

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, C.J.

Mr. Justice Obaidul Hassan

Mr. Justice M. Enayetur Rahim

**CRIMINAL APPEAL NO.47 OF 2015 WITH CRIMINAL APPEAL NO.15 OF
2015 AND JAIL APPEAL NO.24 OF 2014**

(From the judgment and order dated the 13th day of March, 2014 passed by a High Court Division Bench in Death Reference No.74 of 2008 heard along with Criminal Appeal No.5357 of 2008, Criminal Appeal No.5865 of 2008 and Jail Appeal Nos.821-823 of 2008)

Md. Ismail Hossain Babu : . . . Appellant
(In CrI. A.No.47/15)

Sonaddi alias Sonaruddi alias : . . . Appellant
Sonardi alias Md. Sonaddi alias (In CrI. A.No.15/15)
Somaruddi

Md. Tarikul Islam @ Bhota : . . . Appellant
(In Jail. A.No.24/14)

-Versus-

The State : . . . Respondent
(In all the cases)

For the Appellant : Mr. S.M. Shahjahan, Senior
(In CrI. A.No.47/15) Advocate Instructed by Mr.
Zainul Abedin, Advocate-on-
Record

For the Appellant : Mr. Helal Uddin Mollah,
(In CrI. A.No.15/15) Advocate, Instructed by Mr.
Zainul Abedin, Advocate-on-
Record

For the Appellant : Mr. S.M. Baksh Kollol, Advocate
(In Jail A.No.24/14) (State Defence lawyer)

For the Respondent : Mr. Bashir Ahmed, Deputy
(In CrI. A.No.47/15) Attorney General with Mr.
Nirmul Kumar Das, Assistant
Attorney General instructed by
Ms. Shirin Afroz, Advocate-on-
Record

For the Respondent : Mr. S.M. Baksh Kollol, Advocate
(In Jail A.No.24/14) (State Defence lawyer)

Date of Hearing : **The 21st day of June, 2022 and 22nd day of June, 2022**

Date of Judgment : **The 23rd day of June, 2022**

JUDGMENT

M. Enayetur Rahim, J: These appeals are directed against the judgment and order dated 13.03.2014 passed by a Division Bench of the High Court Division in Death Reference No.74 of 2008, heard along with Criminal Appeal Nos.5357 and 5865 of 2008 and Jail Appeal Nos.821-823 of 2008 accepting the reference, dismissing the appeals and thereby affirming the judgment and order of conviction and sentence of death.

Since the appeals have arisen out of the same judgment, those have been heard together, and are being disposed of by this common judgment.

The facts, relevant for disposal of the present appeals are as follows:

The present condemned prisoner-appellants along with another (who was absconding) were put on trial before the Druto Bichar Tribunal, Rajshahi in Druto Bichar Case No.4 of 2008, Nari-O-Shishu Case No.66 of 2007 arising out of G.R. No.274 of 2006 corresponding to Godagari (Rajshahi) Police Station Case No.20 dated 21.10.2006 and charge was framed against them under section 9(3) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (Amended 2003) read with sections 302/ 34 of the Penal Code to which the appellants pleaded not guilty and claimed to be tried.

The prosecution case in short, is that Md. Rafiqul Islam (P.W.1) lodged a First Information Report, shortly, "FIR" on October 21, 2006 with Godagari Police Station, Rajshahi alleging, inter alia, that he was informed by one Mazibur

Rahman on October 20, 2006 at 11.00 P.M. that his daughter Mosammat Miliara Khatun alias Roksana and granddaughter Mst. Parvin alias Sabnur were murdered in her daughter's house. Having received the said information, he along with his wife Aklima, neighbour Naimul and others went to the spot and found that his daughter and granddaughter had been decapitated and their dead bodies were lying in the courtyard; victim Roksana's head was found in the cowshed and head of Sabnur in the latrine. When he asked the people of the locality, they replied that they do not know who murdered his daughter and granddaughter. His elder grandson Minal came after 'Tarabi' prayer and called his mother but received no answer. Neighbour Ibrahim and Mazed came to the place of occurrence. Ibrahim and Mazed climbed up the boundaries of the house of his daughter and found the dead body of his daughter and became senseless. On hearing hue and cry, many people gathered there. The local people Mazibur Rahman open the door from the inside and then informed him and he went to his daughter's house.

The police after investigation into the case submitted charge sheet against the present condemned prisoners appellants and another under section 9(3)/30 of the Nari-0-Shishu Nirjatan Daman Ain, 2000 read with sections 302/ 34 of the Penal Code.

In order to prove the charge the prosecution examined 19 witnesses. The defence cross-examined them and on behalf of the condemned prisoner Tarikul two witnesses were examined.

The case of the defence, in short, is that they have been implicated in the case falsely and the alleged confession made by condemned prisoner-Tariqul Islam @ Bhuta

under section 164 of the Code of Criminal Procedure is not true and voluntary.

On conclusion of the trial the Druto Bichar Tribunal, Rajshahi by its judgment and order dated 23.07.2008 found the present appellants and another guilty under section 9(3)/30 of the Nari-O-Shishu Nirjatan Daman Ain,2000 read with section under sections 302/34 of the Penal Code and sentenced them to death.

The Druto Bichar Tribunal made reference to the High Court Division in view of the provision of section 374 of the Code of Criminal Procedure for confirmation of the sentence of death of the convict, which was registered as Death Reference No.74 of 2008. Being aggrieved by the above judgment convict-Sonaddi alias Sonaruddi preferred Criminal Appeal No.5374 of 2008, convict-Tariqul Islam @ Bhuta and Ismail Hossain Babu preferred Criminal Appeal No.5865 of 2008; they have also preferred Jail Appeal Nos.821, 822 and 823 of 2008 respectively.

A Division Bench of the High Court Division heard the death reference and the above appeals together and disposed of the same by a common judgment. The High Court Division by the impugned judgment and order dated 13.03.2014 accepted the reference and maintained the judgment and order of conviction and sentence of death.

Being aggrieved by the said judgment and order condemned prisoner Sonaddi alias Sonaruddi has preferred Criminal Appeal No.15 of 2015, condemned prisoner-Ismail Hossain @ Babu has preferred Criminal Appeal No.47 of 2015 and condemned prisoner-Tariqul Islam has preferred Jail Appeal No.24 of 2014 before this Division.

Mr. S.M. Sajahan, learned Senior Advocate, appearing in Criminal Appeal No.47 of 2015 preferred by condemned prisoner-Ismail Hossain @ Babu submits that in the instant case admittedly there is no eye witness of the alleged occurrence and the Tribunal as well as the High Court Division convicted appellant-Ismail Hossain @ Babu relying on the confessional statement made under section 164 of the code of criminal procedure by co-accused-Tariqul Islam. He submits that it is well settled proposition of law that a co-accused cannot be convicted relying on the alleged confessional statement made by other accused as the confession of a co-accused is not a substantive evidence and such confession cannot be the sole basis of conviction of a co-accused in the absence of other independent and corroborative evidence, direct or circumstantial.

Mr. Shajahan, referring to section 30 of the Evidence Act further submits that in a joint trial confession of a co-accused may be used as a relevant fact only to lend assurance to any other direct or circumstantial evidence. In the instant case no such corroborative evidence is available to lend support to the said confessional statement and as such, the conviction and sentence awarded against the appellant-Ismail Hossain Babu is bad in law and thus, liable to be set aside.

Mr. Helal Uddin Mollah, learned Advocate, appearing in Criminal Appeal No.15 of 2015 for condemned prisoner Sonaddi @ Sonaruddi adopting the above submissions made by Mr. S.M. Shajahan submits that condemned prisoner Sonaruddi has also been convicted relying on the confessional statement of condemned prisoner-Tariqul Islam and there is no other

evidence to lend support to the said confessional statement in commission of the offence by the appellant.

Mr. S.M. Baksh Kollol, learned Advocate, appearing in Jail Appeal No.24 of 2014 for condemned prisoner-Tariqul Islam (appointed by the Court) submits that the confession of Tariqul Islam is not true and voluntary as he was arrested on 21.10.2006 and taken for remand and after prolong police custody he compelled to make alleged the confessional statement on 26.10.2006; save and except the said statement there is no other evidence to connect the said appellant with the commission of the crime. Both the trial court and High Court Division in deciding the guilt of condemned prisoner-Tariqul has failed to consider this vital factual and legal aspect and as such the conviction and sentence passed against him is liable to be set aside.

Mr. Bashir Ahmed, learned Deputy Attorney General, submits that both the Tribunal and High Court Division rightly and lawfully assessed and evaluated the evidence both direct and circumstantial evidence coupled with the statement under section 164 of the Code of Criminal Procedure made by condemned prisoner-Tariqul and rightly found guilty to the appellants and as such there is no scope to interfere with the impugned judgment and order of conviction and sentence.

Mr. Bashir Ahmed, learned Deputy Attorney General, referring to the case of **Shukur Ali (Md) and another Vs. State, reported in 74 DLR(AD) page-11** submits that in a particular case conviction can be awarded to a co-accused relying on the confession of other co-accused in a joint trial.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned

judgment and order and the evidence adduced by the respective parties.

Having regard to the fact that, in the instant case there is no direct evidence or eye witness to the alleged occurrence. The prosecution witnesses in particular P.Ws-1,2,3,5,6,12 & 15 deposed in the line of FIR story and P.W-2, son of the deceased Meliara as to the recovery of the dead body of two victims from their house. They all came to the place of occurrence after the occurrence. P.W-2, Md. Minal Ali deposed that the occurrence took on 20.10.2006 between 7.30 p.m. and 10.30 p.m. he went to mosque for 'Tarabi' and after prayer he went to his house and called his mother but there was no answer. Thereafter the neighbor Mazed and Ibrahim came out from his house. He went over the boundary with a ladder and saw the head of his mother and sister were separated from their bodies and dead bodies were lying in the courtyard of his house. The police came to his house and prepared the inquest report of the dead bodies of his mother and sister and his signatures so endorsed thereon and marked as ext.3/2 series. The police suspected the accused Sonaddi, Ismail, Mokter, Tariqul. At first, the police arrested accused Tariqul.

P.W-10 Dr. Md. Ashraful Alam proved the post mortem report of deceased-Meliara, exhibit-6 and opined that death of deceased-Meliara was due to shock and hemorrhage followed by violent cut throat wound on the neck which is ante-mortem and homicidal in nature. He also opined that sign of violent sexual act present on her person. He found following injuries on her body:

- I) Head is separate from neck by sharp cutting weapon on detail dissection-

Extravasations of blood found corresponding to the wound.

- II) One penetrating wound; 2"x1" pelvic deep just below the symphyseal pubis.

On detail dissection extravasations blood present corresponding to the wound. Clotted blood found in the pelvic cavity. Vaginal found lacerated and dilated about 3/4". Seminal fluid found within the vaginal canal.

He also proved the post mortem report of deceased Pervin @ Sabnur, exhibit-7 and categorically opined that death of said victim was due to shock and haemorrhage followed by cut throat wound in the neck which is ante-mortem and homicidal in nature. He found following injuries on her person:

- I) Head is beheaded by sharp cutting weapon.
- II) Two incised wound on both forearm of hands vesting from 1½" x 1/4" x muscle deep to 2½" x 1/4" x muscle deep.

On detail dissection extravasations of blood found corresponding of the wounds. 3rd & 4th cervical vertebra found cut.

In view of the above, the prosecution has proved beyond doubt about the manner of the occurrence in particular that victim-Meliara alias Roksana was killed by violent cut throat wound on the neck and she was also raped.

Now, the question is whether the prosecution has been able to prove the charge brought against the present-condemned prisoners.

We have already noticed that in the instant case there is no eye witness of the alleged occurrence.

Condemned-prisoner Tariqul Islam has made a statement under section 164 of the Code of Criminal Procedure before the Magistrate, P.W-9, exhibit-5, which is as follows:

“১৯/১০/২০০৬ তারিখ রাত ০৮.০০ টার সময় রেলঘুন্টি মোড়ে মাসুদের দোকানে চা খাচ্ছিলাম। এ সময় মোক্তার আমাকে ডেকে ইসমাইল হোসেন বাবু ও সোনাদির নিকট নিয়ে যায়। সোনাদি বলে, ছোট বজলুর স্ত্রীর কাছে ৫০,০০০/- টাকা আছে। সেই টাকা নিতে যেতে হবে। আমি বলি, আমাকে ১০,০০০/- টাকা দিতে হবে। তখনকার সিদ্ধান্ত মোতাবেক ২০/১০/২০০৬ তারিখ শুক্রবার শবেকদরের রাতে পাড়ার লোকজন নামাজে ব্যস্ত ছিল তখন রাত ৮.০০ টায় (২০/১০/২০০৬) আমি, ইসমাইল @বাবু, মোক্তার, সোনাদি ০৪ জনে দিঘির পাড় দিয়ে ছোট বজলুর বাড়ীর পাশে লাট্রিনে গিয়ে দাড়াই। মোক্তার লাট্রিনের পাশ দিয়ে থাকা সজনে গাছ দিয়ে ওয়াল টপকিয়ে বাড়ির ভিতর প্রবেশ করে সদর গেট খুলে দেয়। আমরা ০৩ জন ঢুকি। মোক্তার গেট লাগিয়ে দেয়। আমরা ০৪ মিলুর ঘরে প্রবেশ করে ৫০,০০০/- টাকা দাবী করি। মিলু বলে, তার কাছে টাকা নাই। ভয়ভীতি দেখানো হয়। একপর্যায়ে মোক্তার গামছা দিয়ে মিলুর মুখ বেধে ফেলে। সোনাদি প্রথমে জোর পূর্বক মিলুর প্যান্টি ছোঁরা দিয়ে কেটে ধর্ষণ করে। এরপর মোক্তার ও ইসমাইল ধর্ষন করে। এরপর মিলুর চোখ ও মুখ বাধা অবস্থায় ঘর হতে বের করে আঙ্গিনায় টেনে নিয়ে এসে ফেলে দেয়া হয়। কথা ফ্লাস হবে ভেবে আমরা মিলুকে হত্যা করি। মোক্তার মাথা ধরে, আমি ডান হাত ধরি, ইসমাইল ০২ পা ধরে। সোনাদি ছুরি দিয়ে মিলুকে গলায় জবাই করে মাথা ও দেহ আলাদা করে। মোক্তার মিলুর মাথা গোয়াল ঘরের ঢাবিতে রাখে। মিলুর মেয়ে পারভীন @ সাবনুরকে মোক্তার মাথা ধরে সোনাদি জবাই করে। এর মাথা লাট্রিনের মধ্যে রাখি। এরপর আমরা এসে বজলুর বাড়ীর পশ্চিম পার্শ্ব পুকুরে ছোঁরাটি সোনাদি ধুয়ে নেয়। এরপর সোনাদি, ইসমাইল ও মোক্তার ধান ক্ষেত দিয়ে চলে যায়। আমি বাড়ীতে এসে মাথায় তেল পানি দেই। এর পর ঘটনা জানাজানি হলে পুলিশ আসে। আমাকে ২১/১০/০৬ তারিখ বেলা ৪.০০ টায় পুলিশ ধরে। আমরা দেড় ঘন্টা ধরে ঘটনা ঘটাই।”

P.W-9 Md. Sarwar, the Magistrate who recorded the said confessional statement, exhibit-5 proved the same and his signatures thereon as exhibits-5,5/1,5/2,5/3,5/4 and 5/5. He deposed that he observing all legal formalities i.e. complying the provision of sections 364 and 164 of the Code of Criminal Procedure recorded the said statement.

In cross-examination he stated that before recording the statement he examined the physical condition of Tariqul whether there was any mark of injury on his persons and he found no mark of injury on his persons. At the time of the examination under section 342 of the Code of Criminal Procedure condemned prisoner-Tariqul had furnished a written statement denying the allegation made against him stating that at the instance of the investigating officer he made the said confessional statement and he also stated that the other co-accused has got no connection with the alleged murder.

Upon examination of exhibit-5, form of confessional statement, made by the condemned prisoner-Tariqul, it transpires that in column 8 the recording magistrate recorded that- “আসামীকে জিজ্ঞাসাবাদে জানা যায়, পুলিশ তাকে কোন নির্যাতন করেনি। আসামীর দেহ পরীক্ষাতে কোন নির্যাতনের চিহ্ন পাওয়া গেল না। ৬নং প্যারার উত্তরগুলো দেয়ায় ও ৭ নং প্যারার দোষ স্বীকার করায় মনে হয়েছে আসামীর স্বীকারোক্তি স্বেচ্ছামূলক।”

PW-9 also recorded in column 9 of the said form that- “আসামীর দোষ স্বীকারোক্তি স্বেচ্ছামূলক বলে প্রতিয়মান হওয়ায় তা রেকর্ড করা হয়েছে।”

If we considered the evidence of P.W-9 the recording Magistrate, then there is no option but to hold that he complying the mandatory provisions of law recorded the confessional statement of condemned prisoner-Tariqul Islam and the said statement made by Tariqul Islam is true and voluntary and free from any doubt. It is now well settled that if confession of an accused is found true and voluntary conviction can be based solely relying on the same.

In view of the above, we have no hesitation to hold that in finding the guilty of condemned prisoner-Tariqul Islam the trial Court as well as the High Court Division did not commit any error in convicting him.

Let us now consider whether relying on the confession made by condemned-prisoner-Tariqul Islam, condemned prisoner-Md. Ismail Hossain Babu and Sonaruddi can be convicted or not.

Mr. Bashir Ahmed, learned Deputy Attorney General, submits that the evidence of P.Ws-7 and 13 are the corroboration of confessional statement of condemned prisoner-Tariqul Islam and thus, the High Court Division rightly maintained the conviction and sentence of condemned prisoner-Ismail Hossain Babu and Sonaruddi.

We have examined the evidence of P.Ws-7 and 13.

P.W-7 Md. Monirul Islam deposed that he used to work in the house of Kashem Master and on the night of occurrence at about 9.30 P.M he saw accused-Babu, Mokter and Sonaruddi were moving towards west from east and they crossed the house of his master Abul Kashem. The said deposition of P.W-7 was challenged by the defence. P.W-13 Md. Hasan-or-Rashid in his deposition stated that at the evening on the alleged night at about 7.15 A.M. when he was returning from Tatulia he saw Sonaruddi, Mokter and Babu going to the house of Tariqul. These assertions of P.W-13 were also challenged by the defence. Said statements of P.Ws-7 and 13 do not inspire us as the corroborative substantive piece of evidence or evidence of the confessional statement of appellant-Tariqul Islam. Thus, we are not unable to accept the submission of the learned Deputy Attorney General that the evidence of PW-7 and 13 are corroborative in nature to the confessional statement of condemned prisoner-Tariqul Islam.

The facts and circumstances of the present case is not similar to the facts and circumstances of the case of **Shukur**

Ali (Md) and another Vs. State, reported in 74 DLR(AD), page-11.

In the above case the factum of absconsion of accused-Shukur Ali has been considered along with the inculpatory confessional statement of two co-accused, who implicated Shukur Ali also in commission of the offence.

Rather, in this particular case the 'ratio' decided in the cases of **State vs. Abdul Kader alias Mobile Kader 67 DLR (AD), page-6** and **Abdus Salam Mollah vs. State 13 BLC (AD), page-17** will be applicable.

In the case of **Abdus Salam Mollah VS. State, reported in 13 BLC, 17** this Division has observed to the effect:

“Law as in section 30 of the Evidence Act, as to consideration of the confession of a co-accused in a trial when more persons along with confessing accused are being tried jointly for the same offence, is that confession so made by one of such persons affecting himself and some others who are being tried along with confessing accused persons and the confession so made is proved voluntary and true, the Court may take into consideration such confession as against other accused as well as the accused who has made such confession. The law is now settled that confession of an accused can be used against the non-confessing accused finding such non-confessing accused guilty of the offence tried jointly only when there is substantive evidence against the non-confessing accused as to his involvement in commission of the offence as the further evidence against such accused i.e. non-confessing accused. But in the absence of substantive evidence confession of a co-accused cannot be made basis for finding a non confessing co-

accused guilty of the offence charged and tried jointly with the confessing accused and as regard which confession has been made by a co-accused by implicating him and other. The confession of a co-accused can be taken into consideration against non-confessing accused who was tried jointly with confessing accused for same offence along with substantive evidence as an extra weight against the non-confessing accused as per provision of section 30 of the Evidence Act."

The question of weighing of confessional statement of a co-accused tried jointly with some other accused for the same offence against the non-confessing accused come up for consideration in the case of Maqbool Hossain vs. State reported in 12 DLR (SC) 217/page-9 and therein it was held that "The language of the section is very guarded and lends no warrant to the inference that such a statement made by a co-accused could be treated as substantive evidence against the other person, sufficient to sustain his conviction. It is well settled that there ought to be other evidence, whether direct or circumstantial, linking such a person with the crime, before a confession made by a co-accused could be adverted to, in adjudging the guilt of that person".

In the case of Lutfun Nahar Begum vs. the State reported in 27 DLR (AD) 29 the matter of using confession of an accused against non-confessing accused came up for consideration in what way can a confession be used in support of other evidence and whether it can be used to fill in missing gaps and it was held "that confession of an accused cannot be treated as

substantive evidence against another accused but that it can only be used to lend assurance to other evidence”.

In the case of Babor Ali Molla and others vs. State reported in 44 DLR (AD) 10 it has been held, “it is now well settled that the confession of a co-accused is no evidence against the other accused persons. Suction 30 of the Evidence Act contemplates that a confession made by a co-accused in a joint-trial for the same offence affecting himself and others may be taken into consideration. In other words, the confession of a co-accused may lend assurance to the other evidence on record”.

In the case of Ustar Ali vs. the State reported in 1998 BLD (AD) 43 (same case has also been reported in 3 BLC (AD) 53) it has been held “that a confession made by a co-accused in a joint trial for the same offence affecting himself and the others may be taken into consideration to lend any additional assurance to the substantive evidence on record”. (Underlines supplied)

Recently, the same view has been expressed by this Division in the case of **State Vs. Abdul Kader alias Mobail Kader, reported in 67 DLR (AD), Page-6.**

In view of the above proposition we have no hesitation to hold that in this particular case there is no corroborative evidence to lend support of the confessional statement of condemned prisoner-Tariqul in finding the guilt of two other condemned prisoners, namely Md. Ismail Hossain Babu and Sonaruddi.

Thus, it is our considered view that the prosecution has failed to prove the charge against condemned prisoners-Ismail Hossain Babu and Sonaruddi beyond doubt.

Accordingly, the Criminal Appeal No.47 of 2015 and Criminal Appeal No.15 of 2015 are allowed. Condemned prisoners Ismail Hossain Babu and Sonaruddin are acquitted from the charge brought against them.

Jail Appeal No.24 of 2014 is dismissed.

However, considering the fact that the condemned prisoner-Tariqul Islam alias Bhota is in death cell about 14 years and by this time he has been experiencing the agony of death in his death cell, we are of the view that, justice will be best served if the sentence of death is commuted to imprisonment for life.

Accordingly, the sentence of death of the appellant, namely, Md. Tarikul Islam @ Bhota, son of Md. Eslam Dakat of Village-Dhuyapara Joubon Line Para (ধুয়াপাড়া), Police Station-Godagari, District-Rajshahi is commuted to imprisonment for life and also to pay a fine of Tk.5,000/- (five thousand), in default, to suffer rigorous imprisonment for 06(six) months more. He will get the benefit of section 35A of the Code of Criminal Procedure in calculation of his sentence and other remissions as admissible under the Jail Code.

The concerned Jail Authority is directed to shift the appellant Md. Tarikul Islam @ Bhota to the regular jail from the condemned cell forthwith.

Accordingly, the appeal is dismissed.

C.J.

J.

J.