

District: Dhaka

**In the Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)**

Present:

Mr. Justice Syed Md. Ziaul Karim

And

Mr. Justice Sardar Md. Rashed Jahangir

Death Reference no. 38 of 2016

The State

Versus

Md. Kabirul Islam Vorosha @ Kabir (Absconding),
..... Condemned-accused.

Mr. Muhammad Jahangir Alam, D.A.G. with
Mr. Md. Lokman Hossen, A.A.G.

Mrs. Tamanna Ferdous, A.A.G, and

Mr. Sayem Md. Murad, A.A.G.

.....For the State.

Mr. Md. Mohsin Kabir, Advocate

.....For the informant.

Mr. Md. Hafizur Rahman Khan, Advocate

..... State Defence Lawyer.

**Heard on: 21-03-2022, 22-03-2022 and
Judgment delivered on: 23-03-2022 .**

Syed Md. Ziaul Karim, J:

This death reference under Section 374
of the Code of Criminal Procedure (briefly as the

Code) has been made by learned Additional Metropolitan Sessions Judge, fourth Court, Dhaka, for confirmation of death sentence of condemned-accused Md. Kabirul Islam Vorosha @ Kabir passed in Session Case no.6116 of 2009. The learned Judge by the Judgment and order of conviction and sentence dated 11-04-2016 convicted the accused under Section 302 of the Penal Code and sentenced him to death and also to pay a fine of Tk. 1,00,000/-.

The prosecution case put in a nutshell are that on 27-04-2009 at 2 P.M. Md. Kairul Islam Vorosha @ Kajol aged about 31 years son of Karim Uddin Vorosha of house no. 13, Road no.1, Block-F, Chairman Bari, Banani, Police Station-Gulshan, Dhaka, since deceased was working at his 8th floor office room at *New Edge Tobacco*, Ellis Center, 40, Bijoy Nagar, Dhaka. At about 2.15 hours his elder brother Md. Kabirul Islam

Vorosha @ Kabir (briefly as accused) rushed to the office and sat for some time at the office room of P.W. 3, Administrative Officer Md. Sydul Islam. Afterward the accused entered into the room of deceased, Managing Director of that office, inside the room P.W.6 Anwarul Haque, Manager finance and P.W.8, Abdur Rashid, Accountant were talking each other, accused asked them to go out, later P.W. 5, office peon Amjad entered and found altercation between the brothers, accused also threatened him to shot, meanwhile he (PW-5) came out and informed the incident to other staffs, they in all hurriedly rushed to spot and found him (deceased) in bloody and critical condition, when accused was standing with Pistol, the accused then left the office premises, the deceased then taken to Islami Bank Hospital at Kakrail by P.W.6, Anwar, D.G.M. Md. Matlubur Rahman and Driver Siddique; from there he was

shifted to Square Hospital wherein the attending doctor declared him dead.

It was believed that the reasons behind such a murder might be the sequel to conflict between them over long standing family and business feud. Having had heard the incident from P.W. 10, Md. Monirul Islam Sohel, younger brother of the deceased, the prosecution was launched by lodging a First Information Report (briefly as FIR) by P.W.1, Md. Imran Hossin, brother-in-law of the deceased as informant, which was recorded as Paltan Police Station Case no. 63 dated 28-04-2009, corresponding to G.R. no. 257 of 2009 under Section 302 of the Penal Code (exhibit-1).

On hearing the incident the police rushed to the scene, held inquest upon the cadaver and sent it to morgue for autopsy.

During investigation on 20-05-2009 accused was arrested by the police and on following day i.e. on 21-05-2009 he made confession recorded under section 164 of the Code (exhibit-13). During investigation the police recorded the statements of the witnesses under section 161 of the Code, prepared Seizure List and seized different alamats and after concluding investigation submitted Charge Sheet accusing Md. Kabirul Islam Vorosha @ Kabir condemned accused as only accused under section 302 of the Penal Code.

Eventually, the accused was called upon to answer the charge under Section 302 of the Penal Code to which he pleaded not guilty and claimed to be tried.

On 08-09-2010 the accused was granted bail and since 13-06-2011 he remained

absent, so his bail was cancelled. Thereby he was defended by a State defence lawyer.

In course of trial the prosecution in all examined fifteen witnesses out of twenty-four witnesses mentioned in the charge sheet and the defence examined none.

During trial the accused remained absconding so cross examination of the witnesses were done by the state defence lawyer. The defence case as it appears from the trend of cross-examination of the prosecution witnesses are that of innocence and falsely implication. It was divulged in defence that due to conflict between the brothers over the family feud as well as business management he was falsely implicated out of vengeance.

After trial the learned Judge convicted the accused as aforesaid holding:-

(a) The prosecution successfully proved the charge against the accused under sections 302 of the Penal Code;

(b) The confession made by accused was true and voluntary and the same was consistent with the prosecution case;

(c) There were substantive corroborative evidence against the accused by the witnesses;

(d) There were chain of circumstances in the instant case which was proved by the evidence;

(e) The evidence of prosecution witnesses, are consistent, uniform and corroborative with each other with all material particulars.

The learned Deputy Attorney General appearing on behalf of the State supports the reference and submits that there are chain of circumstances in respect of crime of murder. He adds that the accused voluntarily made

confession which was inculpatory in nature. The learned Magistrate P.W-15 recorded the confession complying the legal formalities laid down in section 364 of the Code. He lastly submits that material particulars like Pistol were exhibited and proved by evidence, therefore the reference is required to be accepted which calls for no interference by this court.

In support of his contentions he refers the following cases:

(i) In the case of State Vs. Moslem, 55 DLR 116 held:

“Evidence Act

Section 5

“A close relative who is a material witness cannot be regarded as an interested witness. The term “interestedness” postulates that the witness must have some direct interest

in having the accused somehow or the other connected for some animus or some other reasons.”

(ii) In the case of Zakir Hossain and another Vs. State, 55 DLR (137) held:

“Code of Criminal Procedure

Section 164

“Established legal position is that statement under section 164 CrPC can be used against its maker if it is found to be true, voluntary and inculpatory in nature- Statement under section 164 CrPC cannot be used against any other co-accused without any corroborative evidence and circumstances.”

“Evidence Act

Section 30

“Conviction can be based on the sole confession of the accused although

retracted subsequently if it is found to be true and voluntary.”

The learned Counsel appearing for the condemned accused seeks to impeach the impugned judgment and order of conviction and sentence on three fold arguments:

Firstly : The prosecution beyond reasonable doubt failed to prove the charge against the accused. According to him P.W.3 Saydul Islam, Administrative officer under deceased, his presence in the office was doubtful;

Secondly: The confession made by accused was not true and voluntary rather the same was not recorded by complying the provisions of section 364 of the Code, so the same cannot be accepted as a sole basis of conviction.

Thirdly: There is no eye witness in the case and no independent witness was examined

to corroborate the evidence of the prosecution witnesses, amongst them most important vital witness namely Karim Uddin Vorosha, father of the deceased and accused was not examined by the prosecution without any explanation, so the legal presumption would be had he been examined he would not have supported the prosecution case. He lastly submits that there are some lacuna in respect of the investigating materials and to prove the same in evidence, so the case should be sent back on remand for retrial. Therefore, the reference is liable to be rejected.

In support of his contentions he refers the following cases:

(i) In the case of State Vs. Mokbul Hossain, 37 DLR 157 held:

“Code of Criminal Procedure

Section 509A

“Post mortem reports when can be used as evidence in a case –When conditions are not fulfilled in a case, the post-mortem report cannot be used in evidence.

Under Section 509A, Cr.P.C, Code the report of post-mortem examination may be used as evidence in the following conditions:- (1) if the medical officer who made the report is dead or (2) if he is incapable of giving evidence or (3) if he is beyond the limits of Bangladesh and his attendance cannot be procured without an amount of delay, expense or inconvenience, which , under the circumstances of the case would be unreasonable. The learned Additional Sessions Judge in the present case appears to have admitted the post-

mortem report on the ground that the doctor, who held the post-mortem examination, was not available.”

(ii) In the case of State Vs. Babul Miah
63 DLR(AD) 10 held:

“Code of Criminal Procedure

Section 164(3)

“It is a mandatory requirement that after recording a confessional statement the recording Magistrate is required to make a memorandum to the confession containing a clause to the effect that he had warned the accused that he was no bound to make a confession, that if he makes a confession, it would be used against him, that the statement was true and voluntary, that it was recorded as per version of the maker and that it was read over to the maker after his

statement was recorded which was the true and correct version and it contained a full and true account of statement made by the maker.”

In order to appreciate their submissions we have gone through the record and given our anxious consideration to their submissions.

Let us now weigh and sift the evidence on record as adduced by the prosecution to prove the charge.

P.W.1 Md. Imran Hossain brother-in-law of deceased and informant of this case. He deposed that on 27-04-2009 at 3.15 hours he was going to his office, on the way Monirul Islam Shohel (P.W.10) informed him over telephone that deceased received bullet injuries and taken to Square Hospital, he rushed there and heard about the incident from the office staffs to the effect that his elder brother accused fired him at

office room. He also heard that the accused sprayed ZIPPO FLUID upon the deceased, when he was talking with his father over telephone, then the accused Kabir fired four bullets at his chest and fled away. The victim was then taken to the Islami Bank Hospital at Kakrail, from there he was shifted to Square Hospital wherein the attending doctor declared him dead. Police also rushed to the scene, held inquest and found four bullet injuries upon the cadaver. Then he was sent to the morgue of Dhaka Medical College Hospital for Post Mortem examination, after then he was buried to Banani graveyard, thereafter at 2 A.M. he went to the Paltan Police Station and lodged the First Information Report written by his brother's friend Habibur Rahman Howlader (P.W.4). He proved the FIR as exhibit-1, his signature as exhibit-1/1 and inquest report as exhibit-2 and his signature exhibit-2/1.

In cross examination he stated that he heard about the incident at Square Hospital, ejahar was written at the office room of Officer-in-charge of the Paltan Police Station, wherein Sohel, Mahmud Hossen, Habibur Rahman were present. He did not go to the place of occurrence and heard the accused made confession, he denied the suggestion that due to local rivalry he was killed and he deposed falsely.

P.W. 2 Mahmud Hossen, brother-in-law of deceased he deposed that on 27.04.2009 he was returning home from office, he heard that his sister's husband (deceased) was taken to Square Hospital. He rushed there and found Kajol dead, he also found injuries upon his person. All office staffs and Sohel younger brother of deceased disclosed that accused killed his younger brother Kajol and left the premises. Police held inquest

at the Square Hospital and he stood as one of the witness, he also witness of Seizure List, exhibit-3.

In cross examination he stated that he did not see the occurrence and he had no knowledge about the conflict between the brothers and denied that other terrorist may killed Kajol.

P.W.3 Md. Saidul Islam was the Administrative Officer and also not eye witness, he deposed that the occurrence took place on 27-04-2009 at 2-2.30 hours, accused Kabir came to his room and after some time he entered into the room of Kajol, Managing Director and he heard the sound of 3/4 bullets, he rushed there and found accused Kabir coming out with a Pistol and Kajol was lying in a critical condition, then the staffs taken him to Islami Bank Hospital and then to Square Hospital wherein the doctors

declared him dead, at the hospital the relations came and he disclosed the incident to them.

In cross examination he denied the suggestion that he did not see the occurrence.

P.W.4 Md. Habibur Rahman Howlader, friend of P.W. 2 Mahmud Hossen and not eye witness he deposed that he wrote ejahar at the dictation of informant, he proved his signature exhibit 1/2.

In cross examination he denied that he wrote ejahar without knowing the materials facts.

P.W.5 Md. Amzad Hossain, office peon of deceased Kajol. On 27-04-2009 at 2-2.30 hours he was in the office, at the call he entered into the office room of deceased Kajol, thereafter he came out and went to call Manager Anwar later he heard about firing of 3/4 bullets and found Kajol was in bloody condition and taken to hospital, he was also a witness of Seizure List.

In cross examination he denied that he was not an eye witness and at the instance of police he put his signature on Seizure List.

P.W.6 Md. Anwarul Haque, Manager Finance. P.W.7. Md. Delwar Hossain, Office Peon. P.W.8 Md. Abdur Rashid, Assistant Manager also not eye witness, but found the deceased was lying in the office in a bloody and critical condition he was taken to hospital, and the attending doctor declared him dead.

In cross examination they denied that they were deposing falsely.

P.W.9 Zaigam Ahsan, deceased was his brother-in-law, on 27-04-2009 the occurrence took place and he heard the same from his wife that accused Kabir shoot him to death. He stood as one of the witness in inquest and seizure list (exhibit-3).

In cross examination he stated that he did not see the occurrence.

P.W.10 Md. Monirul Islam Shohel is the younger brother of deceased and accused. On 27-04-2009 he heard that accused Kabir fired their Managing Director Kajol, he informed the matter to his brother Imran. The deceased was then shifted to Islami Bank Hospital and then to Square Hospital where he was declared dead by the doctor. He found different injuries upon the person of deceased.

In cross examination he denied that he had no knowledge who killed Kajol.

P.W.11, Dr. A.K.M. Shafiuzzaman deposed that on 27-04-2009 he was the lecturer of Dhaka Medical College Hospital and held autopsy upon the cadaver of deceased. After examination he prepared the report and opined that:-

“In my opinion the cause of death was due to heamorrhage followed by shock as a result of above mentioned bullet injuries which was antemortem and homicidal in nature.”

He proved the Post Mortem examination report as exhibit-5.

In cross examination he deposed that there were six injuries at the body and denied that he did not examine properly.

P.W.12 SI Md. Kamrul Hossain, deposed that on 28-04-2009 he was attached with Gulshan Police Station and he verified the address of the accused.

P.W.13 Inspector Sheikh Nazrul Islam of CID Ballistic Branch deposed that on 15-06-2009 he was as SI examined the arms. He submits the report as exhibit-6.

P.W.14 Investigating Officer Md. Shamsur Rahman Khan, investigated the case

visited place of occurrence, prepared sketch map and Index, seized different alamats there after referred pellets and bullets to the ballistic department of CID and one pass-port. After concluding investigation he submitted Charge Sheet accusing only accused Mr. Kabirul Islam Vorosha @ Kabir. On re-call by the prosecution he proved the incriminating Pistol as Material Ext.-IV.

In cross examination he denied the suggestion that the seized alamat was not the alamat of the instant case.

P.W. 15 Konika Biswas, she was the Metropolitan Magistrate at that relevant time and recorded the confession of condemned accused Kabir by complying all legal formalities. He proved the same as exhibit-13, he denied the suggestion that the accused was drug addicted and his confession was not voluntary and true.

These are all the evidence on record adduced by the prosecution

We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged with crime, the following principles should be taken into consideration.

a) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.

b) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused.

c) In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffer.

d) There must be clear and unequivocal proof of the corpus delict.

e) The hypothesis of delinquency should be consistent with all the facts proved.

In spite of the presumption of truth attached to oral evidence under oath if the Court is not satisfied, the evidence in spite of oath is of no avail.

It is indisputable that the slain Khairul Islam Vorosha @ Kajol was working inside his office room and accused Kabirul Islam Vorosha @ Kabir entered into that room, at one stage of altercation the accused shoot him to dead.

On going to the materials on record it transpires that fifteen witnesses were examined by the prosecution. Of them P.W.1 is the informant and the deceased Kajol was his sisters husband. P.W. 2 is bother-in-law of deceased and heard the occurrence. P.W. 3, P.W. 5, P.W.6

P.W.7 were the employees. P.W.4 is the friend of P.W.2 and scribe of FIR. P.W.9 was the sister's husband of deceased. P.W.10 is the brother of the deceased. They all heard the occurrence. P.W.3, P.W.5, P.W.6, P.W.7, P.W.8 also did not see about firing inside the office room, but saw the accused coming from the room with Pistol and the deceased Kajol was found bloody condition inside the room. P.W.11 who held post mortem examination upon the cadaver and submitted Post Mortem Report as exhibit-5. He found four injuries. P.W.12, P.W.13, P.W.14 are the official witnesses, of them P.W.13 is the Ballistic expert of CID who submitted the report about the firearm. P.W.14 is the investigating officer who submitted Charge Sheet accusing accused Kabir. PW-15 Magistrate recorded confession of accused (Exbt.-13).

It is true that there is no eye witness to the incident of murder. The case is absolutely rest upon the circumstantial evidence and confession of the accused (exhibit-13).

Following are the circumstances:

(a) On 27-04-2009 at 2-2.30 hours the deceased was working at his office room, at that time his elder brother rushed to the office and then entered to the room and then after firing came out and fled away. His coming and leaving the premises were witnessed by P.W.3, P.W.5, P.W.6, P.W.7 and P.W.8.

(b) The informant P.W.1, and P.W.2 and P.W.10 are the relations of the deceased; and heard the incident.

(c) The deceased was taken to the hospital where the attending doctor declared him dead. P.W.1, P.W.2 and P.W.10 were present at the hospital and heard about the occurrence. So

the evidence regarding firing by the accused upon the deceased are consistent, uniform and corroborative with each other with all material particulars. There is absolutely no reason to disbelieve the consistent and corroborative evidence of those competent witnesses having no reason whatsoever to depose falsely against the accused. The defence extensively cross-examined them but nothing could be elicited to shake their credibility in any manner whatsoever. So the same are invulnerable to the credibility.

Let us now consider how far the confession (exhibit-13) of the accused can be used as a basis of conviction. It is pertinent to point out that the accused was arrested on 20-05-2009 on the following day i.e. on 21-05-2009 he made confession which was recorded by P.W. 15, Magistrate Konika Biswas.

For the convenience of understanding the material excerpt of the said confession reads as hereunder:

“আমার বাবা করিম উদ্দীন ভরসা এর নিকট হতে টাকা নিয়ে কোন্ড স্টো-রজ করি। সেটা চালু কর-ত বাবার নিকট টাকা চাই। বাবা ৭৫ লক্ষ টাকার Slip -দয় খাইরুল ইসলাম কাজল (৩৫) এর নিকট হ-ত টাকা নি-য় নেওয়ার জন্য। আমি ঐ Slip নি-য় ২৮-৪-০৯ তাং ভাই-য়র কা-ছ বিজয়নগর (৪০নং) অফি-স যাই দুপু-রর দি-ক। ৮ম তলায় গি-য় তার রু-ম চুকি। যে-য় দেখি সে চেয়া-র বসা। আমি Slip দিই আর টাকা চাই। Slip -প-য় সে বাবার সা-থ মোবাইল ফো-ন আলাপ কর-ত থা-ক। এসময় আমি রাগ হ-য় ZIPPO FLUID তার দি-ক ছিটা-ত থাকি। ভাই এগুলো দে-খও কিছু ব-লননি। সে কথা বল-তই থা-ক। এক পর্যা-য় আমি আমার প্যা-ন্টর প-কট হ-ত রিভলবার বের ক-র ভাই-ক লক্ষ্য করে ৪ রাউন্ড গুলি ছুড়ি। ৪টা গুলিই বুকে লাগে। এরপর সে পড়ে যায়। এরপর দৌড়ে নীচে চল যাওয়ার প-থ সিঁড়ি-ত কিছু লোকজন দেখ-ত পাই। আমি নী-চ নে-ম CNG ক-র রামপুরা বন্ধুর বাসায় যাই। এরপর মাদক নিরাময় কেন্দ্র চ-ল যাই। আমি মাদক নিই যে কার-ন ওখা-ন যাই। ওখা-ন এতদিন ছিলাম। পুলিশ আমা-ক ওখান হ-ত গ্রেফতার ক-র গতকাল ২০-৫-০৯ ইং তারিখ। উ-ল্লখ্য ভাই এর রু-ম ১ম ঢোকোর পর টাকা চাই এবং তার সা-থ আমার

কথা কাটাকাটি হয়। ভাই টাকা দি-ত চায়নি। কথা কাটাকাটির এক পযা-য় তার রু-মর সাম-ন ৪/৫ জন কর্মচারীরা এ-স দে-খছিল। কথা কাটাকাটির পর বাবার সা-থ সে মোবাই-ল কথা বল-তছিল। রিভলবার ২ মাস আ-গ কি-নছি। এই আবার বক্তব্য। ”

স্বাঃ কবিরুল ইসলাম

স্বাঃ অস্পষ্ট

২১-৫-০৯

কনিকা বিশ্বাস

-ম-দ্রাপলিটন ম্যাজি-স্ট্রট ঢাকা।”

On careful scrutiny of the above confession we find that the same was made in terms of the prosecution case. It was the admission in terms or at rate substantially all facts which constituted the offence. Moreso PW-15 recorded the confession by observing all legal formalities laid in section 364 of the Code. PW-15 was extensively cross-examined by the defence but nothing could be elicited to shake its credibility in any manner whatsoever.

It is pertinent to point out that at the time of recording confession by PW-15 the

confessing accused did not raise any objection regarding its truth and voluntaries but later on, and being enlarged on bail he remained absconding, which absolutely a presumption of guilt.

It further appears to us that above confessing accused implicated himself in commission of crime of murder. The materials on record shows that his confession was shown as voluntary and inculpatory in nature. It is well established that confessional statement 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 confessions made by the accused (exhibit-13) was not only inculpatory in nature, but also true and voluntary and as such the Court below very

rightly based solely on the confession and correctly convicted and sentenced the above accused by the impugned judgment and order, having duly found him guilty for the offence committed under Sections 302.

In the case of Islam Uddin(Md.) alias Din Islam Vs. The State 13 BLC(AD)81 held:

“ It is now settle 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. The High Court Division has rightly found the judicial confession of the condemned-prisoner true and voluntary and considering the same, the extra judicial confession and, circumstances of the case, found the condemned-prisoner guilty and*

accordingly imposed the sentence of death upon him. ”

Similar views were taken in the cases of Abdur Rashid and others Vs. The State 3 BLD 206, Amir Hossain Vs. The State 6 BLD(AD)193, Gouranga Chandra Paul Vs. The State 59 DLR 17, 29 DLR(SC)27, Shajahan Ali (Md.) alias Md. Shahjahan Vs. The State 59 DLR 396, Hazrat Ali and others Vs. The State 44 DLR(AD) 51, The State Vs. Abul Kalam Azad and others 8 BLC 464. Therefore we hold that the Court below rightly convicted the above confessing accused after considering the evidence on record.

On appraisal of the confession it further appears to us that as first part of it is inconsistent merely on some facts but the same are not at all material for deciding the case in our hand inasmuch as second part of it is inculpatory in respect of crime of murder. Moreso, it is well

settled that inculpatory part can be accepted by rejecting the untrue exculpatory part.

In the case of State vs. Lalu Mia and another 39 DLR(AD) 117 held:

“Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible.”

In the said decision at paragraph no. 43 it was observed:

In Nishi Kanta Jha v. State of Bihar, AIR 1969 SC 422, the exculpatory part of a confession of the accused was disbelieved and rejected by the court and its inculpatory part was accepted and the conviction of the

accused for murder was upheld by the Supreme Court in view of the facts and circumstances of that cases which are briefly stated here for better appreciation of the point involved : From a first class railway compartment of the Barawni express a dead-body of a person with multiple stab-injuries was recovered when the train reached Madhabpur Railway Station at about 4 P.M. on 12-10-1961, and about two hours thereafter, a person was found washing his blood stained clothes in a river; there was a cut-injury in his right fore-finger. On query by a passer-by (P.W.17) he explained that a cowboy had caused the injury with a glass in the course of a sudden quarrel. The witness, on going home, reported the matter to his brother (P.W.24) who stated that he heard just a while ago that the dead-body of a person had

been recovered at the Railway Station and that the murderer had been missing, P.W.24, along with others, went out in search of the man and having found him a few miles away arrested him and then produced him before the village head-man to whom he made a statement. In the statement he admitted his presence in the First Class Railway Compartment in which a murder was committed. He disclosed his identity as Nishi Kanta Jha and stated that when he boarded the Express train at Jhajha Railway Station he found “ an unknown passenger” in the First Class compartment, that from the next station, Sirutala, one Lalmohan Sharma, whom he knew from before, entered the compartment, that when the train left the next station Lalmohan Sharma killed the ‘ unknown passenger’ by several dagger blows

and when he tried to prevent the assaults he received the cut-injury in his right hand, that when the train reached the next railway Station, Madhabpur, Lalmohan Sharma left the train and finding himself alone in the compartment, along with the murdered man, he also jumped down in fear of arrest. He further stated that he washed his blood stained clothes in a river and proceeded to the house of his cousin at Roshan but was apprehended by P.W.24 and others who produced him to the head-man. During trial the evidence, particularly of the Headmaster of Jhajah High School, disclosed that the victim was Joy Prakash Dobe, a student of Class X (Science Group) of his school and the accused, Nishikanta, was a student of the same school and same class but in Art Section and that both of them played foot-ball

in the school. The question arose whether this confessional statement could be used against the accused since it was exculpatory in nature excepting the admission of his innocuous presence in the railway compartment as a passenger witnessing the crime committed by one Lalmohan Sharma. If his statement excepting his presence in the compartment was excluded there was no evidence to connect him with the murder, merely on the basis of the cut-injury in his finger. He was convicted by the High Court which accepted the inculpatory part of the statement and rejected the exculpatory part as false and inherently improbable and his conviction was maintained in appeal by the Supreme Court on the following reasons. The exculpatory portion was inherently improbable particularly, a minor cut-injury in

the fore-finger could not have caused profuse bleeding flooding his entire clothes, exercise books and was also contradicted by the explanation of the accused under section 342 Cr.P.C. wherein he stated that he had not traveled by the Barauni Express but he traveled by the Too-fan Express which had reached Madhabpur Station about four hours earlier, that the injury in his finger was inflicted by cow-boy while he was proceeding to Roshan after getting down from the train.”

Similar views were taken in the cases of Hazrat Ali and others vs. The State 44 DLR (AD)-51= 11 BLD(AD) 270. The State Vs. Afazuddin Sikder 50 DLR- 121 and The State Vs. Bellal Hossain 20 BLD-45.

Therefore, the prosecution by cogent, convincing and unimpeachable evidence on

record proved the complicity of the above accused with the crime of murder.

Moreover, the impugned judgment and order of conviction in its entirety is well founded in the facts and circumstances of the case. So, the submissions advanced by the learned Counsel for the defence are not the correct exposition of law. However we have gone through the decisions referred by them, we are in full agreement with the principles enunciated therein but the facts leading to those cases are distinguishable to that of the instant case. So we are unable to accept his submissions. On the contrary the submissions advanced by the learned Deputy Attorney General for the State prevails and appears to have a good deal of force.

With regard to the sentence imposed upon convict we are of the view that sentencing discretion on the part of a Judge is the most

difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come-out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Penal Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice.

In the light of discussions made above and the preponderant Judicial views emerging out of the authorities referred to above we are of the view that the complicity of the accused in the occurrence of murder has been well proved. The learned Judge rightly and legally convicted and sentenced him as such the same suffers from no legal infirmity which calls for no interference by this court.

In view of forgoing narrative:-

(a) Death reference No. 38 of 2016 is accepted;

(b) The impugned judgment and order of conviction and sentence dated 11-04-2016 passed by the learned Additional Metropolitan Sessions Judge, fourth Court, Dhaka in Metro Session Case no. 6116 of 2009 is hereby maintained. The sentence of death imposed upon the condemned-accused Md. Kabirul Islam

Vorosha @ Kabir stands confirmed. The learned Judge of the court below shall take appropriate measure to secure his arrest and direct the concern authority to execute the sentence in terms of the judgment passed in Metro Session Case no. 6116 of 2009 and in accordance with law.

The Office is directed to send down the records at once.

(Justice Syed Md. Ziaul Karim)

Sardar Md. Rashed Jahangir, J:

I agree.

(Justice Sardar Md. Rashed Jahangir)