

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Syed Mahmud Hossain, *Chief Justice*
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

JAIL APPEALS NO.3,4 OF 2015

(From the judgment and order of conviction and sentence dated 15.11.2011 and 16.11.2011 passed by the High Court Division in Death Reference No.25 of 2006 with Criminal Appeal No.1161 of 2006 with Jail Appeal No.156 of 2006, Criminal Appeal No.1375 of 2006 with Jail Appeal No.154 of 2006, and Criminal Appeal No.4482 of 2006 with Jail Appeal No.155 of 2006, and Criminal Appeal No.4326 of 2006 with Jail Appeal No.153 of 2006 and Jail Appeal No.152 of 2006)

Md. Abdul Mannan @ Mannan :Appellant
(In Jail Appeal No.3 of 2015)

Md. Afsor Ali Sheikh :Appellant
(In Jail Appeal No.4 of 2015)

Versus

The State :Respondent
(In both the Appeals)

For the appellants : Mr. A.B.M Bayezid, Advocate.
(In both the appeals)

For the respondent : Mr. Biswajit Debnath, Deputy
(In both the appeals) Attorney General.

Date of hearing : The 7th day of October, 2020.

Date of judgment : The 21st day of October, 2020.

JUDGMENT

Obaidul Hassan, J. These Jail Appeals are directed against the judgment and order dated 15.11.2011 and 16.11.2011 respectively passed by a Division Bench of High Court Division in Death Reference No.25 of 2006 with Criminal Appeal No.1161 of 2006 with Jail Appeal No.156 of 2006, and Criminal Appeal No.1375 of 2006 with Jail Appeal No.154 of 2006, and Criminal Appeal No.4482 of 2006 with Jail Appeal No.155 of 2006 and Criminal

Appeal No.4326 of 2006 with Jail Appeal No.153 of 2006 with Jail Appeal No.152 of 2006 partly accepting the reference and dismissing the appeal arising out of Druto Bichar Case No.16 of 2005 corresponding to Kamrangirchar Police Station Case No.7(2) 05 dated 22.02.2006 in connection with G.R. No.12 of 2005 under Sections 302/34 of the Penal Code, 1860 (hereinafter referred to as the Penal Code) convicting the appellants and sentencing them to death with a fine of Tk. 50,000.00.

Facts of the case, in short, are that one Shefali lodged First Information Report (Shortly, FIR) with kamrangirchar police station being No. 07(2)05 dated 22.02.2005 stating, inter alia, that on 26.02.2005 at 4:00 p.m. keeping her mother Sakina Begum (hereinafter referred to as Sakina) and son Sohel of 12 years in her residence of Kamrangirchar, she went to her father's house at Madaripur. On 22.02.2005 at 5:00 p.m. she received a message through telephone that her mother Sakina Begum and her son Sohel had been killed. Reaching her residence at Kamrangirchar, she came to know that on 10.02.2005 at 14:45 p.m. they were murdered inside the house (hereinafter referred to as Place of Occurrence in short P.O). The police and the locals after breaking the door entered into the room and recovered two decomposed dead bodies and sent them for postmortem. It was suspected that the reasons behind such murder might be the sequel to the

conflict between the deceased family and the suspected accused namely Falan, Yunus, Roky Mia and Afsar. In this regard, the informant lodged FIR with Kamrangirchar Police Station which was registered as Kamrangirchar Police Station Case No.07(2)05 under Sections 302/34 of the Penal Code.

During investigation two accused namely, Md. Afsar Ali Sheikh and Md. Abdul Mannan alias Mannan made confessional statements under Section 164 of the Code of Criminal Procedure, 1898 (shortly, the Code) implicating themselves and others.

After investigation, the police submitted charge sheet on 19.04.2005 against Abdul Mannan alias Mannan, Nure Alam, Md. Abul Hossen, Mykel Faruq and Md. Afsar Ali Sheikh under Section 302 read with Section 34 of the Penal Code accusing them for the murder of the deceased Sakina Begum and Sohel.

At the commencement of trial, charge was framed against the accused persons under Section 302 read with Section 34 of the Penal Code by the trial Court and it was read over to the accused persons present before the trial Court to which they pleaded not guilty and claimed to be tried.

The prosecution examined as many as 12(twelve) witnesses in support of the prosecution case and they were cross-examined by the defence. Thereafter, the accused persons were examined

under Section 342 of the Code of Criminal Procedure, 1898 to which they claimed innocence and led evidence in defence.

The defence case as it transpires from the trend of cross-examination is that of innocence and false implication. It was divulged in defence that the informant had an extramarital relationship with one local which locked an internal conflict between them. For such reasons accused were implicated.

The learned Judge of the Druto Bichar Tribunal-1, Dhaka (hereinafter referred to as the Tribunal), in consideration of the evidence on record, found the charge sheets accused persons Abdul Mannan alias Mannan, Nure Alam, Md. Abul Hossen, Mykel Faruq and Md. Afsar Ali Sheikh guilty of the charge under Section 302 read with Section 34 of the Penal Code and accordingly, convicted and sentenced them to death and also to pay a fine of Tk.50,000.00.

Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence dated 27.02.2006 passed by the Tribunal, the convicts namely, Md. Afsar Ali Sheikh preferred Criminal Appeal No.1161 of 2006 with Jail Appeal No.156 of 2006; Md. Abul Hossain preferred Criminal Appeal No.1375 of 2006 with Jail Appeal No.154 of 2006; Md. Abdul Mannan alias Mannan preferred Criminal Appeal No.4482 of 2006 with Jail Appeal No. 155 of 2006; Mykel Faruq preferred Criminal Appeal

No.4326 of 2006 with Jail Appeal No.153 of 2006 and Nure Alam alias Nuira preferred Jail Appeal No.152 of 2006 before the High Court Division. Upon hearing the appeals, the High Court Division by its judgment and order dated 15.11.2011 and 16.11.2011 respectively allowed the Criminal Appeals No.1375 of 2006 and 4320 of 2006 with Jail Appeals No.152-154 of 2006 preferred by Nure Alam alias Nuira, Md. Abul Hossen, Mykel Faruq and they were acquitted from the charge leveled against them and also dismissed the Criminal Appeals No.1161 & 4482 of 2006 along with Jail Appeals No.155 & 156 of 2006 preferred by the convict-appellants herein namely, Md. Abdul Mannan alias Mannan and Md. Afsar Ali Sheikh; and their conviction and sentence imposed by the trial Court was maintained.

Being aggrieved by and dissatisfied with the judgment and order dated 15.11.2011 and 16.11.2011 passed by the High Court Division in Death Reference No.25 of 2006 along with Criminal Appeal Nos.1161 of 2006 and 4482 of 2006 with Jail Appeal Nos. 156 of 2006, and 155 of 2006 (by a common judgment), the convict-appellants herein preferred these Jail Appeal Nos.3 & 4 of 2012 before this Division that has arisen out of Jail Petition Nos.1 and 2 of 2012.

Mr. A.B.M. Bayezid, the learned Advocate, appearing for the appellants, has taken us through the FIR, testimonies of the

witnesses, the judgment and order passed by the trial court and the appellate court (High Court Division), the postmortem report and connected materials on record and submitted that Md. Afsar Ali Sheikh's statement under Section 164 of the Code is exculpation and he retracted his confessional statement saying that he was not involved with the offence. Mr. Bayezid also submits that the said confession was not supported by any other witnesses, and the confession of Mannan is also not effective, because he also retracted his statement. He further submitted that the statements of P.Ws 8 and 12 are unusual and anomalous and are not credible to use in the case as evidence and the High Court Division should not have considered those evidence as per law for which the judgment has been vitiated in convicting the convict-appellants. He further submitted that the trial Court and the High Court Division misread and misconceived the facts and circumstances of the case and the evidence on record and the materials of the case records, 342 statements of the appellants as well as the aspect of law and thus committed a serious error of law occasioning failure of justice and, as such, the impugned judgment and order is liable to be set aside for ends of justice. He next submits that the courts below did not apply its judicial mind in considering the evidence as well as passing the judgment and,

as such, the judgment and order of conviction and sentence is liable to be set aside for ends of justice.

In reply, Mr. Biswajit Debnath, the learned Deputy Attorney General appearing on behalf of the respondent, State, submits supporting the impugned judgment and order of conviction and sentence of the High Court Division and prayed for dismissal of the appeal.

We have examined the FIR, the testimonies of the witnesses, inquest report, post mortem examination report, judgment and order of conviction and sentence passed by the Tribunal, judgment and order of affirmation of conviction and sentence passed by the High Court Division in appeal and the connected materials on record.

In this case, both the appellants have been found guilty of the charges brought against them under Sections 302/34 of the Penal Code and they have been convicted and sentenced by the Tribunal under Section 302 read with Section 34 of the Penal Code which was affirmed by the High Court Division.

Since the charge against the appellants (accused) has been brought by the prosecution under Sections 302/34 of the Penal Code, burden lies upon the prosecution to prove that the deceased victims Sakina Begum and Sohail were done to death and the cause of death was homicidal in nature. Therefore, we

shall have to examine whether the prosecution has been able to prove the case beyond any shadow of doubt that the death of Sakina and Sohel was homicidal in nature and the same was done by the appellants.

To ascertain the above questions let us first examine the evidence on record about the cause of death.

From the inquest report of deceased Sohel it appears that Ali Nur Hossen, S.I., who held inquest mentioned that ".....লাশটি সিড়ির উপর কাপড় দিয়া মুখ ঢাকা অবস্থায় মাথা শরীরের সংগে বুলন্ত অবস্থায় প্রাপ্ত হইয়া পার্শ্ববর্তী আলম এর মাধ্যমে সনাক্ত করিয়া মোঃ মোশারফ হোসেন পিং আক্কেল আলী সাং সাইনবোর্ড এর মাধ্যমে উলট পালট করিয়া প্রতিবেদন প্রস্তুত করিতে থাকিলাম। সিড়িতে রক্ত নির্গত এবং যথেষ্ট পচন ধরা ও সাদা পোকায় কিলবিল অবস্থায় দেখিতে পাইলাম। উচ্চতা অনুঃ সাড়ে তিন ফুট। পরনে কালো প্যান্ট এবং গায়ে স্যান্ডো গেঞ্জি। বুক হইতে পেট পর্যন্ত কাটা। পচনের কারণে শরীরের বিভিন্ন অংশ ছুটিয়া গিয়াছে।" (Underlined by us)

In the inquest report of deceased Sakina it has been mentioned that ".....গলা ঘাড় হইতে বিচ্ছিন্ন হইয়া বুলন্ত অবস্থায়। মুখমন্ডল সাদা পোকায় আবৃত। পড়নে লাল প্রিন্টের শাড়ী, দুই পা ফাক করা, পেট ফুলা, বুক গামছা দিয়া খাটের পায়ার সঙ্গে বাধা (লাশে যথেষ্ট পচন ও দুর্ঘন্ধ রহিয়াছে।)" (Underlined by us)

Thus, it appears from the inquest report that the head of Sohel was hanging with the body and the throat of Sakina was severed from her neck and was hanging being detached from the neck.

In the postmortem report of Sohel, the cause of death was opined by the doctor as under:

“Opinion: In my opinion the death is due to haemorrhage and shock resulting from cut throat injury which is ante-mortem and homicidal in nature.”

Regarding the cause of death of Sakina it was opined in the postmortem report by the doctor that the death was due to asphyxia resulting from strangulation which was ante-mortem and homicidal in nature.

Thus, considering the nature of injuries, it appears that the cause of death of Sakina and Soheli was homicidal in nature.

In the FIR, the informant claimed that the convict-appellants caused her mother and son to death. There was no eye witness of the occurrence.

Now, let us turn our eyes to examine the circumstances, judicial confessions made by the appellants as well as the depositions of the witnesses to ascertain whether the appellants caused the death of the deceased victims which were homicidal in nature.

In course of the trial, the prosecution in all examined 12 witnesses of them P.W.1, Shefali Bagga is the informant and her mother and son Soheli were murdered. P.W.3, Md. Tota Mia husband of P.W.1, P.W.2 Md. Salahuddin, P.W.4, Md. Mokhles, P.W.7, Alam are the local seizure list witnesses of whom P.W.2 is also a witness of inquest. They merely heard the occurrence. P.W.5, Farida Yeasmin, P.W.6, Hasina Khatun are the

neighbours of P.W.1. They heard the incident but did not disclose the manner of occurrence. P.W.8, Md. Rafiqul Islam, Metropolitan Magistrate, Dhaka who recorded the confessions of accused Md. Afsar Ali Shaikh and Abdul Mannan. P.W.9, Dr Md. Habibuzzaman Chowdhury held autopsy upon the dead bodies. P.W.10, S.I Md. Moniruzzaman recorded the case and filled up the form of FIR. P.W.11, Constable Md. Nizamuddin carried the dead bodies to the morgue for autopsy. P.W.12, S.I. Ali Nur Hossain investigated and submitted charge sheet against the accused.

P.W.1, Shefali Begum as informant deposed that on the 6th February she went to Madaripur keeping her mother Sakina Begum and son Sohel in her residence. She talked with them over telephone four days after her going to Madaripur. Subsequently, she received information from her neighbour Salauddin about the incident. Accordingly, she rushed to Dhaka and came to learn that the locals saw her mother and son during 10th to 12th February but after then they did not see them. On the 21st February, the neighbours for the first time could sniff the smell of rotten dead bodies from the inside of the house and they informed about the matter to the police. The police and the locals opened the door by breaking the same and recovered two decomposed dead bodies. She further stated that she suspected

accused Afsar a tenant, who borrowed Tk.3,000.00 from her. Regarding repayment of the said amount of money there was a conflict between them and to that effect once he tried to strangulate her. Later on, Afsar was arrested by the police and confessed that he along with Naira, Mannan, Abul and Mykel murdered her mother and son. Subsequently, accused Mannan also confessed that he gave three dao blows on the body of her mother and they left the P.O. by locking the door keeping the deceaseds inside. Shefali lodged the FIR and proved the same as Exhibit-1 and her signature on it as Exhibit-1/1. She identified accused Afsar, Mannan, Naira, Abul and Mykel Faruk on the dock and said that the accused persons disclosed that on 12th February at 11:00 p.m. they entered into her residence and at about 12:00 a.m. they murdered her mother and son. On that fateful night, they watched movie in a C.D. at her residence which was subsequently seized by the police.

In cross-examination, she stated that she did not mention the name of Mannan in the FIR and also did not mention that her husband married thrice and she was her husband's third wife, accused Afsar was her tenant and some outstanding money had been lying with him for which once he tried to strangulate her. She denied the suggestion that she had an extramarital relationship with one local and Afsar used to bring tea for them

and at one stage Afsar found them in an immoral position. She further stated that she was in Kuwait for 5(five) years and after return she constructed a house. She lodged the FIR and heard the occurrence from the witnesses and accused Nuira stated that they murdered her mother and son.

P.W.2, Salahuddin is a local seizure list witness. He deposed that he was informed about the incident by the locals and informed the matter to the police station. The police and locals opened the door by breaking it and recovered the dead bodies of Sohail and Sakina. S.I. Ali Noor Hussain held inquest upon the two cadavers. He proved the inquest report as Exhibits-2 and 3 respectively and his signature on those reports as Exhibits-2/1 and 3/1 respectively. He informed the matter to the informant Shefali, who came on 23rd February and lodged the FIR. The police seized some materials along with blood stained mattress and prepared seizure list. He proved the same as Exhibit-4 and his signature on it as Exhibit-4/1. On 9th February one C.D. cassette and one 21" TV along with a remote was seized (Exhibit-5) from the house of accused Abul. He proved his signature as Exhibit-5/1. One blood-stained lungi was seized from the house of accused Mannan who was subsequently arrested. He proved those materials as Mat. Exhibits-I and II series respectively.

In cross-examination, he admitted that he did not see the occurrence. He denied the suggestion that he deposed falsely.

P.W.3, Md. Tota Mia is the husband of the informant and a seizure list witness. He deposed that he was a mason by profession. Being informed about the incident he rushed to the P.O. and found that his mother-in-law and son were killed. His wife lodged the FIR against accused Afsar, Naira and Abul. Accused Afsar confessed that he along with Mannan, Naira, Mykel Faruq and Abul murdered them. On 27.02.2005 one C.D. cassette was recovered from the house of Abul in his presence which was marked as Exhibit-6. He proved his signature in the seizure list as Exhibit-6/1. Later on one 'boty' was seized which was marked as Exhibit-7 and he proved his signature in the seizure list as Exhibit-7/1, on the admission of Abdul Mannan one blood-stained lungi was recovered from his house on 01.03.2005 (Exhibit-8) and the said witness has proved his signature as Exhibit-8/1. The police arrested accused Afsar, Mannan, Naira, Mykel and Abul. They confessed that they had murdered them. The PW 3 identified the accused on the dock.

In cross-examination, PW 3 admitted that he did not see the occurrence and the time of confession of accused was not known to him. He denied the suggestion that for the cause of immoral

activities of his wife such incident took place and he deposed falsely.

P.W.4, Md. Mokhles was a rickshaw puller by profession and uncle of the informant. He deposed that the informant lodged the FIR. Later accused Afsar and Mannan were nabbed. He was taken to the police station wherein the accused Afsar confessed that he along with Faruq, Abul, Mannan and Nuira had murdered the deceased. One C.D. cassette was recovered from the house of Abul and a blood-stained lungi was recovered from the house of Abdul Mannan.

In cross-examination, he denied the suggestion that due to previous enmity the accused persons were falsely implicated in this case.

P.W.5, Farida Yeasmin and P.W.6, Hasina Khatun were the local witnesses. They deposed that the dead bodies were recovered from the house of the informant by breaking the door.

In cross-examination, they stated that after the occurrence, the news was published in the newspaper regarding the incident to the effect that 'the murder of the deceased was caused as a consequence of extramarital relation of the informant.'

P.W.7, Alam is a resident of Munshirhati. He deposed that the police opened the door after breaking the same and recovered the dead bodies of the deceaseds and prepared the inquest report.

He stood as a witness and he proved his signature in the inquest report which has been marked as Exhibit-2/2 and Exhibit-3/2.

In cross-examination, he stated that he cannot say how many injuries were found in those dead bodies.

P.W.8, Md. Rafiqul Islam, was a Metropolitan Magistrate at the relevant time. He deposed that he recorded confessions of the accused upon complying with all legal formalities laid down in Section 364 of the Code of Criminal Procedure. He proved the confessions of Afsar and Abdul Mannan as Exhibits-9 and 10 respectively. He stated that their confessions were true and voluntary.

In cross-examination, he stated that legal formalities were complied with in recording the confessions and denied the suggestion that at that time of recording the confession the I.O. was present.

P.W.9, Dr. Md. Habibuzzaman Chowdhury deposed that at the relevant time he was the Assistant Professor, Forensic Medicine Department of Sir Salimullah Medical College, Dhaka. On 21.02.2005 he held autopsy of the dead body of Sakina Begum and found as under:

“Body was decomposed at earthly maggot stage. Ligation material was in situ.

On removal of the ligature material a complete transverse ligature mark was seen around the neck in mid level. No other external injury was seen.

On dissection: no internal injury was seen inside the body. He mentioned that viscera was found congested, ante-mortem congestion in the neck tissue under the ligature mark."

This witness opined that "the death was due to asphyxia resulting from strangulation which was ante-mortem and homicidal in nature." He proved the report as Exhibit-11.

On the same day, P.W.9 also held autopsy of Sohel and found as under:

"Body was mutilated. Head was detached and devoid of soft tissue. Head was being separated from the trunk by homicidal cut throat. No other ante-mortem injury was detected as body was decomposed being mutilated multiple bones are being fractured.

On dissection: ante-mortem congestion was seen in the soft tissue of the neck injury. Body was found mutilated due to decomposition."

Doctor, the P.W. 9 gave his opinion saying that "the death was due to haemorrhage and shock resulting from cut throat injury which was ante-mortem and homicidal in nature." He also proved the said report as Exhibit-12.

In cross-examination, he denied the suggestion that without holding proper postmortem he prepared the reports.

P.W.10, Md. Moniruzzaman, deposed that at the relevant time he was attached to Kamrangirchar Police Station. He recorded the case and filled up the form of FIR, he proved the same as Exhibit-15. In cross-examination, he stated that in FIR the informant suspected accused Falan, Yusuf, Rafiq and Afsar.

P.W.11, Constable Nizamuddin, carried the dead bodies to the morgue for autopsy.

In cross-examination, he admitted that he did not identify the dead bodies.

P.W.12, Ali Noor Hussain deposed that at the relevant time he was attached to the Kamrangirchar Police Station. On being informed, he rushed to the P.O. and recovered two decomposed dead bodies and prepared the inquest report and sent the dead bodies to the morgue for autopsy. The case was entrusted to him for investigation. He visited the P.O, prepared the sketch map and index, recorded the statements of the witnesses under section 161 of the Code, seized alamots and arrested the accused Abdul Mannan and Afsar, who made confessions before the Magistrate. He also arrested the other accused and submitted charge sheet against accused Abdul Mannan, Naira, Abul Hussain, Mykel Faruq and Afsar.

In cross-examination, he stated that being received the radio message from his higher officers, he went to the P.O. wherein he

found 100/150 people assembled there. Opening the door by breaking the same he along with others entered into the house and recovered the dead bodies. He admitted that he arrested accused Afsar and Abdul Mannan who later made confessions and denied the suggestion that those confessions were not voluntary. He also denied the suggestion that without proper investigation he submitted a perfunctory charge sheet.

These are all the evidence on record adduced by the prosecution to prove the charge.

The defence also examined two witnesses. Now let us see what did they say in their deposition.

D.W.1, Md. Hanif a local businessman, deposed that accused Abul was known to him, who was a tempo driver by profession. On 21.02.2005 he heard about the incident of murder. He also deposed that accused Abul was not present in his house at the time of occurrence and he had no complicity with the alleged murder.

In cross-examination, he denied the suggestion that accused Mannan and Afsar confessed their guilt and he deposed falsely.

D.W.2, Haji Abdul Khaleque was a local witness and accused Abul was known to him. He deposed that accused Mannan and Afsar were the tenants under accused Abul. The police arrested Abul from his house.

In cross-examination, he stated that on 12.02.2005 a conspiracy of murder was hatched up in the house of Abul.

D.W.1, Md. Hanif and D.W.2, Haji Abdul Khaleque in fact tried to prove the innocence of accused Abul Hussain.

There is indeed no eyewitness in the instant case and the case absolutely rests upon the confessions of the two accused Md. Afsar Ali Shaikh and Md. Abdul Mannan alias Mannan. Their confessional statements run as follows:

Appellant Md. Afsar Ali Sheikh: “আমি কাপড়ের ব্যবসা করতাম, মহিলাদেরকে বেশী বাকি দেয়ায় আমার বাবা আমাকে অবিশ্বাস করে মাস দেড়েক আগে বাড়ি থেকে বের করে দিলে আমি আমার বন্ধু আবুলের বাসায় গিয়ে উঠি, গত ১২.০২.২০০৫ ইং আমি ও আবুল ক্যারম বোর্ড খেলে বাসায় গিয়ে দেখি গেটে মান্নান, নুর ইসলাম, ও ফারুককে দেখি। আমরা সবাই আবুলের বাসায় ঢুকি, বাসায় ঐদিন অন্য কেউ ছিল না। আবুল একটি সিডি ছাড়ল আমরা ছবি দেখতে থাকাকালে মান্নান বলে শেফালী তার বাড়ি মান্নানের নামে লিখে দিয়ে বিয়ে করতে চায়। কিন্তু শেফালীর মা তা করতে দেয়না। তখন নুর আলম বলে শেফালীর মা তার মাও এর সাথে ও ঝগড়া করেছে নুর আলম ও ফারুক তখন একটি প্রান জুস খেতেছিল। তখন আবুল সিডি বন্ধ করে ক্যাসেটটি হাতে নিয়ে বলে চল শেফালীর বাসায় যাই। তার আগে মান্নান বলে চল শেফালীর মাকে মেরে ফেলি। তখন আমরা ৫ জনে একত্রে শেফালীদের বাসায় যাই, মান্নান শেফালীদের বাসার গেটে গিয়ে শেফালীর মাকে খালা খালা বলে ডাকলে শেফালীর মা কে ডাকে জানতে চাইলে মান্নান পরিচয় দেয়, তখন শেফালীর মা গেট খুলে দেয়। আমরা সবাই তখন শেফালীদের বাসায় ঢুকি। আবুল তন জিজ্ঞেস করে খালা একটি ছবি দেখা যাবে। তখন শেফালীর মা বলে আমি ঘুমিয়ে যাব তখন তোমরা ছবি দেখে আমাকে ডেকে দিয়ে য়েয়ো। এসময় শেফালীর মা বাসার ভিতরে ঢুকতে যাওয়ার সময় ফারুক পিছন থেকে শেফালীর মা ছকিনা বিবির মুখে হাত দিয়ে চেপে ধরে এবং সকিনা বিবির পড়নের শাড়ি কাপড় দিয়ে মুখ পেছিয়ে ফেলে, তখন আবুল, নুর আলম ও ফারুক এ ৩ জনে সকিনা বিবিকে ধরে তার রুমে নিয়ে গুয়ে ফেলে। তখন মান্নান খাওয়ার ঘর থেকে বটি আনে এবং সবাই জামা খুলে আমাকে রাখতে দেয় এবং আমাকেট গেটে পাহাড়া দিতে বলে। মান্নান বটি দিয়ে সকিনা বিবির গলায় পোছ

মারে, তখন রুমের খাটের উপর ঘুমিয়ে থাকা শেফালীর ছেলে সোহেল (১০) দস্তাদস্তির শব্দ শুনে জেগে গেলে আবুল গিয়ে ছেলেটিকে চেপে ধরে, তখন মান্নানের হাত থেকে নুর আলম বটিটি নিয়ে গিয়ে বটি দিয়ে সোহেলের গলায় পোছ দেয়। নুর আলম ও ফারুক সোহেলের লাশটি সিঁড়িতে টেনে এনে ফলে আবার ঘরের ভিতর ঢুকে ১৫/২০ মিঃ ভিতর থেকে ঘর বন্ধ করে দেয়। আমি, আবুল ও মান্নান তখন সিঁড়ির কাছে দাড়ানো, পরে নুর আলম ও ফারুক বিদ্যুৎ বন্ধ করে বের হয়ে আসে। ফারুক বাহির থেকে তালা মেরে দেয়। আমরা সবাই তখন বুড়িগঙ্গা নদীতে যাই, সবাই হাত মুখ ধুইয়ে আমার কাছে রাখা জামা নিয়ে পড়ে, ১২.০২.২০০৫ ইং দিবাগত রাত অর্থাৎ ১৩.০২.২০০৫ ইং রাত ০০.০১টা থেকে রাত ১.৩০টা পর্যন্ত আমরা শেফালীদের বাসায় থেকে শেফালীর মা ও ছেলের মৃত্যু নিশ্চিত করে ফিরে আসি, আমি ভুল করেছি, আমি অনুতপ্ত হয়ে স্বেচ্ছায় এ দোষ স্বীকারোক্তি দিলাম। আমি ক্ষমা প্রার্থী।”

Appellant Md. Abdul Mannan: “গত ১২.০২.২০০৫ ইং দিবাগত রাত ১১.০০ টার দিকে আবুলের বাড়িতে আবুল, আমি, আফসার, নুর আলম ও ফারুক সিঁড়ি দেখার জন্য একত্রিত হই, সিঁড়ি দেখাকালে নুর আলম বলে শেফালীর মা রাস্তা নিয়ে তাকে বকাবকি দিয়েছে, তখন আবুল বলে চল বুড়িকে শেষ করে দেই, আমি বললাম শেফালীর সালে আমার সু-সম্পর্ক আছে তা করা ঠিক হবে না, তখন আবুল সিঁড়ি খুলে একটি ক্যাসেট হাতে নিয়ে আমাদের নিয়ে শেফালীদের বাসায় গিয়ে খালা খালা বলে ডাকলে শেফালীর মা দরজা খুলে দিলে আমরা সবাই ঢুকি, আবুল ও আফসার শেফালীর মাকে ধরে মুখে কাপড় পেচিয়ে শুয়ে ফেলে, আমি বটি এনে ছকিনা বেগমের গলায় ৩টি কোপ দেই, মৃত্যু নিশ্চিত করার জন্য আফসার বটি দিয়ে ছকিনার গলায় আরও কুপ দেয়, এ সময় খাটে ঘুমিয়ে থাকা সোহেল জেগে গেলে নুর আলম ও ফারুক তাকে চেপে ধরে বটি দিয়ে কুপিয়ে মেরে ফেলে, ফারুক সোহেলের লাশ টেনে নিয়ে সিঁড়িতে ফেলে, আফসার ও ফারুক শেফালীর রুমে ঢুকে টাকা পয়সা যা পেয়েছে নিয়ে নেয়, আবুল বাইরে দিয়ে বাসায় তালা লাগিয়ে দেয়, আমরা সবাই তখন শিমুল তলা বুড়িগঙ্গার ঘাটে গিয়ে হাত পা ধুইয়ে যার যার বাড়ি চলে যাই, আমি ভুল বুঝতে পেরে অনুতপ্ত ও ক্ষমা প্রার্থী।”

P.W.8, Md. Rafiqul Islam, Judicial Magistrate, in his examination-in-chief stated that the confessional statements of the appellants were recorded complying with all the legal formalities of section 364 of the Code of Criminal Procedure. The defence

cross-examined him but could not shake the credibility of his deposition in any manner whatsoever.

From the confessional statement of Afsar Ali Sheikh, it is found that the confession was made voluntarily but later he sought to retract his confession by filing an application at the time of examining him under Section 342 of the Code. In his application, he claimed that the police after arresting him inhumanly tortured and compelled him to make confessional statement. The police threatened to put him in to cross-fire if confessional statement was not made. The police assured him that if he made confessional statement, then he would be made approver in the case and be acquitted. So, the confessional statement made by him is not true and voluntary.

From the evidence on record, it appears to us that appellant Afsar Ali Sheikh made the confessional statement voluntarily but later he retracted his statement making a false story. During cross-examining P.W.12, the investigation officer, who produced the appellant before the magistrate for making confessional statement, was not cross-examined in this regard i.e. he compelled the appellant to make confessional statement. So, the retraction of confessional statement by the appellant Afsar is out of consideration.

It was held in the case of *State and another vs. Abdul Kader @ Mobile Kader and others* [67 DLR(AD) 6] that, "If the confessional statement is found true and voluntary, it can form the basis for conviction even if retracted so far the maker is concerned."

From the materials on record, it appears to us that the appellants made confessional statement implicating themselves in committing the murder of the deceased victims Sakina and Sohail and the confessions were made voluntarily. The judicial confession which appears to be true and made voluntarily can be the sole basis of conviction against its maker without further corroborative evidence even if it is retracted by its maker.

We have already discussed in the preceding paragraphs that since there is no eyewitness to this incident, confessional statements of the appellants can be the sole basis of convicting the accused if it is found true and voluntary. The High Court Division rightly came of an opinion that the confessional statements made by the appellants were true and voluntary. In the case of *Islamuddin (Md) @ Din Islam vs. State* [13 BLC (AD) 81] it has been held that "It is now well settled principle of law that judicial confession if it is found to be true and voluntary can form the sole basis of conviction as against the maker of the same." In this pursuance, the High Court Division observed rightly that "Their

confessions were shown as voluntary and inculpatory in nature. So it is well established that confessional statements if found inculpatory in nature and also true and voluntary it can be used against its maker and conviction can solely be based on it without any further corroborative evidence." In the instant case the confession made by accused Afsor Ali Sheikh (Ext.9) and Md. Abdul Mannan (Ext.10) were not only inculpatory in nature, but also true and voluntary.

When a Magistrate records confessional statement of an accused under Section 164 of the Code of Criminal Procedure he must observe some legal formalities (i) he must give statutory warning and caution the accused that he is not bound to make a confession; (ii) the Magistrate must be satisfied on questioning the accused that the statement has been made voluntarily. After completion of recording the statement, the Magistrate must add a memorandum at the end of the confession relating to his action. If the Magistrate observes all the legal formalities in recording the confessional statement of an accused generally the confession should be treated as voluntary and true.

Even if, in making statement the accused gives inculpatory and exculpatory statement together, the Court can accept inculpatory part of the statement and reject the exculpatory part of such statement of the accused. There is no scope to reject the

statement to its entirety, even if one part of the confessional statement is untrue and other parts is true. The Court is to see whether or not the statement was recorded by the recording Magistrate observing all legal formalities. If it is done observing all legal formalities only the true part of the statement can be accepted by the Court.

In this case, we find that the statement recording Magistrate after observing all legal formalities recorded the statements of the accused appellants. Thus, we are not hesitant to accept the same as true and voluntary.

In this case the appellants retracted their confessional statement during examination under Section 342 of the Code of Criminal Procedure only, but not before. It has been held in the case of *State vs. Minhun alias Gul Hassan* reported in *PLD 1964 SC 813* that "Retracted confessions, whether judicial or extra-judicial, could legally be taken into consideration against the maker of those confessions himself, and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration. As against the maker himself his confession, judicial or extra-judicial, whether retracted or not retracted, can in law validly form the sole basis of his conviction, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement."

In this case the appellants retracted their confessional statement during examination under Section 342 of the Code of Criminal Procedure, but in view of the above decision this kind of delayed retraction has no value in the eye of law, if the confessional statement is found true and voluntary.

In view of the facts and evidence discussed above, our considered opinion is that the prosecution has been able to prove the case beyond reasonable doubt that both the appellants murdered the deceased victims Sakina and Sohel and, therefore, we find no wrong or illegality at the finding of the High Court Division to convict the appellants for murdering Sakina and Sohel and sentencing them to death based on judicial confession. As such, the conviction and sentence passed by the High Court Division in respect of the appellants does not suffer from any kind of legal infirmities, thus it does not call for interference by this Division.

From the materials on record, it is found that the Tribunal passed the judgment and order of conviction and sentence of death of the appellants on 27.02.2006. Since then both the appellants Md. Afsar Ali Sheikh and Md. Abdul Mannan have been in condemned cell for more than 14(fourteen) years suffering the pangs of death. In this circumstance, we are of the view that justice would be sufficiently met, if the sentence of

death of the appellants be commuted to one of imprisonment for life.

Accordingly, the appeals are **dismissed**. The sentence of death imposed upon the appellants Md. Afsar Ali Sheikh and Md. Abdul Mannan by the High Court Division is commuted to imprisonment for life, however, the fine imposed upon the appellants is maintained.

C. J.

J.

J.

J.