

IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(CRIMINAL APPELLATE JURISDICTION)

**Present:**

**Mr. Justice S M Kuddus Zaman**

**And**

**Mr. Justice A.K.M. Rabiul Hassan**

**Criminal Appeal No.3664 of 2020**

Putul Miah

....Appellant

-Versus-

The State

.... Opposite Party

Mr. A.N.M. Abed Raja, Advocate

... For the convict-appellant.

Mr. Sujit Chatterjee, D.A.G. with

Mr. Moududa Begum, A.A.G.

Mr. Mirza Md. Soyeb Muhit, A.A.G.

Mr. Mohammad Selim, A.A.G.

Mr. Zahid Ahmed (Hero), A.A.G.

.... For the State.

**Heard on 05.06.2024.**

**Judgment on 03.07.2024.**

**S M Kuddus Zaman, J:**

This appeal at the instance of convict accused Putul Miah is directed against the judgment and order of conviction and sentence dated 23.01.2020 passed by the learned Session Judge, Moulvibazar in Session Case No.268 of 2012 arising out of Moulvibazar Police Station Case No.04 dated 06.07.2011

corresponding to G.R. Case No.188 of 2011 (Moulvibazar Model) convicting the appellant under Sections 302/34 of the Penal Code and sentencing him to imprisonment for life and pay fine of Taka 50,000/-(fifty thousand).

Facts in short are that cousin brother of victim Sayed Miah namely Saleh Ahmed lodged an ejahar on 06.07.2011 at 23.45 hours alleging that on 03.07.2011 above victim Sayed Miah set out for Moulvibazar town but he did not return home and his mobile phone was found switched off. They searched to find out above victim but to no avail. On receipt of an information of a floating dead body in the Wapda canal he rushed to above place on 06.07.2011 and found the dead body of victim Sayed Miah with cut injury on neck. His legs were fastened with electric wire with a bamboo pole. He suspects that Habib, Jashim, Humayun and other unknown co-accused persons murdered his brother and dumped the dead body in above canal.

PW15 Sub-Inspector of Police Sajol Kumar Kanu retrieved above dead body, prepared inquest report of the same and forwarded above dead body for post-mortem examination. The

investigation of the case was assigned to PW15 Sajol Kumar Kanu who in course of investigation prepared a sketch map of the occurrence place alongwith an index thereof, seized alamats, prepared inquest report and seizure list, arrested appellant Putul Miah and produced him before a Judicial Magistrate for recording his confession under Section 164 of the Code of Criminal Procedure, 1860. He also recorded statement of prosecution witnesses under Section 161 of the Code of Criminal Procedure. In above investigation offence punishable under Sections 302/34 of the Penal Code having prima facie proved against appellant and other four accused persons he submitted charge sheet No.313 on 31.10.2019 against them.

At trial the prosecution examined 17 witnesses and excepting PW16 all were cross examined by the defence. Documents and materials produced and proved by the prosecution at trial were marked as Exhibit Nos.A - J.

Defence case was one of not guilty and false persecution.

On consideration of facts and circumstances of the case and evidence on record the learned Session Judge acquitted three co-

accused persons namely Jashim Miah, Habib Raja and Khokon Miah and convicted the appellant alone under Sections 302/34 of the Penal Code, 1860 and sentenced him thereunder as mentioned above. Co-accused Humayun having died during the trial of the case his name was struck out of the case.

Being aggrieved by and dissatisfied with above judgment and order of conviction and sentence dated 23.01.2020 passed by the learned Session Judge, Moulvibazar convict accused Putul Miah moved to this Court and preferred this appeal.

As mentioned above to bring home the charge leveled against 4 accused persons the prosecution examined 17 witnesses and excepting P.W.16 Dr. Kanti all above PWs were cross examined by the defence. The defence declined cross examination of PW16 Dr. Kanti.

PW1 Saleh Ahmed is the informant of this case and cousin of victim Sayed Miah. He stated that victim Sayed Miah set out for Moulvibazar on 03.07.2011 morning to purchase wearing apparels for his brother but he did not return home and his mobile phone was found switched off. Al-Amin saw victim Sayed

Miah at 8.00 P.M. was conversing with co-accused Habib and Jashim and on the basis of above information he lodged a GD with Moulvibazar Police Station. On 06.07.2011 at 11.00 A.M. he rushed to the Wapada canal on hearing of a floating dead body and identified the dead body of victim Sayed Miah. Above victim was murdered by slaughtering and he his legs were tied by electric wear with a bamboo pole. He suspects that accused Habib, Jashim, Humayun and other unknown persons have murdered his brother. The witness proved above ejahar and his signature on the same which was marked as Exhibits-1 and 1/1 respectively. Police recovered the mobile phone of victim Sayed Miah from the possession of accused Putul Miah who confessed to the Judicial Magistrate to have committed murder of victim Sayed Miah.

In cross examination he stated that he saw accused Putul Miah in Moulvibazar Police Station after about 15-16 days of the occurrence. He did not know when accused Putul Miah was arrested. He denied that accused Putul Miah made a false confession due to police torture. He did not mention the name of

accused Putul Miah in the ejahar as a suspect. He was in the police station when accused Putul Miah was arrested.

PW2 Al Amin stated that about  $1\frac{1}{2}$  years back he saw victim Sayed at Baliar Kheya ghat where he was conversing with co-accused Habib and Jashim. Subsequently the dead body of victim Sayed was recovered. In cross examination he stated that he did not mention to the Investigating Officer that he saw victim Sayed alongwith co-accused Jashim and Habib. He did not say anything to the informant before recovery of the dead body of victim Sayed. About 5 days before the dead body of victim Sayed was found he informed the informant that he saw victim Sayed was conversing with co-accused Jashim and Habib.

PW3 Md. Miah is a seizure list witness. He stated that in his presence Police seized a bamboo, electric wear and pair of sandal from the occurrence place. The witness proved above materials which were marked as Material Exhibit No.I series.

In cross examination he stated that he did not know who murdered victim Sayed.

PW4 Dulal Miah is a witness to the inquest report of the dead body of victim Sayed. The witness proved the inquest report and his signature on the same which were marked as Exhibit Nos.3 and 3/1 respectively. In cross examination he stated that co-accused Khokon contested in the UP election.

PW5 Tamiz Ullah is another witness to the seizure list. He stated that from the place of occurrence police recovered one shirt and lungi in his presence and seized those items by a seizure list and he gave signature on the same as a witness. The witness proved above seizure list and his signature on the same which were marked as Exhibit Nos.4 and 4/1 respectively. In cross examination he stated that he did not know the name of the person who murdered victim Syed.

PW6 Shamim Ahmed is another witness to the seizure list who proved his signature in the seizure list which was marked as Exhibit-4/2. In cross examination he stated that he did not see the dead body of the victim Sayed. Police seized the lungi and shirt in his presence.

PW7 Md. Adar Miah is a witness to the inquest report of the dead body of victim Sayed. The witness proved his signature on above document which was marked as Exhibit Nos.3/2. He also witnessed the preparation of the seizure list by the police and identified his signature in the seizure list which was marked as Exhibit-2/2. In cross examination he stated that the dead body of victim Sayed was retrieved from the channel of the Khondokar Bari.

PW8 Abul Kashem stated that he went to catch fish in the WAPDA channel and saw a floating dead body. He informed above fact to the villagers who informed the police and police retrieved above dead body. In cross examination he stated that he did not know who committed murder of above victim.

PW9 Mosharaf Hossain Badsha gave identical evidence as PW8. He stated that on 06.07.2011 at 12 o'clock in the noon he went to the occurrence place and saw the floating dead body of victim Sayed. Police seized some alams from above occurrence place in his presence by dint of a seizure list and he gave signature on the same as a witness. The witness proved his



signature on the seizure list which was marked as Exhibit-2/3. In cross examination he stated that he did not know who murdered victim Sayed.

PW10 Ali Ahammed stated that Police retrieved the dead body of victim Sayed from the water of WAPDA canal. In cross examination he stated that he did not know how victim Sayed was murdered.

PW11 Mahmud Ali is a witness to the inquest report of the dead body of victim Sayed. The witness proved his signature on the inquest report which was marked as Exhibit No.3/3. In cross examination he stated that he did not know how victim Sayed was murdered.

PW12 Md. Fazilat Miah is a witness to the seizure list. He stated that in his presence police recovered blood stained shirt and lungi of victim Sayed and seized those items by a seizure list and he gave signature on the same as a witness. The witness proved his signature on above seizure list which was marked as Exhibit No.4/3. In cross examination he stated that he did not know who murdered victim Sayed.

PW13 Md. Khorshed Alam is another witness to the seizure list. He stated that at 8.00 - 8.30 P.M. Investigating Officer told to him that a mobile telephone was found and on his request he gave signature on the seizure list. The witness proved above seizure list and his signature of the same which were marked as Exhibit Nos.5 and 5/1 respectively. In cross examination he stated that he did not know from where or from whose possession the Investigating Officer recovered above mobile telephone.

PW14 Md. Moklesur Rahman is another witness to above seizure list who identified his signature on the above seizure list which was marked as Exhibit No.5/2. He stated that the Investigating Officer found above mobile telephone in the house of Aklis Miah. In cross examination he stated that he did not go to the house of Aklis Miah.

PW15 Sajol Kumar Kanu is the Investigating Officer of this case. He stated that in course of investigation he visited the place of occurrence and prepared a sketch map of the same alongwith an index thereon. The witness proved above sketch map and index of the place of occurrence and his signatures on above

documents which were marked as Exhibit Nos.6, 6/1 and 7, 7/1 respectively. He also prepared inquest report of the dead body of victim Sayed. He proved his signature on the inquest report which was marked as Exhibit No.3/3. He seized alamats of this case by three seizure lists and the witness proved his signatures in above seizure lists which were marked as Exhibit Nos.2/4, 4/4 and 5/3 respectively. He forwarded the dead body of victim Sayed for post-mortem examination and arrested accused Putul Miah and produced him to a Judicial Magistrate for recording of his confession under Section 164 of the Code of Criminal Procedure, 1860. In above investigation offence punishable under Sections 302/34 of the Penal Code having prima facie proved against 5 accused persons he submitted a charge sheet No.313 on 31.10.2019 against them. The witness also proved the seized article namely one shirt, one lungi and old Nokia Mobile Telephne which were marked as Material Exhibit Nos.I series. In cross examination he stated that he recovered the mobile telephone from the house of accused Aklis Mia on the basis of presentation of accused Putul Miah and seized the same.

PW16 Dr. Kanti Bhattacharjee was the Residential Medical Officer of Moulvibazar Sadar Hospital who performed post-mortem examination of the dead body of victim Sayed. He stated that he found following injuries on the dead body of victim Sayed:

“One cut injury on the anterior aspect middle of neck (5” X 3”X up to vertebral Column) extending from one side neck to the other side with cutting of trachea, oesophagus, Blood Vessels and other structure of neck.”

In his opinion death of victim Sayed was due to shock and haemorrhage resulting from above mentioned injury which was ante-mortem and homicidal in nature.

The witness proved above post-mortem report and his signature on the same which were marked as Exhibit Nos.6 and 6/1 respectively. The cross examination of the witness was declined by the defence.

PW17 Mahmudul Hasan is the Judicial Magistrate who recorded confession of accused Putul Miah. He stated that on

20.07.2011 he was working a Judicial Magistrate at Moulvibazar and on the production of PW15 Sajol Kumar Kanu he recorded the confession of accused Putul Miah on compliance of all legal procedure after giving him three hours time. Above accused gave above confession voluntarily before him. The witness proved the confession of the accused Putul Miah and his six signatures and three signatures of above accused on the same which were marked as Exhibit Nos.8, 8(1) – 8(6) and 8(7) – 8(9) respectively.

The confession of accused Putul Miah is reproduced below:

“ইউনিয়ন পরিষদ নির্বাচনের আগের দিন রাত্রে ঘটনা। রাত সাড়ে নয়টায় জসিম আমার নিকট ফোণ দিয়া একটি জিনিস খাওয়ার জন্য বলীরবাগ গোদারাঘাটে যাইতে বলে। আমি গিয়া দেখি জসিম, হাবিব ও ছায়েদ মিলিয় হাটিয়া পশ্চিম দিকে যায় এবং তাদের তিন জনের পিছনে পিছনে খোকন ও হুমায়ুন হাটিয়া যায়। আমাকে জসিম আসিয়া বলে আসো এক যায়গায় বসিয়া হেরোইন খামু। আমি তাদের লগে লগে বালিকান্দি গ্রামের ভিতরে দিয়া গিয়া ওয়াপদা বাঁধে উঠি। এরপর আরো হাটিয়া ছোট দুটি বাধের আইশনা (ঢালে) বসিয়াছি। উখানে বসার পর হাবিব তার উরা (রান) থেকে ওয়ার (কারেন্টের তার) বাহির করিয়া খোকন ও হাবিব মিলিয়া ছেলেটা সায়েদের গলায় পেছ দিয়া ধরিয়াছে। সায়েদ ছাটাছাটি লইছে আমি চিৎকার মারিয়াছি।

খোকন আমার হাতে লোহার কাটাকাট জিনিস হাতে ও পায়ে মারিয়াছে এবং আমি মুখ খুলিলে কারেন্টের ফ্যানের সহিত আমাকে লটকাইয়া মারবে হুমায়ুন সায়েদের বুকের উপর উঠাইয়া খাড়া হইয়া উঠায় দাড়াইয়া থাকে। এরপর জসিম সায়েদের গলায় পাড়া দিয়া ধরিয়াছে এবং একটি ছুরি বাহির কয়িয়া সায়েদের গলায় পোছ মারিয়াছে। আমি সায়েদের পায়ে ধরিয়াছি, না ধরিলে আমাকে মারার হুমকি দেয়। এরপর সায়েদ এর লাশ ফেনা, বন, খের দিয়া রাস্তার পার্শ্ব গুরিয়া ঢেকে রাখা হইয়াছে। দুইদিন পর হাবিব ঐ জায়গা (লাশ যেখানে রাখা) গিয়া দেখিয়াছে লাশটা বাহির হইয়া গিয়াছে। মেঘ দিছে পানির মাঝে ভাসি গেছে। দুইদিন পর খোকন আসি আমাকে খবর দিছে সন্ধ্যার সময় ওয়াপদার বাঁধে যাওয়ার লাগি। রাত ১০.০০ টার দিকে লাশ যেখানে রাখা হইছে সেখানে লইয়া গেছে। গিয়া লাশটা সেখান থেকে উঠানি হইছে এবং বাম পার্শ্ব গাতার মধ্যে ফেনার নিচে পালাইয়া রাখা হইছে। লাশটা ঢাকিয়া গুরিয়া আমরা চলিয়া আসি। মারার পরেই জসিম সায়েদের শরীর থেকে ১টি মোবাইল, ১ টি সোনার চেইন, ১ টি রূপার চেইন, ১ টি রূপার হাতের বেসলেট ও ৮০০০/- টাকা নিয়া দেয়। মারার তিন দিনের দিন আমি, জসিম ও হাবিব সিলেটে একটি মার্কেটে যাই মোবাইল চুরির লাগি। মোবাইল আমি বেঁচতে দিছে না। নিজে তাদের হাত থেকে নিয়া নিছি। এরপর যে যার বাড়ি চলিয়া গেছি।”

In cross examination he stated that accused Putul Miah was arrested at 3.00 A.M. on 20.07.2011 and produced before him on

the same day. He denied that accused Putul Miah made above false confession in fear of police torture.

Above is all about the evidence, oral and documentary adduced by the prosecution to substantiate the charge leveled against four accused persons under Sections 302/34 of the Penal Code.

Mr. A. N. M. Abed Raja, learned Advocate for convict-appellant Putul Miah submits that in this case there was no eye witness who saw the commission of murder of victim Sayed. It has been alleged that the mobile telephone of victim Sayed was recovered from the possession of accused Putul Miah but the prosecution could not prove above claim by legal evidence. It has been stated by PW15 Sajol Kumar Kanu that above mobile telephone was found in the house of accused Aklis Miah who was not an accused in this case. Two witnesses of above seizure list were examined at trial but none of them has supported the prosecution case that above mobile telephone was recovered from the possession of accused Putul Miah. It is true that accused Putul Miah made a confession to PW17 Mahmudul Hassan a Judicial

Magistrate under Section 164 of the Code of Criminal Procedure. But above confession was neither made voluntarily nor the same was true. Moreover, above confession was basically exculpatory in nature since above accused did not involve himself in striking the fatal blow. The learned Session Judge did not accept above confession as true and therefore he acquitted three co-accused persons. But the learned Judge has committed serious illegality in placing reliance on above false confession and convicting the appellant on the basis of the same which is not tenable in law.

Mr. Sujit Chatterjee, learned Deputy Attorney General for the State submits that in this case there is no eye witness. But the appellant has made a confession under Section 164 of the Code of Criminal Procedure confessing to have actively participated in the commission of murder of victim Sayed. The mobile telephone of victim Sayed was recovered from the possession of accused Putul Miah and the same has been proved by the evidence of three prosecution witnesses namely PW13 Md. Khorshed Alam, PW14 Md. Moklisur Rahman and PW15 Sajol Kumar Kanu. On consideration of above oral, documentary and circumstantial



evidence the learned Session Judge has rightly convicted accused Putul Miah under Sections 302/34 of the Penal Code and sentenced him to imprisonment for life which calls for no interference.

We have considered the submissions of the learned Advocate for the respective parties and carefully examined all materials on record including the oral evidence of 17 prosecution witnesses, confession of accused Putul Miah, seizure list, inquest and post-mortem report of the dead body of victim Sayed.

PW16 Doctor Kanti Bhattejee performed post-mortem examination of the dead body of victim Sayed and found that the anterior aspect of the middle of neck of victim Sayed was cut up to the vertebral column extending from one side to the other side of the neck cutting the trachea, esophagus and other structure of the neck. In his opinion victim Sayed was murdered due to above cut injuries which was ante-mortem and homicidal in nature. The witness proved the post-mortem report and his signature on the same which were marked as Exhibit Nos.6 and 6/1 respectively. The cross examination of above witness was declined by the

defence. As such, above evidence of PW16 Dr. Kanti a public servant and an independent and neutral prosecution witness stands uncontroverted.

PW15 Sub-Inspector Sajol Kumar Kanu another independent and neutral witness has stated that the dead body of victim Sayed was retrieved from the water of the canal at 12.10 P.M. on 06.07.2011 and he found cut injury on the neck of above dead body and prepared inquest report of the same. PW15 Sajol was not cross examined by the defence as to the place from where the dead body of Sayed was retrieved or the nature and size of the injuries found on the dead body of victim Sayed.

PW1 Saleh Ahmed is the informant of this case who saw the the dead body of victim Sayed with above injuries was floating in the water of the canal. Above evidence was supported by PW4 Dulal Miah and PW7 Md. Adar Miah. The defence did not cross examined above prosecution witnesses as to the place and manner of retrieval of the dead body of victim Sayed or the existence of cut injuries as mentioned above.

On consideration of above mutually corroborative oral evidence of competent witnesses namely PW1 Saleh Ahmed, PW4 Dulal Miah, PW7 Md. Adar Miah and PW15 Sajol Kumar Kanu and PW16 Dr. Kanti we hold that the prosecution has succeeded to prove beyond reasonable doubt the date, place and manner of the murder of victim Syed and that the dead body of victim Sayed Miah was floating in the Wabda Cannel with marks of cut injury on the neck on 06.07.2011 who went on missing since 03.07.2011 evening.

As mentioned above in this case there is no eye witness who saw the commission of murder of victim Sayed.

Accused Putul Miah has made a confession before a judicial Magistrate under Section 164 of the Code of Criminal Procedure. It is well settled that an order of conviction and sentence can be lawfully recorded against an accused solely on the basis of his confession provided the confession was true and made voluntarily. A statement can be designated as a confession only if the maker of the statement involves himself in the commission of the alleged offence unequivocally and clearly.

PW15 Sajol Kumar Kanu has stated that he arrested accused Putul Miah on 19.07.2011 at 3.00 A.M. But PW17 Mahmudul Hassan, Judicial Magistrate has stated that accused Putul Miah was arrested on 20.07.2011 at 3.00 A.M. and he was produced before him on same date at 12.15 P.M. As such accused Putul Miah was produced before the learned Judicial Magistrate within 24 hours from the time of his arrest.

The Judicial Magistrate who recorded above confession of accused Putul Miah gave evidence as PW17 in support of voluntariness of the making of above confession. He was subjected to cross examination by the defence but to no avail. As such we hold that the confession of accused Putul Miah was made voluntarily.

Now let us analyze the confession of accused Putul Miah. In above confession accused Putul Miah has stated that he went to smoke heroine but suddenly co-accused started assaulting the victim. The appellant did not say how the victim was brought to the occurrence place and why he was the murdered. The appellant did not implicate himself in striking any fatal blow

causing death to victim Sayed. Nor the appellant involved himself in the planning or conspiracy for commission of murder of victim Sayed. The appellant did not involve himself with the act of fastening the legs of victim Sayed or striking dagger blow on the neck of the victim.

Relevant part of above confession is reproduced below: ওখানে বসার পর হাবিব তার উরা (রান) থেকে ওয়ার (কারেন্টের তার) বাহির করিয়া খোকন ও হাবিব মিলিয়া ছেলেটা সায়েদের গলায় পেছ দিয়া ধরিয়াকে। সায়েদ ছাটাছাটি লইছে আমি চিৎকার মারিয়াছি। The appellant further stated that co-accused Humayun pressed with leg the chest of victim Sayed and co-accused Jashim pressed the neck of victim Sayed with leg and struck a dagger blow on the neck of victim Sayed.

It is true that above accused has confessed to have pressed one leg of victim Sayed. But he has claimed that he was forced to do so by above co-accuseds. The learned Session Judge did not convict co-accused Jashim and Habib on the basis of above confession who allegedly struck fatal blows causing death of victim Sayed.

On a detailed analysis of above confession we find that the same is not inculpatory in nature since the maker of above

confession accused Putul Miah did not implicate himself in the commission of murder of victim Sayed willingly and voluntarily.

As far as recovery of the mobile telephone of victim Sayed from the possession of accused Putul Miah is concerned two seizure list witnesses namely PW13 Md. Khorshed Alam and PW14 Md. Moklisur Rahman were examined by the prosecution to prove above claim. PW13 Md. Khorshed Alam stated that he did not know wherefrom above mobile telephone was recovered by PW15 Sajol Kumar Kanu nor he knows who was the owner of above mobile telephone. He further stated that on the request of above Investigating Officer he gave signature on the seizure list. PW14 Md. Moklisur Rahman gave identical evidence. He stated that PW15 Sajol Kumar Kanu recovered above mobile telephone from the house of Aklis Miah.

In this regard PW15 Sajol Kumar Kanu stated that he recovered above mobile telephone from the house of accused Aklis Miah on the presentation of accused Putul Miah. But in this case above mentioned Aklis Miah was not made an accused or cited as a witness and above claim of PW15 Sajol remains not

corroborated by any other evidence. The prosecution has failed to prove by legal evidence that the mobile telephone of victim Sayed was recovered from the possession of accused Putul Miah.

As mentioned above learned Session Judge has convicted the appellant alone but he has convicted the appellant under Sections 302/34 of the Penal Code, 1860. Section 34 of the Penal Code applies when an offence has been committed by more than one person in furtherance of common intention of all. As such recording of conviction against the appellant under Sections 302/34 of the Penal Code, 1860 was misconceived and not tenable in law.

On consideration of above facts and circumstances of the case and evidence on record we hold that the prosecution has miserably failed to prove the charge leveled against accused Putul Miah under Section 302 of the Penal Code, 1860 by legal evidence but the learned Session Judge most illegally convicted accused Putul Miah under Sections 302/34 of the Penal Code and sentenced him thereunder to imprisonment for life which is not tenable in law.

In the result, this appeal is allowed.

The impugned judgment and order of conviction and sentence dated 23.01.2020 passed by the learned Session Judge, Moulvibazar in Session Case No.268 of 2012 arising out of Moulvibazar Police Station Case No.04 dated 06.07.2011 corresponding to G.R. Case No.188 of 2011 (Moulvibazar Model) convicting the appellant under Sections 302/34 of the Penal Code, 1860 and sentencing him to imprisonment for life and pay fine of Taka 50,000/- (fifty thousand) is hereby set aside.

Accused Putul Miah is acquitted of the charge leveled against him under Sections 302/34 of the Penal Code. Let accused Putul Miah be set at liberty at once if he is not wanted in connection with any other case.

Send down the lower Court's records immediately.

Communicate this judgment and order to the Court concerned at once.

**A.K.M. Rabiul Hassan, J:**

I agree.



