons threatened his brother.

He deposed that the victim Farhad was going to the house of accused-persons and took some litchis then the accused persons beaten him and the said facts was disclosed by accused Komola Khatun in her confessional statement.

In cross- examination of the defence this witness stated that he had 4 brothers and one sister and they lived in a same house and house of the Kuddus was about 20-25 yards from their house and he came to the house after purchasing some eggs and searched for the victim in the nearby houses and also the house of the accused-persons but they did not inform the said matter to the police station and the dead body was found after 2 days of missing nearby the pond of one Sumiaya Begum which was about 100-150 yards from their house. The village defence police informed the matter to the police station. The police sent the dead body to the morgue. He lodged the Ejaher at the evening. They could identify the dead body looking the wearing pant. He was examined by police after 2/3 days of the occurrence.

This witness denied the suggestion that he did not inform to the police that the accused-persons were fled away. He also denied the suggestion that the accused Komola Khatun had no knowledge about the incident and she did not confess the matter. He denied that the accused-persons did not kill his nephew and they were innocent.

P.W. 3, Monayem Hossain, a teacher of a Moktob and the brother of the informant deposed that he did business of betelnut and on 04.05.2010 at about 9:00 p.m. he returned back his house from the Bazar then the mother of victim disclosed that she could not find out her son Farhad. Thereafter he again went to the Bazar and at about 11:00 p.m. met with his brother the informant and disclosed him that the victim was missing. They searched for the victim in several places and went to the house of Kuddus and saw accused Kuddus, Shahab Ali, Komola Khtun, Ibrahim, Juwel, Monta and other making and they did whispering.

He deposed that on asking about the victim they told them to the effect: *ওঁম গ্যমখ থ অগিৱাশক্ৰ িল* They did maiking in the surrounding area for the next 2 days. They found the dead body at the north of the pond of one Sumaiya Begum and no muscle in the mouth and hands was cut off and intestines came out and no muscle in the left leg and the accused-persons fled away after arrival of the police. The accused-persons killed his nephew and indentified them on the dock.

In cross-examination of the defence this witness stated that he went to Kheruajani Bazar at about 3:00 p.m. and on the way back to the house he met with the mother of victim who disclosed the matter to him. Thereafter he alone went to the house of accused Kuddus and saw all the accused persons in the said house and the police officer examined him on the next day.

He denied the suggestion that he did not disclose to the police about the whispering of the accused. He learnt about the recovery of the dead body at about 6:30 a.m. and went there and saw many people were present there and the police came to the said area about 10:00 a.m. He denied the defence suggestion that he did not disclose to the police about the running away of the accused persons and accused persons were not involved with the murder and deposed falsely.

P.W.4 Most. Rehana Khatun, wife of the younger brother of the informant, deposed that on 04.05.2010 at evening victim Farhad was going towards the house of Ibrahim then Shahab Ali and Komola Khatun called him for eating litchis and she saw the victim Farhad went there and at about

9:00 p.m. the mother of victim disclosed that they could not find out Farhad and she also searched for the victim Farhad with his mother. She deposed that on 06.05.2010 she went to the house of Kuddus and she asked them about the victim and in reply they told that: *ওঁনি গ্যাম্‌থ্‌ ন্‌জি তেঁতা ইল* and accused Komola then standing on the door and she could not enter into the room of accused and found Kuddus, Shahab Ali, Ibrahim, Jewel, Montaj Ali, Abdul Mozid and others in the courtyard and they did whispering about any matter.

She deposed that on 07.05.2010 at 6:00 a.m. the daughter of informant Latifa went to the pond of one Sumaiya Begum then the neighbour Badsha informed her that a dead body was lying north to the pond and Latifa went there and found several injuries on the person of victim and on getting information the police came to the place of occurrence and subsequently the accused-persons fled away. The police sent the dead body to the Mymensingh Medical College Hospital Morgue and the police examined her. He identified the accused persons on the dock.

In cross-examination of the defance this witness stated to the effect: \dot{O} inv hLb Kgj vLv $\#$ i $\#$ $\#$ i ev xhv Lb tej v $\#$ $\#$ and the house of Ibrahim was east to her house and the house of Kuddus was about 20-25 yards from the house of Ibrahim and house of Montaj just to the east of the said house.

In cross examination she stated that on the said night she did not go to the house of accused searching for the victim Farhad and on the next day she searched for the victim in the house of Naba, Tara and the surrounding houses. She was informed about the recovery of the dead body from Latifa and went there and found the decomposed dead body. The police examined her after few days. She denied the suggestion that she did not disclose about the calling of the victim by Komola and also denied the suggestion that she did not disclose to the police that the accused persons were worried while they saw her at their house. She denied that she deposed falsely.

P.W.5 Fatema Begum @ Fatema Khatun, mother of the victim deposed that Farhad was 8 years old, he was a student of class two, on 04.05.2010 and while she was in the Twebwell along with her daughter Latifa for fetching water then victim

was going towards the house of Ibrahim then Shahab Ali and Komola Khatun told him to the effect: *Òj "zL† hv#e†j Avgi † †j*
inv † † † The victim Farhad did not return back home and they went to the house of Ibrahim to search for victim Farhad but did not find anyone in the house of Ibrahim and then went to the house of Kuddus and saw Shaheb Ali, Kuddus, Ibrahim, Montaj Ali, Komola Khatun, Abdul Mazid and others in the courtyard of the said house and they were worried and on asking about victim Farhad, accused Komola told that: *Òñm gyMx†h N†i t††a iL* Thereafter she went to the Bazar and on the way to Bazar she met with Monayem the uncle of the victim and returned home. Monayem again went to the Bazar and he searched for the victim in several places. While her husband returned back in the house she told him that accused Komola called the victim Farhad and then did not come back.

She further deposed that on 07.05.2010 the dead body was found from the north to the pond of Sumaiya Begum. One Badsha informed the same and then her daughter Latifa run away in the said pond and could identified the dead body and

his two hands was cut off, no flesh on the mouth and intestine came out. They could identify the dead body looking the wearing pant and thereafter the police came to the place of occurrence. Then the accused-persons fled away stacking the door. The accused Shahab Ali, Kuddus, Ibrahim, Komola Khatun, Abdul Mazid, Montaj Ali, Juwel and other killed her son. She identified the accused person on the dock. She was examined by the police.

In cross-examination of the defence this witness stated that she had two sons and two daughters and there are four family in their house and there were 15/16 members in their family. The house of Ibrahim about 7/8 yards east to their house and the house of Kuddus was about 10/15 yards from the house of Ibrahim. And they called victim Farhad at evening and the victim Farhad went out alone. She confirmed that at about 8:00 p.m. her son did not return back and her husband was not home and at about 8:00-9:00 p.m. she went out searching for the victim and she went to the houses of Ibrahim, Kuddus, Sahid, Montaj and others.

This witness denied the suggestion that she did not disclose to the police that victim Farhad went to the house of Ibrahim and Komola called the victim Farhad for eating litchis and also denied that it is not true that she did not disclose to the police that when Farhad was called she and her daughter was not present nearby the tubewell and did not disclose to the police that all the accused-persons were in the house of Kuddus and she went to the house of Kuddus around 8:00 to 9:00 p.m. and found all the accused-persons at the courtyard of Kuddus consulted something and it is not true that the said facts was not disclose to the police officer. She also denied the suggestion that she did not disclose to the police officer that Shahab Ali threatened her. In reply to the question that: ~~the accused persons~~ ~~invited~~ ~~the victim~~ ~~to~~ ~~the~~ ~~house~~ ~~of~~ ~~Kuddus~~ ~~at~~ ~~8:00~~ ~~to~~ ~~9:00~~ ~~p.m.~~ ~~and~~ ~~found~~ ~~all~~ ~~the~~ ~~accused-persons~~ ~~at~~ ~~the~~ ~~courtyard~~ ~~of~~ ~~Kuddus~~ ~~consulted~~ ~~something~~ ~~and~~ ~~it~~ ~~is~~ ~~not~~ ~~true~~ ~~that~~ ~~the~~ ~~said~~ ~~facts~~ ~~was~~ ~~not~~ ~~disclose~~ ~~to~~ ~~the~~ ~~police~~ ~~officer.~~ ~~She~~ ~~also~~ ~~denied~~ ~~the~~ ~~suggestion~~ ~~that~~ ~~she~~ ~~did~~ ~~not~~ ~~disclose~~ ~~to~~ ~~the~~ ~~police~~ ~~officer~~ ~~that~~ ~~Shahab~~ ~~Ali~~ ~~threatened~~ ~~her.~~ ~~In~~ ~~reply~~ ~~to~~ ~~the~~ ~~question~~ ~~that:~~ ~~the~~ ~~accused~~ ~~persons~~ ~~invited~~ ~~the~~ ~~victim~~ ~~to~~ ~~the~~ ~~house~~ ~~of~~ ~~Kuddus~~ ~~at~~ ~~8:00~~ ~~to~~ ~~9:00~~ ~~p.m.~~ ~~and~~ ~~found~~ ~~all~~ ~~the~~ ~~accused-persons~~ ~~at~~ ~~the~~ ~~courtyard~~ ~~of~~ ~~Kuddus~~ ~~consulted~~ ~~something~~ ~~and~~ ~~it~~ ~~is~~ ~~not~~ ~~true~~ ~~that~~ ~~the~~ ~~said~~ ~~facts~~ ~~was~~ ~~not~~ ~~disclose~~ ~~to~~ ~~the~~ ~~police~~ ~~officer.~~ ~~She~~ ~~also~~ ~~denied~~ ~~the~~ ~~suggestion~~ ~~that~~ ~~she~~ ~~did~~ ~~not~~ ~~disclose~~ ~~to~~ ~~the~~ ~~police~~ ~~officer~~ ~~that~~ ~~Shahab~~ ~~Ali~~ ~~threatened~~ ~~her.~~

She denied the suggestion that she did not disclose about the fled away of the accused-persons. She denied that the accused persons did not kill the victim Farhad and the recovered dead body was not the dead body of her son and she deposed falsely.

P.W.6 Most. Latifa Akter, the daughter of the informant, deposed in a same language as deposed by her mother. She deposed that they went to the house of accused Ibrahim but they were not present and thereafter went to the house of Kuddus and saw that Kamla was standing on the door and accused Kuddus, Ibrahim, Abdul Mazid, Montaj Ali, Shahab Ali and Juwel were in the courtyard and they consulted to any matter and she asked the accused Komola about Farhad, in reply she told that: *ওঁহি গ্যাম্‌থ্‌ ন্‌হি তেঁতা ইল* She deposed that on 07.05.2010 at morning while she went to the pond of Sumaiya with ducks then one Badsha informed her that a dead body was lying on the north to the pond and saw his nose, ear, hands were cut off and intestine came out and flesh of leg cut off and she could identified the victim looking the wearing pant and she went to the house and informed the matter and the police came to the place of occurrence and the accused persons flee away stacking the door. She identified the accused-persons on the dock.

In cross-examination of the defence this witness stated that she was a student of class four in Brac School. She also

disclosed that at evening, while she and her mother were in the tubewell they saw Komola Khatun called her brother Farhad and the house of Ibrahim about 7/8 yards from their house and Farhad went alone and her mother saw the same. The police officer examined her.

She denied the defence suggestion that she did not disclose to the police that Komola Khatun called the victim Farhad for eating litchis while they were in tubewell and at about 8:00 p.m. they went to the house of accused searching for the victim Farhad and about 11:00 p.m. her father was returned back and came to know the facts from her mother. She denied the suggestion that she did not disclose to the police about the whispering or accused persons were consulting any matter in the house of Ibrahim. She also denied the suggestion that she did not disclose to the police that after arrival of the police the accused-persons fled away and she deposed falsely and she deposed as a tutor witness.

P.W.7 Md. Aziz, deposed that he knew the informant and he was his neighbour and he was a Rickshaw puller. On 04.05.2010 at evening the son of Aiyub Ali was missing and on

07.05.2010 the dead body was found on the north of the pond of Sumaiya Begum. On 02.06.2010 while he was ridding Rickshaw nearby the house of Ibrahim then the police came there and recovered a wooden box from the house of Ibrahim and the local people told that the dead body was kept in the said box. Later on the police officer seized the said box and prepared the seizure list and he put his signature in the seizure list. He proved the seizure list and his signature as Exhibit No. 3 and 3/1.

In cross examination of the defence this witness stated that after one month of the incident the said material was seized from the house of accused and many people were also present there. He stated that he had also same type of Box in his house and denied the suggestion that he deposed falsely.

P.W.8 Tutol, deposed that on 04.05.2010 he was in his house and next day at about 11:00 a.m. he came to know that son of the informant was missing and they did miking and on 07.05.2010 he also came to know that the dead body was found on the north side of the pond of Sumaiya Begum and he run away in the said pond and found the dead body and

several injuries found on the person of the victim and he came to know that the dead body had been kept in the house of accused Kuddus and also came to know that accused Saheb Ali, Kuddus, Ibrahim, Montaj and others killed the victim Farhad and kept his dead body under a cot of Kuddus. Thereafter they cut off his hands and covered his dead body with polyethene sack and kept under the wooden box of Ibrahim and after three days of the incident accused Monta kept the dead body near the pond.

The police prepared the inquest report and took his signature in the inquest report. He proved his signature present in the inquest report as Exhibit No. 1/2. He deposed that when the police came to the place of occurrence the accused-persons fled away and he was examined by the police.

In cross examination of the defence this witness stated that his village was adjacent to the village of the informant and he could not say after how many days the police came to the place of occurrence. He deposed that while he went to see the dead body found many people present there and he did not find any of the accused person present there and also came to

know that the accused persons fled away from the area. He denied the defence suggestion that he deposed falsely.

P.W.9 Md. Fazlul Hoque, was an Advocate Assistant, deposed that on 04.05.2010 he had in his house and on the next day morning he came to know that the victim Farhad was missing and they searched for him. On 07.05.2010 he came to know that the dead body was found near the pond of Sumaiya Begum then he went there and found several cut injuries on the person of the deceased and came to know that accused Komola, Shahab Ali, Ibrahim, Kuddus and other killed the victim Farhad. Thereafter the police came to the place of occurrence and the accused-persons fled away and the police held the inquest report. He put his signature in the inquest report, he proved his signature present in the inquest report as Exhibit No. 2/3.

In cross-examination of the defence this witness stated that he was the resident of another village. He came to know the missing of the victim when informant did miking and when learnt the recovery of the dead body he went there and saw

about 100 peoples were present there and the dead body was decomposed. He denied that he deposed falsely.

P.W.10 Md. Sanaullah Khan (Maruf), who had a fishery firm in Kheruajani village and in everyday he came there. He knew the informant and on 02.06.2010 at about 6:00 p.m. while he was returning back from his fishery firm he saw police and local people in the house of accused Ibrahim and saw a large wooden box and people saying that the accused persons killed the victim Farhad and kept the dead body under the wooden box. The police seized the said wooden box and prepared the seizure list and he put his signature in the said seizure list. He proved his signature present in the said seizure list as Exhibit No. 3/2. He further deposed that the people told that accused Shahab Ali, Kuddus, Montaj, Modhu, Komola Khatun, Jewel and others killed the victim Farhad. He identified the accused persons on the dock. He told that seized wooden box was present in the court.

In cross-examination of the defence this witness stated that he lived in Mymensingh town and the occurrence took place in Muktagacha police station area and he went his

fisheries everyday and which is about 30-40 feet from the place of occurrence. He wanted to get electric connection from the house of Kuddus but he denied. Thereafter on paying the bill he installed electric line from the house of the nephew of Kuddus. He denied the suggestion that he deposed falsely.

P.W.11 Md. Habibul Islam, deposed that he knew the informant. He deposed that on 04.05.2010 the son of the informant was missing and the informant did miking. On 07.05.2010 the dead body was recovered from the north side of the pond of Sumaiya Begum and he went there and found several injuries on the person of the victim. The police prepared the inquest report and he put his signature. He proved his signature as Exhibit No. 1/4. He further deposed that the local people told that accused Shahab Ali, Kuddus, Ibrahim, Komola Khatun, Montaj and others killed the victim Farhad and he was examined by the police officer.

In cross-examination of the defnece this witness stated that accused Kuddus filed a case against him for trying to rape the niece of Kuddus but which was a false case. He stated that when he went to the place of occurrence saw many people

were present there. He denied the suggestion that he learnt from the surrounding people that accused-persons killed the victim Farhad and he denied the suggestion that due to prolonged enmity he deposed falsely and the case instituted against him was ended before 5 years.

P.W.12 Md. Lutfar Rahman Shishir, Senior Assistant Judge, deposed that on 01.06.2010 he was Judicial Magistrate of Mymensingh and he recorded the confessional statement of accused Komola Khatun. He after complying all the procedure under section 164 of the code of criminal procedure recorded the confessional statement and he had 5 signatures in the confession and the accused also put her 5 signatures. He proved the said confessional statement and his signatures as Exhibit No. 4, 4/1, 4/2, 4/3, 4/4 and 4/5.

This witness stated that on 07.05.2010 he recorded the statement of witness Sharifa Akter and he had two signatures and also two signatures of Sharifa. He proved the said statement and his signature as Exhibit No. 5 and 5/1.

In cross-examination of the defence this witness stated that the accused Komola Khatun was arrested on 31.05.2010

and brought before Muktagacha police station at about 12:20 p.m. and on the next day at about 1:00 p.m. she was brought before him and he did not ask the time of arrested and she was in whose custody in the aforesaid time. He further stated that this witness disclosed that accused Jewel hit the chip of the head of victim Farhad with his elbow and thereafter the victim Farhad fell down to the ground and which was written in the confessional statement. This witness further stated that on 31.07.2010 the said accused filed an application for retraction and Magistrate Jahangir Hossain was in duty.

He further stated that he had no knowledge whether the police recorded her statement when she was in the custody of the police. He denied the suggestion that he recorded the confession as per providing statement of the police.

P.W.13 doctor Md. Monjurul Kadir, who held the autopsy of the deceased, deposed that on 07.05.2010 he held the autopsy of victim Md. Farhad (10) identified by constable No. 317 Mofizuddin and found loss of both lips, right side of face, both ears, by sharp cut wound. Imputed both arms by chop wounds. Sharp cut wound on the left iliac region.

Multiple stab wounds on the multiple sides of both legs. Sharp cut wound on the anterior abdominal wall and intestine comes out from the injury.

He further deposed that on dissection he found all the viscera were pale due to hemorrhage.

And made the following opinion: “cause of death was due to hemorrhagic and neurogenic shock. Resulting from the above-mentioned injury. Caused by moderately heavy sharp cutting and sharp cutting pointed weapon which was ante-mortem and homicidal in nature.”

He proved the said post-mortem report and his signature present in the report as Exhibit Nos. 6, 6/1 and 6/2.

In cross-examination of the defence this witness stated that he held the autopsy on the basis of G.D. entry No. 224 dated 07.05.2010 and found that lips, ears, and right side of mouth was lost and which was ante-mortem and he also stated that he did not mention the time of injury.

P.W.14 Md. Mofizur Rahman @ Mofiz Uddin, constable No. 317 deposed that on 07.05.2010 he was attached at the Muktagacha police station and as per direction of the officer-

in-charge he went to Kheruazani village and found the dead body of victim Farhad near the pond. The police officer hand over the dead body to him to brought to the morgue and after completing the post-mortem he received the dead body and handed to the relatives of the victim and he put his signature in the challan form. He proved the said challan and his signature as Exhibit- 7 and 7/1.

In cross examination of the defence this witness stated that through G.D. No. 224 they went the place of occurrence.

P.W.15 Md. Abdul Motaleb, constable No. 1022, deposed that on 18.01.2011 he was attached at Moktagacha police station and went to Kheruazani village with S.I. Omar Ali and on the identification of P.W.18 Sharifa Khatun the police officer seized an old cot from the house of accused Kuddus and the witness Sharifa told them that the dead body was kept under that cot and the police office prepared the seizure list. He proved the seizure list and his signature as Exhibit- 8 and 8/1.

P.W.16 Md. Mosharaf Hossain, Sub-Inspector of police, deposed that on 07.05.2010 he was attached with Muktagacha

police station and on the direction of the Officer-In-Charge at about 9:00 a.m. on 07.05.2010 he went Kheruazani village and found the dead body of the deceased Farhad on the north side of the pond of Sumaiya Begum and on identification of the informant Aiyub Ali the father of the victim he held the inquest of the dead body and prepared the inquest report and took the signatures of the witnesses in the inquest report. He proved the inquest report as Exhibit No. 1 and his signature as Exhibit No. 1/5 and the dead body was decomposed and found injury on the left side of the waist and intestine came out and the deceased was wearing a half pant and thereafter the informant lodged the Ejaher being No. 6 dated 07.05.2010 at about 19:15 p.m. He was entrusted to investigate the case. He visited the place of occurrence, prepared the inquest report, the sketch map along with separate index, seized three alamats, prepared the three seizure list. He proved the three seizure list as Exhibit Nos. 9, 10 and 11 and his signatures as Exhibit Nos. 9/1, 10/1 and 11/1 respectively. On 07.05.2010 he also seized a wooden cot and a white colour plastic old sack and prepared the seizure list. He further deposed that on

08.05.2010 at about 13:05 p.m. He also prepared a seizure list of a brown colour old half pant and which was brought by the constable and prepared the seizure list and also seized one pair of old sandal which was used by accused Kuddus and he prepared the said seizure list on 02.06.2010. He prepared another seizure list of a wooden box which was 3 feet length, 2 feet wide and 2 feet height. He proved the said seizure list as Exhibit No. 3 and his signature as Exhibit No. 3/3 and proved the seized material as material Exhibit No.I. He sent the dead body to morgue through challan by constable No. 317 Mofizur Rahman and he proved the said chalan and his signature as Exhibit Nos. 7 and 7/1. He prepared the separate sketch map along with index and he proved the same as Exhibit No. 12 and his signature as Exhibit No. 12/1 and index as Exhibit No. 13 and his signature as Exhibit No. 13/1. He arrested accused Komola Khatun on 01.06.2010 and sent her before the Magistrate for recording her confessional statement. He arrested accused Ibrahim @ Ibra on 20.06.2010 and sent him before the court and due to his transfer he handed over the case docket to the officer-in-charge on 30.07.2010.

In cross-examination of the defence this witness stated that the F.I.R. was lodged on 07.05.2010 at about 7:15 a.m. and he admitted that in a column of Ejaher the name of accused was not filled-up and he also admitted that before the said Ejaher a G.D. entry No. 214 dated 07.05.2010 was recorded. He prepared the inquest report and the sketch map on the basis of said G.D.

He stated that on 08.05.2010 at 1:05 p.m. he seized alamat in the Muktagacha police station. On 10.05.2010 he prepared another seizure list and arrested accused Komola Khatun on 31.05.2010 at about 12:20 p.m. and produced her before the magistrate 01.06.2010 at 1:00 p.m. on the said night she was in the police station and he also recorded 161 statement of accused Komola Khatun. He denied the suggestion that he provided the 161 statement of Komola Khatun to the magistrate and who recorded the statement accordingly. He denied the suggestion that the accused Komola Khatun did not disclose anything to him and his investigation is perfunctory.

P.W.17 Md. Omar Hossain Miah, Sub-Inspector of police, deposed that on 01.08.2010 he was entrusted to investigate the case and visited the place of occurrence. On 28.01.2011 he seized an old cot and prepared the seizure list and proved his signature in the seizure list as Exhibit No. 8/2 and he handed over said cot to one Helal Uddin through Jimmanama and he proved the said Jimmanama as Exhibit No. 14 and his signature as Exhibit No. 14/1.

He further deposed that on 28.01.2011 he prepared the sketch map No.1 and 2 along with separate index. He proved the said sketch map and index as Exhibit No. 15 and 16 and his signature as Exhibit No. 15/1 and 16/1. The cot was seized from a tin-shad hut of accused Abdul Kuddus and the hut mentioned in the "ka" which was the house of Ibrahim wherein the dead body of the victim was kept. He examined the witnesses and arrested accused Montaj @ Monta. In his investigation he found that the age of victim Farhad was 8 years and on 04.05.2011 he went to the house of Ibrahim for playing and the house of accused Ibrahim and house of

accused Kuddus was adjacent house from where the victim was missing.

He further deposed that while Shahab Ali and Juwel were bundling litchis at the house of accused Kuddus then victim Farhad went there and fell down and some litchis were melted away and then Shahab Ali hit Farhad on his head by a khatia of guava tree then Farhad fell down on the ground. They think that the victim had died from his injuries and kept the victim covered by a sack under the cot and thereafter on consultation accused Kuddus, Ibrahim @ Ibra, Abdul Mazid @ Modhu, Montaj Ali @ Munta cut off the hands of the victim and Shahab Ali also cut off the mouth and Komola gave the dao and kept in a wooden box in the house of Ibrahim. Thereafter the accused Komola lost his sense and after nursing her daughter she regain her sense and after two days that is on 07.05.2010 the accused Montaj Ali brought the dead body and kept in to the pond of Sumaiya Begum at 6:30 a.m. and the local people saw the dead body which was decomposed. In his investigation he found prima-facie case against the accused-persons and accordingly submitted charged sheet being No.

76 dated 05.06.2011 under section 302/201/34 of the Penal Code.

In cross-examination of the defence this witness stated that the first investigation officer Md. Mosharaf Hossain investigated the case till 30.07.2010 and who examined eye-witnesses namely Sharifa Khatun, witness Helal Uddin, Sohag, Liton, Constable Motaleb and prepared two sketch maps along with index. He denied the suggestion that he did not investigate the case properly and with influence of informant he filed the false charge sheet.

P.W.18 Sharifa Akter, deposed that the victim Farhad was his neighbour and she knew him and the occurrence took place before four years ago and his dead body was found about 1 kilometer from their house and disclosed that the accused Kuddus, Komola Khatun were her parents, Ibrahim was her grand-father, Juwel was uncle, Shahab was her brother and other accused were her relatives. He deposed that victim Farhad did not come to their house and she did not know nothing about the killing. She was arrested and produced

before the magistrate and she did not put any signature in any paper but she proved her signature as Exhibit No. 5/2C.

This witness was declared hostile.

In cross-examination of the prosecution this witness stated that this is not a fact that she deposed before the magistrate voluntary and she did not know the magistrate. He denied that her father, mother, brother and uncle conjointly killed the victim Farhad and covered the dead body by a sack and kept the same under the cot. She also denied the suggestion that to save her parents and brother and uncle she deposed falsely.

The confessional statement of accused Komola Khatun as under: 0 vgi v g Kg vl vZ! | MZ " ev# g\$ evi i c%& g\$ evi Be(' Be(i Q †) † Mv+Mv g w -! cv i † v † Mg vw † | Zvivmvi w -! . \$ m/ Q 1K ! vM ew2 † v8 † i v m | ml v 4 † K vKQ ! w -! ev B K † i Zviv - † i ey) † i w -! e - † v † |) † ew2 † B 4 † K | m N † i gB6 † e † m eK w -! w ev † † 4 † K | 3 invi) † † i N † i -v † v m 787 ` † † v † | 3 inv) † † i 1Kw w -! 4 v eiv w † † * |) † † 3 inv † i gv4 vi w † c K † w † † vZ K † i | 3 † 3 inv gw † † c † 2 g † i v † | Be(l ei c † † 1 † m N v ` † † v8 n * | cw 9v † † ; ; n * | Be() † † † K cv † † vgi = v

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

We have heard the learned Deputy Attorney General,
 the learned Advocate of the appellants and the State defence
 lawyer, perused the Ejaher, the charge sheet, the inquest
 report, the seizure list, the post mortem report, the confession
 of accused Komola, the impugned judgment and the papers
 and documents as available on the record.

The prosecution case is that the deceased Farhad aged
 about 8 years was missing on 04.05.2010 and the informant
 came to know about 11:00 p.m. while he returned back from
 Mymensingh with his brother the P.W.3 and then came to the

house and his wife disclosed that at evening the victim Farhad went away towards the house of Ibrahim for playing and thereafter she could not find him. Accordingly they searched for him in several houses including the house of accused persons and also did miking two days in the said area and after three days of missing on 07.05.2010 they found the dead body of the victim in the north side of the pond of Sumaiya Begum and could identified the dead body looking the wearing pant of the deceased and several injuries found on the person of the deceased. His two hands, nose, ears were cut off, tongue was lost, no flesh on the mouth and left leg and intestine came out. Thereafter the informant lodged the Ejaher on 07.05.2010. In the Ejaher the informant stated that due to the previous enmity regarding the land property with the accused-persons a Salish was held but the accused-persons did not accept the decision of the said Salish, for which he filed a criminal case under sections 107/117 of the code of criminal procedure against the accused Kuddus and others and the date was fixed on 03.05.2010 and while he was going to the court accused

Kuddus threatened him and thus suspected the accused persons that they may be killed the victim.

In his deposition P.W.1 also deposed in a similar language but subsequently he told the facts which was disclosed by accused Kamola Khatun in her confessional statement made under section 164 of the code of criminal procedure as well as the statement made by witness Sharifa Khatun.

This case as made out by P.W.5 that on the date of occurrence the victim went towards the house of Ibrahim for playing but subsequently they told to effect: ~~Ò Lb m vñe A y x & Kgj vLv z j "zL† h#e†j Avgi † † inv †K † † †~~ The P.W.6 the daughter of the informant also stated in a similar way which was also supported by P.W.4 the wife of the brother of the informant.

We have carefully examined the evidence, the F.I.R. and the evidence of P.W.1. It is our view that the aforesaid portion of calling away by the accused Shahab Ali and Komola is contrary to the initial facts and the deposition of P.W.1. The F.I.R. was lodged after three days and the P.W.1 in his

deposition stated that only his wife disclosed to him that at the evening before sunset the victim running away towards the house of Ibrahim for playing nothing more. So, from the testimony of P.W.4, P.W.5 and P.W.6 it is our considered view that which is subsequent thought of those three witnesses.

The another fact is that the P.W.2, P.W.3, P.W.5 and P.W.6 went to the house of Ibrahim and found that none was present in the said house, then they went to the house of Kuddus and found that accused Kuddus, Shahab Ali, Komola Khtun, Ibrahim, Juwel, Monta and others were present there and they were worried and they did consolation about any matter and while asking them about the victim Farhad then they told to the effect: ~~Onm gyMxth Nti tpa iL~~ this version also has not been mentioned in the F.I.R. as well as the deposition of P.W.1.

We have also considered the entire material facts of the case. The prolonged enmity among the parties has been proved and the testimony of the above witnesses presumed to be subsequent embellishment of the F.I.R. story. The F.I.R. was lodged after three days of the occurrence, even after 12 hours

of the recovery of the dead body but no reflection about the aforesaid facts in the F.I.R. as well as in the deposition of P.W.1.

It is admitted that the victim was a minor boy aged about 8 years was missing on 04.05.2010 and subsequently killed and the dead body was recovered on 07.05.2010 and the entire body was decomposed and the vital part of the dead body was not found and cut off. It is a very atrocious and heinous offence.

On close reading of the evidence it is found that no eye-witnesses to see about the killing and the said facts of killing only brought out from the confession of accused Komola Khatun who was arrested on 31.05.2010 after 20 days of the occurrence. In her confessional statements she narrated the details of the facts.

We have perused the said 164 statements from where it is found that the magistrate after completing all the formalities of provision of law recorded the said confessional statements. But it is found that which is purely an exculpatory confession in

nature. The accused Komola Khatun did not implicate her with the alleged offence.

The learned Deputy Attorney General submits that the said witness purposely suppressed the facts and did not implicate her. He submits that as per provision of section 32 of the Penal Code she is liable for commission of offence for constructive liability. The section 32 of the penal code as under: *"In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions."*

In the case of The State –vs. Md. Moinul Haque and other, reported in 21 BLD(HCD)-465, it has been held: *"It is not necessary to prove individual overt act to connect them with the offence under section 6(4) of the Act which provides for punishment both for individual as well as for constructive liability of a gang. It is very pertinent to note the word 'gang' and the word 'cause death' as has been used to make not only the acts but also omission as defined in section 32 of the Penal Code punishable under section 6(4) of the Act."*

We have perused the evidence on record the words referring to acts include illegal omission provided under section 32 of the Penal Code is not applicable in the instant case since the confessional statement of accused Komola Khatun is purely an exculpatory confession.

In the instant case admittedly no eye witness of the occurrence and the case based upon the confession of Kamola Khatun and the circumstantial evidence is that there were long enmity among the parties and the informant filed the case under sections 107/117 of the code of criminal procedure against the accused Kuddus and others before the occurrence. It is also found that the victim Farhad running away towards the house of Ibrahim at the relevant time nothing more.

From the evidence on record it is found that the calling away the victim Farhad by the accused Komola and Shaheb Ali if considered then it is subsequent embellishment of the F.I.R. story and which was not supported by the informant the P.W.1.

It is found from the evidence of the P.W.2, P.W.5 and P.W.6 that they went to the house of Kuddus and Ibrahim

searched for the victim boy and saw that the accused persons did consultation gathering in the courtyard of accused Ibrahim but the said fact also did not disclose in the F.I.R. as well as the P.W.1 did not disclose the same.

Even no independent witness to see that the dead body of victim was kept by any of the accused in the pond from where the dead body was recovered.

Now we have examined the confessional statement of accused Komola Khatun, we have already considered that the said confessional statement of Komola Khatun recorded by the magistrate after fulfillment of all the procedure of law. But the which seems to be an exculpatory in nature.

In the case of Akkas Ali and other -versus- The State, reported in 19 BLD (HCD)-268. Wherein their lordship held: *“The confessional statement appears to be exculpatory having no active part in the occurrence by the confessing accused and as such the same cannot be used against its maker and as such the conviction cannot be sustained on the basis of said confessional statement.”*

It is found that though the confessional statement was made by the magistrate after fulfillment of all the procedure of law but on the basis of the said exculpatory confessional statement conviction of appellant Komola Khatun cannot be based for conviction and same cannot be treated to prove guilty of the accused convict Komola.

Similar view has been taken in the case of Ibrahim Mollah and others –vs. The State, reported in 40 DLR (AD)-216 wherein my lord Mr. A.T.M. Afzal the then Chief Justice took view: *“That confession, in my opinion, was no confession in the eye of law because from the beginning to the end it was nothing but a testimony against the other accused without the maker having involved himself in any part of the commission of the alleged offence not to speak of other accused, the maker himself could not be convicted upon such a statement inasmuch as he did not implicate himself in the least in the alleged offence in all fairness. Prosecution should have examined him as a witness instead of making him an accused so that the other accused could cross-examine him.”*

Series of cases cited by the learned Advocate that the confessional statement of co-accused should not be used as the sole basis of conviction in absence of independent and corroborative evidence. In the case of Lutfun Nahar Begum - versus- The State, reported in 27 DLR (AD)-29, wherein their lordship held: *“The language of the section does not render the confession of a co-accused as evidence within the definition of section 3 of the Evidence Act. It simply says that the court may ‘take into consideration such confession’. And the confession of an accused cannot be treated as substantive evidence against another accused but that it can only be used to lend assurance to other evidence.”*

This principle also supported by the decision of the case of Alamgir Hossain and another –versus- The State, reported in 22 BLC (AD)-155, wherein their lordship held: *“The confessional statement of a co-accused is admissible against other persons in the sense that it may be taken into consideration against them along with other evidence. But for this section 30, the confessional statement of one accused will*

be inadmissible in evidence against another accused in view of section 3 of the Act.”

Wherein their lordship further held: *“The statement of a co-accused does not fall within the definition of evidence as given in section 3 of the Act. The simple reason is that it is not made on oath; that it is not made in presence of the accused and that its veracity is not tested by cross-examination. It is therefore, a very weak evidence against co-accused if it is regarded as evidence under section 30.”*

We have already considered the testimony of P.W.5 and P.W.6 that the victim running away towards the house of Ibrahim for playing nothing more and if it is found true that the said accused-persons consulted about any matter in their house but none of the witnesses disclosed that they heard that they consulted about the killing of the victim Farhad.

On perusal of the confessional statement of co-accused Komola Khatun it is found that the accused Jewel inflicted in the chip of victim nothing more.

Though the witnesses deposed that after recovery of the dead body the accused-persons fled away from their house

and it is also found from the said 164 statement that after consultation accused Ibrahim and Kuddus cut off the hand and the dead body was kept in the house of Ibrahim and two days after the incident Ibrahim and Montaj brought the dead body on the north side of pond of Sumaiya Begum at the Fazar prayer time. It is also found that none saw the same and no such evidence that anyone saw them to bring anything. If we considered the confessional statement of the co-accused Komola Khatun it has already been considered which was exculpatory in nature and we have already considered that on the basis of the said exculpatory confession the maker is not found guilty for the offence since she did not do any part for killing or disappearance of the victim. In such a case only on the basis of the statement and evidence that the victim running away towards the house of Ibrahim it is unsafe to connect the accused-persons alleged to be involved in murder and the exculpatory confessional statement should not be the sole basis for conviction of those accused persons since no substantial evidence brought against them.

The another question is that the daughter of Komola Khatun also made statement under section 164 of the code of criminal procedure and she was made as witness. But the prosecution declared her hostile. In such a case when a witness examined in the dock then the statement made under section 164 of the code of criminal procedure can be used to support or challenged the evidence in the court. This matter elaborately discussed in the case of Humayun Kabir and another -versus- The State, reported in 72 DLR (AD)-47, wherein their lordship held: *“When a prosecution witness is declared hostile, the court under such circumstances, in its discretion may allow the party, who calls him as witness, to put any question in the form of cross-examination. Such discretion is unqualified and is point apart from any question to the hostility. The value of the evidence of such hostile witness cross-examined by the party calling him cannot be used for or against either party. Such witness loses all evidentiary value. When the witness has been discredited on one point may not be given credit on another.”*

The learned Deputy Attorney General also frankly conceded with the said matter that 164 statement of the witness Sharifa Khatun should not be treated as evidence. But on perusal of the judgment it is found that the trial court considering the confessional statement of Komola Khatun made under section 164 statement and the statement of Sharifa Khatun the P.W.18 under section 164 convicted the accused persons amalgating the two statements. Since our Apex court by the aforesaid decisions decided that the said statement of the witness cannot be considered as evidence and it cannot be treated for conviction of any other co-accused in such a case it is our considered view that the trial court measurably failed to understood the said facts and wrongly passed the impugned judgment.

Now the question is that whether any moral conviction can be passed and awarded. In the case of *The State –versus- Khadem Mondal*, reported in 10 BLD (AD)-228, wherein their lordship held: *“In a charge of murder moral conviction is no substitute for legal evidence. The only fact that the girl was found lying dead in the room of her husband, although very*

grave and definitely incriminating, susceptible to give rise to a genuine moral conviction as to the guilt of the accused, in the absence of other incriminating conduct of the accused is not sufficient to convict and sentence him under section 302 of the Penal Code. It is improper to substitute moral conviction for legal evidence.”

From the above decision it is found that though in the cited case the victim's dead body was found in the pond, but in the instant case no evidence that victim was killed in the house of the accused. Furthermore the alleged Wooden Box was seized but no blood or any alamsats for committing offence found in the said Box. In such a case it is our view that the decision is very much applicable in the instant case.

It is found that the condemned-convict Shahab Ali obtained bail and face the trial and he was also examined under section 342 of the code of criminal procedure and thereafter he remaining absconded. The learned Deputy Attorney General submits that it is not only absconding but he is fugitive from justice. It is settled principle that if anyone seeking redress before this court as a fugitive his matter

should not be considered at all. The said principle elaborately discussed in several decisions of our Apex court, wherein the Apex court discharged the rule of writ petition and rejected the entire proceedings where the petitioner was a fugitive. But in the instant case it is found that the condemned-convict faced the trial and he was examined under section 342 of the code of criminal procedure. In disposal of the death reference made under section 374 of the code of criminal procedure the High Court Division should dispose of the same afresh considering the evidence on record. It is settled principle that the fugitive cannot get justice but in the instant case it is our considered view that since this is a capital sentence and the reference made by the concerned Judge and this court has jurisdiction to considered all the matter.

We have already considered that the case of calling away by the accused Ibrahim is not proved and confessional statement of co-accused Komola wherein it is found that accused Shahab Ali had no involvement about the killing or the disappearance of the dead body. And conviction should be

awarded on the basis of legal evidence and where there is no evidence then moral conviction cannot be awarded.

In the case the of Pear Ali Khan alias Pear Ali –versus- The State, reported in 3 BLC (HCD)-555, wherein their lordships held that: *“The principle of law is that absconsion of the accused alone cannot be considered to be a valid ground for conviction without there been any supporting evidence.”*

And in the case of Sanaullah –versus- The State, reported in 2 BLC (HCD)-544, wherein their lordship held that: *“The learned Assistant Sessions Judge convicted and sentenced the accused appellant Sanaullah in considering the circumstances as to fact of his absconsion from the very beginning of the case. Absconsion of an accused may be considered as a circumstance for making an inference about commission of an offence, but that alone cannot be the basis of conviction without any corroborative evidence whatsoever. Mere absconsion of an accused without any corroborative evidence as to the offence alleged to have been committed cannot be the basis of conviction so as to sustain it in law. The learned Assistant Sessions Judge has failed to make proper*

appreciation of the evidence on record in convicting and sentencing the accused appellant under section 395 of the Penal Code. The prosecution, as it appears has failed to prove the case against the appellant for which he is liable to be acquitted of the charge.”

Similar view has been taken in the case of The State – versus- Sree Ranjit Kumar Pramanik, reported in 45 DLR(HCD)-660.

We have considered the entire material facts of the case that though the accused-prisoner Shaheb Ali a fugitive and cannot redress before this court but minimum requirements is that the prosecution should prove that he had any involvement to commit murder. If we considered the 164 statement of co-accused Komola Khatun wherein she also did not mention that the said accused had any involvement to commit murder in any way.

Considering the aforesaid facts and circumstances of the case it is our view that though the convict-accused-prisoner Shahab Ali has a fugitive but in disposal of the death reference we are in agreement with the aforesaid decisions that

absconson is not the basis of conviction without any legal evidence or substantive evidence .

Considering the aforesaid facts and circumstances of the case and the evidence on record it is our considered view that the prosecution measurably failed to prove the charge leveled against the condemned-prisoners, the condemned-convict and the convict-appellant Komola Khatun.

Considering the facts and circumstance of the case and the discussions as made above we find merit in the appeal.

In the result, the death reference is rejected. The impugned judgment and order of conviction and sentence dated 09.11.2015 in Sessions Case No. 645 of 2011 by the learned Additional Sessions Judge, 2nd Court, Mymensingh is hereby set-aside. Consequently the order of conviction and sentence against all the accused-convicts namely (1) Shahab Ali (Absconding) and condemned-prisoners (2) Abdul Kuddus, (3) Ibrahim @ Ibra, (4) Abdul Mazid @ Madhu, (5) Muntaj Ali @ Monta (6) Md. Jewel and (7) Komola Khatun is hereby set-aside.

The criminal appeal No. 9529 of 2015 is hereby allowed. The condemned-prisoners namely (1) Abdul Kuddus, son of late Nayeb Ali, (2) Ibrahim @ Ibra, son of Md. Chan Miah, (3) Abdul Mazid @ Madhu, son of late Gohar Sheikh, (4) Muntaj Ali @ Monta, son of late Kachim Uddin and (5) Md. Juwel, son of Ibrahim @ Ibra be set at liberty forthwith if not wanted in connection with any other cases.

The convict-appellant Komola Khatun is discharged from her bail bond.

Consequently all the Jail Appeals are hereby disposed of.

Communicate the judgment and transmit the lower Court records at once.

Bhishmadev Chakrabortty, J:

I agree.

M.R.