

No.3664 of 2004, and Jail Appeal No.1185 of 2004 were heard together and disposed of by the aforesaid single judgment.

The prosecution case, in short, is that accused Md. Rofiquul Islam was a security guard of the regional office of M/S HRC Group of Industries at 46, Kawran Bazar, Dhaka. Deceased Mohammad Ali and Zakir Hossain were also the security guards of the same office. On 09.12.1998 the accused and another security guard named Asad were on duty for the shift of 2:00 pm to 10:00 pm. After them, deceaseds Mohammad Ali and Zakir Hossain resumed their duty at 10:00 pm for the shift of 10:00 pm to 6:00 am. On that day Belayet Hossain, the Sales Representative of the company, after collecting sale proceeds of Tk.4,22,280.00 from the market returned to the office in the late hour. He then counted the money in his room. In the meantime, the Account Section of the Office was closed. So he could not deposit the money in the office. He kept the money in the chest of drawers in his room in the office. The accused while on duty saw Belayet Hossain counting and keeping such huge amount of money in the chest of drawers. At this he being tempted and made his mind to rob the money. At midnight he came to the office, when deceaseds Mohammad Ali and Zaku Hossain were on duty. The main gate of the office building was locked. The accused requested the deceased guards for allowing him to sleep in the office for the night showing special reason. Accordingly, the deceased guards, unlocking the gate

allowed him to enter in the building. Deceased Mohammad Ali slept in the first floor of the building. The accused was allowed to sleep beside him. Deceased Jakir Hossain was on duty on the main gate. The accused inflicted shabol blows and caused the death of Mohammad Ali who was sleeping. Then calling deceased Jakir Hossain on the first floor caused his death striking him with shabol blows. Then he robbed the money breaking the chest of drawers, unlocked the main gate taking keys of the gate from the deceased guards. Thereafter, he came out of the gate and locked the same again and then went to his village home with robbed money. After keeping the money in a hidden place in his house, he came back to Dhaka.

Next morning of occurrence the officers and staff came to the office and found the main gate was locked and the security guards were absent. They informed Tejgaon Police Station. Police came and found that the gate was unlocked. The officers, including informant Mesbah Uddin Ahmed, the Chief Executive Director of the Company entered into the building, found security guards Mohammad Ali and Jakir Hossain lying dead with injuries on their bodies on the first floor, the chest of drawers was broken and money kept therein was missing.

On the basis of G.D. Entry No.706 dated 10.12.1998 of Tejgaon Police Station recorded the case on the information given by Khairul Alam, an officer of HRC Group of Companies, Regional

Office, 46, Kawran Bazar. The police made inquest of the dead bodies of the deceaseds and sent the dead bodies to the morgue for post mortem examination. Thereafter, informant Mesbah Uddin Ahmad lodged First Information Report at 2:05 pm with Tejgaon Police Station without naming any accused. Police arrested the accused on 10.12.1998 at 7:30 pm from the barrack and taking him with them went to his village home and leading to his confession recovered Tk. 4,22,280.00 kept in a polythene bag and also Tk.8,548.00 kept in another polythene bag and also the keys of the locks of the gate of the office there from. The police also recovered a shabol the weapon used in the offence from the basement of the place of occurrence building hidden behind a signboard as pointed by the accused himself. The accused made confessional statement recorded by the learned Magistrate under section 164 of the Code of Criminal Procedure, 1898. After investigation police submitted charge sheet against the accused Md. Rofiqul Islam alias Rafique under sections 302/394/411 of the Penal Code, 1860.

The accused was put on trial in the 4th Court of the Metropolitan Additional Sessions Judge, Dhaka, wherein charge was framed under sections 302/394/411 of the Penal Code, 1860 against the accused. The charge was read over and explained to him to which he pleaded not guilty and claimed to be tried. After recording of the prosecution evidence fresh charge under section

302 of the Penal Code for committing murder of each deceased and under section 394 of the Penal Code, 1860 was reframed.

In order to substantiate the charge the prosecution examined 15 witnesses and tendered one, namely P.W.4, Gias Uddin for cross-examination, but the defence declined to cross-examine him.

After closing of the prosecution evidence, the accused was examined under section 342 of the Code of Criminal Procedure, 1898 when the accused repeated his innocence, complained of police torture, contended that he made no confessional statement to the Magistrate and declined to adduce any evidence.

The defence case, as it transpires from the trend of cross-examination of the prosecution witnesses and the statement made by the accused while he was examined under section 342 of the Code of Criminal Procedure, 1898 is that of innocence and false implication out of suspicion. The confessional statement of the accused was not voluntary and true. It was extracted inhumanly torturing the accused. Belayet Hossain, Shah Alam, Yeakub Ali and his cousin in collusion with one another killing the security guards robbed the money.

On consideration of the evidence adduced by the prosecution the trial court convicted the accused under section 302 of the Penal Code, 1860 and sentenced him to death and to pay a fine of Tk.5000.00.

Feeling aggrieved by and dissatisfied with the judgment and order passed by the trial Court, the appellant preferred Criminal Appeal with Jail Appeal before the High Court Division. The matter of death penalty has been referred before the High Court Division by the learned Judge, Metropolitan Additional Sessions Judge, 4th Court, Dhaka under section 374 of the Code of Criminal Procedure, 1898 for confirmation. After hearing, the High Court Division by its judgment and order dated 12.05.2008 and 13.05.2008 accepted the Death Reference and dismissed the Criminal Appeal with Jail Appeal.

Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the appellant preferred Criminal Appeal before this Division.

Mr. Saifuddin Mahmud, the learned Advocate, appearing for the appellant took us through the FIR, testimonies of the witnesses, the inquest report, the postmortem report, the charge sheet, the judgment and order passed by the trial Court and the High Court Division, the connected materials on record and submits that the prosecution must prove its own case beyond reasonable doubt. The appellant is quite innocent and he committed no offence. During remand, he was tortured physically and he was given electric shock for this reason the appellant was compelled to make confessional statement as per direction of investigating officer, but the High Court Division has failed to consider it, which has

resulted in an error in the decision occasioning failure of justice. He further submits that the seizure list witnesses were not examined before the trial Court, but the trial Court without considering the vital witnesses convicted the appellant and High Court Division has failed to consider it, which has resulted in an error in the decision occasioning failure of justice. He also submits that no money of dacoity was recovered from the control and possession of the appellant, but he was falsely implicated in this case. The High Court Division failed to consider it. Thus, the judgment and order passed by the High Court Division is liable to be set aside.

In reply, Mr. Biswajit Debnath, learned Deputy Attorney General, appearing on behalf of the respondent with the leave of the Court made his submissions in support of the judgment and order passed by the High Court Division and prays for dismissal of the appeal.

We have heard the learned advocates appearing on behalf of both the parties and examined the FIR, the testimonies of the witnesses, inquest report, postmortem examination report, judgment and order of conviction and sentence passed by the trial Court, judgment and order passed by the High Court Division in appeal and the connected materials on record.

Now, to ascertain whether the prosecution has been able to prove the charge against the appellant Md. Rofiqul Islam alias

Rafique, let us examine and analyze the depositions of the witnesses produced by the prosecution.

P.W.1, Mesbah Uddin, is the informant. He deposed that at the material time he was posted as the Executive Director (Administration) in the regional office of M/S HRC Group of Companies at 46, Kawran Bazar, Dhaka. The occurrence took place on the night following 09.12.1998 at any time after zero hour on the first floor of his office. He further stated that on 10.12.1998 at 7:45 am. Yeakub Ali, Assistant Executive of his office over telephone informed him that the collapsible main gate of his office was found unlocked. Receiving such information, he rushed to the office at 8:45 am. He further stated that M/S Shield Security Company supplied security guards in their office. The guards used to do shifting duty. He heard from Yeakub that on the night of occurrence, Mohammad Ali and Zakir Hossain were on duty as security guards in the shift from 10:00 pm to 6:00 am. The keys of the lock of the main gate were lying with them. In the morning they were found absent. In the meantime the Manager of Shield Security Company and other employees came there. The high official of their head office also came. Khairul Alam, the Sales Executive of their company made a G.D. Entry with Tejgaon Police Station. The police came. The collapsible gate was found unlocked. The lock of the door of the room of Assistant Manager Sheikh Masud in the ground floor beside the staircase was found broken.

The chest of drawers kept in that room was also found broken and open. He then with the police and the men of the Shield Security Company went to the first floor and found the main door of the hall room shut, but unlocked. Entering into that room, he found the dead body of security guard Mohammad Ali lying in the west side of the office room. The dead body of security guard Zakir Hossain was also found lying in the same room. He found shabol piercing wounds on the necks and chest of both the dead bodies. Blood was found on the carpet. The police made inquest of the dead bodies. Coming down to the room of Masud, chest of drawers was found opened and Tk.4,22,280.00 kept therein was found missing. In the room of Khairul Alam chest of drawers was also found broken and open. Five/six thousand taka kept in that chest of drawer was found in tact. This witness also stated that he went to the police station and lodged FIR. Later on, he heard that accused Rofiqul Islam committed the offence of murder of the deceased guards and robbed money. Police arrested Rofiqul Islam and leading to his confession recovered the robbed money from his village home at Bhuapur of Tangail. Mizanur Rahman and Khairul Alam of their office accompanied the police at the time of such recovery. Police also recovered and seized a 'shabol' from the basement of their office building. Police also seized the alampats from the place of occurrence and wearing apparels of the deceased. He further stated that before lodging FIR by him Khairul Alam, the

Administrative Officer of their office made G.D. Entry No.706 dated 10.2.1998 with Tejgaon Police Station. He further stated that he received Tk.4,30,340.00 on 07.03.1999 under a Jimmanama, Exhibit-13. Some money was kept with the police as specimen. In cross-examination, he stated that on the night of occurrence, Yeakub and his cousin were living in the second floor of the place of occurrence of office building. He saw them inside the collapsible gate of the building where they were confined. There was only one staircase inside the collapsible gate. He came to know that two security guards were missing. He stated that the security guards at night could get anybody entered into the building unlocking the gate.

P.W.2, SMA Sabur stated that he was an officer of M/S HRC Company. He stated that he went to the village home of accused Rafique at Bhuapur of Tangail with the police on the night following 10.12.1998. Accused Rafique, Khairul Alam and Driver Shahabuddin also went there. Rafique told them that he had kept the money digging earth beneath the chowki in his hut. But they did not find the money there. The father of accused Rafique told them that the money was hidden digging earth in a land at a little distance from their house. Then they went there with the father of Rafique and recovered Tk.4,22,280.00. During cross-examination, he denied the defence suggestion that he did not go to the house of

the accused at Bhuapur and that the money was not recovered from there

P.W.3, Yeakub Ali stated in his deposition that his office was at 46, Kawran Bazar. He used to live in that office building at night. The occurrence took place on the night following 09.12.1998 at any time from 10:00 pm to 5:00 am. In the office room dead bodies of Mohammad Ali and Zakir Hossain with blood were recovered. Police made inquest of the dead bodies. Tk.4,22,280.00 of Sales Executive Belayet Hossain was found missing from the chest of drawers. In cross-examination, he stated that as he was sleeping he heard no sound. He denied the suggestion that at his and his cousin's connivance the money was robbed killing the guards or that the accused was falsely implicated.

P.W.4, Gias Uddin, a cousin of P.W.3, was tendered by the prosecution for cross-examination, but the defence declined to cross-examine him.

P.W.5, Mizanur Rahman, stated that at the material time he was the Deputy General Manager(General Affairs) of HRC Company. The occurrence took place on the night following 09.12.1998 on the first floor of the building at 46, Kawran Bazar. Checking the office it was found that sale proceeds amounting to Tk.4,22,280.00 was missing and the chest of drawers was broken. At the direction of the daroga he went to the police station in the evening and found security guard Rafique (accused) was present

there. The stolen money was recovered from the house of accused Rafique. In cross-examination, he stated that none could enter into the office building so long the collapsible gate remained locked, but anyone could move from the ground floor to the second floor. He denied the defence suggestion that Yeakub, Jahangir and his brother robbed the money and that he deposed falsely.

P.W.6, Shah Alam, stated that he heard that the money was recovered from accused Rafiquel Islam. He stated that Rafique admitted that he had taken the money. In cross-examination he admitted that he did not state to the police that on his arrival in the office accused Rafique informed him that the Administrative Officer called him. He denied the defence suggestion that he deposed falsely.

P.W.7, Khairul Alam, deposed that on 10.12.1998 at 8:00 am over telephone he was informed that the gate of his office was locked and the guards were not available. He then went to his office at 46, Kawran Bazar. Entering into the building, he found two security guards, namely Zakir Hossain and Mohammad Ali lying dead. Then coming to the ground floor, he found the drawers of the almirah open. Tk.4,22,280.00 was found missing from the drawer. Following night at 9:00 pm the Officer-in-Charge of Tejgaon Police Station informed them over telephone that the offender was detected. He was asked to go to the police station. Then he went to the police station saw accused Rafiquel Islam, the

security guard of their office, was confined there. In reply to the query of the trial Judge this witness further said that there were six security guards in their office. He further said that on the following night of occurrence, he and his one office colleague went to the village home of the accused. The accused was taken with them. The accused told that the robbed money was kept underneath the chowki. But digging earth they did not find money there. The father of the accused informed that the money was removed and kept under land. The money was recovered digging earth of that land. Thereafter, they returned to Tejgaon Police Station with the money. In cross-examination he denied the defence suggestion that he deposed falsely.

P.W.8, Belayet Hossain, in his deposition stated that at the time of occurrence he used to serve as a Sales Representative of HRC Company. On 09.12.1998 he came to their office at 46, Kawrar Bazar with sale proceeds amounting to Tk.4,22,280.00. Before his arrival, the Accounts Section of their office was closed. He and his colleague Shah Alam enumerated the money and kept the same in the drawer of a cabinet while they were counting the money. The accused Rafique and Asad were on duty as security guards in the office. Next day at 8:30 am he came to the office and found the staff of their office with some other persons standing in front of the locked main gate of the office building. Entering into the building, he found guards Zakir and Mohammad Ali lying dead. He could

perceive that the offences of robbery and murder have been committed. He further said that later on leading to the confession of accused Rafique Tk.4,22,280.00 was recovered.

P.W.9, SKA Masud, stated that entering into the office building, he found the door of his room was open. There were some file cabinets of the account holders in his room. He found the drawers of those file cabinets were broken. They also found marks of taking away money from the drawer cabinet of Belayet Hossain. On counting, it was found that Tk.4,22,280.00 was missing from the drawer cabinet of Belayet Hossain. He came to know that police after going to the upstairs found two security guards, namely Zakir Hossain and Mohammad Ali lying dead in front of the counter. The police seized some alamats from that place. He informed the police that accused Rafiqul Islam and Asad were on duty as security guards in the evening shift. The people of the security company reported that accused Rafiqul Islam was not available. In the previous night, he was not in the barrack. In the evening of 10.12.1998 accused Rafique was arrested from the barrack. Taking him in the police station he was quizzed, when he confessed that he committed the murder of the deceased. Khairul and Sabur went to the village home of the accused with the police. Money was recovered from the house of Rafique.

P.W.10, Faridul Islam, a finger print expert, stated that he went to the place of occurrence of the Office of HRC Company at

46, Kawran Bazar and collected photos of eight finger prints appearing on drawer cabinets lying in the ground floor and first floor. Thereafter, he compared those finger prints with the specimen finger prints of the accused collected by the Investigating Officer and gave his opinion, which has been marked as exhibit-5. He further said that the finger prints collected by him were found identical with the specimen finger prints of the accused. In cross-examination, he denied the suggestion that the opinion given by him was perfunctory one.

P.W.11, Md. Dadan Mia, is a seizure list witness. He stated that one day in Tejgaon Police Station in his presence the police seized the wearing apparels and badges of the deceased security guards under the seizure list, Exhibit-6.

P.W.12, Basu Datta Chakma, a Sub-Inspector of Police, stated that on 10.12.1998 while he was attached to Tejgaon Police Station, the case was endorsed to him for investigation. He taking up investigation of the case visited the place of occurrence, prepared the sketch map, exhibit-7, with a separate index, exhibit-8, recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure, 1898, seized one pair of boot, a cut piece of blood stained carpet, exhibit-3 and some furniture including steel file cabinets, five locks of different sizes, a bundle of two taka notes as alams from the place of occurrence under the seizure list. He further stated that S.I. Muzibur Rahman made

inquest of the dead bodies of deceased Zakir Hossain and Mohammad Ali and sent the dead bodies to the morgue for post mortem examination. He arrested accused Rafiqul Islam, who admitted that he kept the robbed money amounting to Tk.4,22,280.00 in the house of his father at Bhuapur under Tangail district. Then a police taking the accused with them went to Bhuapur and leading to the confession of the accused recovered Tk.4,30,828.00 and the keys of the locks of the place of occurrence office. He further said that he took the specimen finger prints of the accused and sent the same for comparing with the finger prints of the robber collected from the place of occurrence by the finger prints expert. He also recovered a 'shabol' from the store room in the basement of the place of occurrence building leading to the confession of the accused and seized the same preparing seizure list, exhibit-9. After completion of investigation he submitted charge sheet against the accused. In cross-examination, he denied the defence suggestions that he inhumanly torturing the accused compelled him to make the confessional statement as tutored or that no money was recovered from the village home of the accused.

P.W.13, Md. Aminul Islam, Magistrate of 1st Class in his deposition stated that while he was attached to Chief Metropolitan Magistrate Court, Dhaka, on 14.12.1998 at 2:00 pm accused Rafiqul Islam Rafique was produced before him for recording his

confessional statement. The accused after observing all the legal formalities and giving the accused sufficient time for reflection recorded his confessional statement. He voluntarily made the confessional statement. He then sent him to the jail hayat. He proved the confessional statement, marked as exhibit-10. In cross-examination he stated that the investigating officer produced the accused to him. It was noted in the confessional statement that the accused was allowed time for reflection and that he questioned the accused. The accused was kept in the custody of his peon in his chamber. He denied the suggestions that there were injuries on the person of the accused or that the accused did not make any confessional statement to him or that he wrote the confessional statement at the instance of the investigating officer.

P.W.14, Dr. Md. Belayet Hossain, deposed that on 10.12. 1998 as the Lecturer of Forensic Medicine Department of Dhaka Medical College he held post mortem examination of the dead body of deceased Mohammad Ali, aged 23 years 6 months and found the following injuries on his person:

- I. One incised wound $1\frac{1}{2}$ " X $\frac{1}{2}$ " X skin on right parietal region.
- II. One lacerated wound $\frac{1}{2}$ " X $\frac{1}{2}$ " X skin on right parietal region.
- III. One lacerated wound $2\frac{1}{2}$ " X $\frac{1}{2}$ " X skin on left fronto-parietal region.

- IV. One lacerated wound $1\frac{1}{2}$ " X $\frac{1}{2}$ " X skin on left parieto occipital region.
- V. One penetrating wound 1" X $\frac{1}{2}$ " X cavity on left side of neck.
- VI. Two penetrating wounds each measuring $1\frac{1}{4}$ " X $\frac{1}{2}$ " X cavity on the left side of neck.
- VII. One penetrating wound $1\frac{1}{2}$ " X $\frac{1}{2}$ " X cavity on right side of neck extending upto midline.
- VIII. One incised wound 1" X $\frac{1}{3}$ " X skin on right cheek.
- IX. Abrasions of various sizes and shapes on right fore arm (measuring 3" X 2") neck, front of chest and left arm.
- X. Bruises on the neck, front of chest and right and left side of chest wall.

On dissection he found fracture on the frontal bone and haematoma in the under surface of the scalp of the frontal, both parietal, right temporal, occipital and left frontal region. The ribs of the left side were found fractured.

As to the cause of death he opined that death of the Mohammad Ali was due to hemorrhage and shock resulting from above wounds which were ante mortem and homicidal in nature.

He further stated that, on the same day he held autopsy of the dead body of Zakir Hossain, aged 21 years and found the following injuries:

- I. Two penetrating wounds each measuring $1\frac{1}{4}$ " X $\frac{1}{2}$ " X cavity on front of neck.

- II. Four incised wounds each measuring 2" X $\frac{1}{2}$ " X muscle and soft tissue, on the front of the neck extending on right side of neck.
- III. Three incised wounds each measuring $\frac{1}{2}$ " X $\frac{1}{2}$ " X skin and soft tissue on the left side of neck.
- IV. One incised wound $\frac{1}{2}$ " X $\frac{1}{2}$ " X muscle on the left cheek.
- V. One lacerated wound 3" X $\frac{1}{2}$ " X scalp on the right front to parietal region.
- VI. One lacerated wound 2 $\frac{1}{2}$ " X $\frac{1}{2}$ " X scalp, on the left front of parietal region.
- VII. One incised wound $\frac{3}{4}$ " X $\frac{1}{2}$ " X muscle on the left ring finger cutting nail.
- VIII. One scratch mark 1 $\frac{1}{4}$ " long on the right side of penis.
- IX. Abrasion, 1" X $\frac{1}{2}$ " on the front of chest and left side of forehead.
- X. Bruising and swelling on dorsum of right hand.

As to the cause of death he opined that the death was due to hemorrhage and shock resulting from the above injuries which were ante-mortem and homicidal in nature. In cross-examination he denied the suggestion that the post mortem reports were not correct or that he did not held postmortem examination properly.

P.W.15, Md. Golam Rahman, in his examination-in-chief, stated that on 11.12.1998 at 2:00 pm the investigating officer in his presence recovered a shabol from the basement of the place of occurrence building hidden behind a signboard. The accused himself brought out the shabol. The investigating officer seized the

shabol, preparing a seizure list, exhibit-9 and obtained his signature, exhibit-9/2, thereon. He identified the seized shabol which was marked as material exhibit-XI. He denied the suggestion that as a staff he gave false evidence.

P.W.16, S.I. Md. Maniruzzaman, stated that on 10.12.1998 while he was attached to Tejgaon Police Station, the Officer-in-Charge of that Police Station, on the basis of G.D. Entry No.760 dated 10.12.1998, issued a requisition, entrusting him recovery of robbed money. Accordingly, he with force and accused Rafiqul Islam started for the village home of the accused at about 11:30 pm and reached at Bhuapur Police Station at 4:10 am. Then taking some police officers and force from that police station they went to the house of the accused at Golabari at 4:40 am. He recovered eight keys as shown by the accused from the dwelling hut of the accused in presence of the witnesses and seized the same preparing a seizure list, exhibit-5. Thereafter, he recovered Tk.4,22,280.00 wrapped with a piece of polythene and Tk.8,548.00 wrapped with another piece of polythene kept in a carton digging earth in the jute field of Ajmat Fakir at a distance of 500 yards from the house of the accused leading to the confessions of the accused, his father and brother. He seized the money preparing seizure list, exhibit-16. In cross-examination, he stated that six police personnel including himself, and the accused went to Bhuapur from Tejgaon Police Station. He did not know whether any officer of HRC Company

went to Bhuapur. He denied the suggestion that the story of recovery of money and keys from the village home of the accused leading to his confession is concocted or that the accused was falsely implicated.

From the depositions of the witnesses, it appears that P.W.8 is the sale representative of the company who on the following day i.e. on 09.12.1998 after collecting sale proceeds amounting to Tk.4,22,280.00 from the market returned to his office in the afternoon when the Account Section of the office had already been closed. He with help of P.W.6, Shah Alam counted the money and kept the money locked in his drawer cabinet. Thereafter, they left the office. P.W.8 and P.W.6 corroborated each other at their deposition. P.Ws.1,2, 5-9 and 15 in their depositions stated that on 10.12.1998 in the morning coming to the office they found the collapsible gate of their office was locked and the security guards on duty Mohammad Ali and Jakir Hossain were absent. They were not able to enter into the building. Thereafter, P.W. 7 informed the police and made a G.D. Entry No.706 dated 10.12.1998 and after arrival of the police the gate was unlocked. After entering into the building they found the dead body of Mohammad Ali and Jakir Hossain with bleeding injuries on the first floor and the drawer cabinet was found broken and the money kept by P.W.8 was missing thereon. P.Ws.6 and 8 testified that the accused was on duty when they counted the money. P.W.6 also deposed that the

accused informed him that P.W.8 had called him. The accused in his confessional statement confessed the same. P.W.6 testified that the appellant had seen them to count such huge amount of money.

The inquest reports were made by the police on the dead body of the deceased persons in presence of P.Ws.5 and 9. P.W.14 testified that he had held post mortem examination on the dead bodies of the deceased persons. From the inquest reports as well as post mortem report reports, it appears that Mohammad Ali and Jakir Hossain were killed brutally. The testimonies of the witnesses prove that the deceaseds were killed on the night following 09.12.1998 in the first floor of the office building of M/S HRC Company, Regional Office at 46, Kawran Bazar while they were on duty as security guards. It is further proved by the evidence produced by the prosecution that sale proceeds of tea amounting to Tk.4,22,280.00 was taken away breaking the drawer cabinet and the offence of robbery was also committed.

Admittedly, there is no eye witness in the instant case. The trial Court as well as the High Court Division convicted and sentenced the convict-appellant based on circumstantial evidence and the confessional statement made by appellant Md. Rofiqul Islam alias Rafique under section 164 of the Code of Criminal Procedure, 1898.

The confessional statement of Rafique under section 164 of the Code of Criminal Procedure, 1898 is as follows:

“আমি বাংলাদেশ শীল্ড কোম্পানীতে নিরাপত্তা প্রহরী হিসেবে চাকুরী করতাম। ঐ কোম্পানী হতে চুক্তিভিত্তিক আমি এইচ,আর, সি কোম্পানীর কাওরান বাজার অফিসে গার্ডের কাজ করতাম। আমরা গার্ড ছয়জন মিলে দুইজন করে তিন শিফটে সেখানে কাজ করতাম। গত মাসের ১৬ তারিখে আমার জ্বর ও পাতলা পায়খানা হলে আমি টাকার অভাবে চিকিৎসা করতে পারি নাই। বাড়ীতে গেলে ভাইয়ের ফরম (ছেড়া) আকবা সংসারের জন্য টাকা চায়। তাই আমি খুবই আর্থিক কষ্টে ছিলাম। আবার আমার চাকুরী কনফার্মের জন্য সুপারভাইজার টাকা চায়। তাই আমি দিশেহারা হয়ে পড়ি। গত ৯ তারিখে দুপুর ২ টা থেকে রাত দশটা পর্যন্ত ডিউটি করে অপর দুইজন গার্ড জাকির ও মোঃ আলীকে ডিউটি বুঝাইয়া দিয়া আমি চলে আসি। আমার ডিউটি করার সময় অনুমান বিকাল ৪.০০ টার সময় এইচ,আর,সি কোম্পানীর বেলয়েত সাহেব অনেকগুলো টাকা টেবিলের উপর রেখে (ছেড়া) করতেছিল। তিনি কোম্পানীর ভ্যান চালককে দিয়ে আমাকে সেখানে ডাকিয়া নেন। তিনি (ছেড়া) ডেকে বলেন যে টাকা হিসাব করিতেছেন (ছেড়া) যেন কোন লোক না আসে। অফিসের টাকা কোথায় রাখে তা আমি আগে থেকে জানতাম। ইহার পর আমি দ্বিতীয় গেটে গিয়া ডিউটি করি। ডিউটি করাকালীন আমি (ছেড়া) নেওয়ার চিন্তা করি। ডিউটি শেষে আমি আমার সাথের গার্ডসহ তেজকুনি (ছেড়া) ফিরে যাই। রাত অনুমান ১১.০০ টার সময় মিরপুর যাওয়ার কথা বলে (ছেড়া) হই। ইহার পর রাস্তায় পায়াচারী করে রাত ১.০০ টার সময় এইচ,আর,সি অফিসে যাই। সেখানে গার্ড মোঃ আলীকে তার সাথে রাতে (অপাঠ্য) কথা বলি। সে গেট খুলে আমাকে ভিতরে নেয়। কিছুক্ষণ পর অপর গার্ড জাকির সেখানে আসে। তখন মোঃ আলী দোতলায় ঘুমাতে যায় এবং জাকির ডিউটি করে। আমিও মোঃ আলীর সাথে ঘুমাতে যাই। কিছুক্ষণের মধ্যে মোঃ আলী ঘুমাইয়া যায়। (ছেড়া) আমি উপরে নিয়া যাই। তারপর কিছুক্ষণ চিন্তা করে ওর বুকুে শাবল দিয়ে আঘাত (ছেড়া) উঠে দাড়াই ওকে আরও আঘাত করি। ও পড়ে গেলে ওর গলায় শাবল মারি (ছেড়া) পর কিছুক্ষণ বসে থাকি চিন্তা করি এবং স্বাভাবিক হত্যার চেষ্টা করি। তারপর নীচে নামি (ছেড়া)। বসি ঘুম আসে না। তারপর উপরে আসি চিন্তা করি জাকিরকে কিভাবে উপরে আনবো। (ছেড়া) বলি মোঃ আলী ও কে যেন কেমন করছে চল দেখে আসি জাকির মোঃ আলী দেখার জন্য উপরে যায়। ও কে পিছন থেকে শাবল দিয়ে প্রথম ঘাড়ে আঘাত করি। তাকে আরো কয়েকবার আঘাত করি। উহাতে জাকির পরে গেলে একই ভাবে গলায় শাবল মারি কয়েকবার। তখন জাকিরও মারা যায়। বাথরুমে শাবলের রক্ত ধুই। তারপর ঐ শাবল দিয়ে আলমারী ভেঙে টাকা গুলি বের করে নেই। ঐ টাকা গুলো একটা কাটুনে করে নিয়ে বাহির থেকে ভিতরে তালা দিয়ে আমি চলে আসি। আমি রাতে মিরপুরে বোনের বাসায় যাই। সেখান ভোর ছয়টার দিকে টাকা গুলো নিয়ে গ্রামের বাড়ী যাই। বাড়ীতে গোপনে ঘরের মেঝেতে টাকা গুলো পুতে রাখি। আমার মাকে শুধু টাকার কথা বলি। মা আমাকে টাকা গুলো না রেখে ফেরত দিতে বলে। আমি মাকে নিষেধ করি। আমি সন্ধ্যা সাতটার দিকে তেজকুনিপাড়ার ব্যারাকে আসি। ইহার আধা

ঘন্টা পর পুলিশ আমাকে ধরে। পুলিশ থানা থেকে আমাকে মিরপুরে নেয়। তখন আমি ঘটনা স্বীকার করি। বাড়ী থেকে টাকা বের করে দেই।“(As printed in the paper book of Death Reference No.145 of 2004)

In the confessional statement the appellant vividly narrated the details of the offences committed by him i.e. offences of robbery and murder of two security guards, namely Mohammad Ali and Jakir Hossain.

From the confessional statement of the appellant, it appears that when P.Ws.6 and 8 were counting money, the appellant saw it and he admitted that he had knowledge where the money was kept. Accordingly, when P.W.8 left the office keeping the money in his drawer cabinet, he came back to the office though the working shift of appellant was ended. After killing Mohammad Ali and Jakir Hossain, he broke the lock of the drawer cabinet and took away the money. P.W.10, Faridul Islam deposed before the Court as a finger print expert. From the report (Ext.5) produced by him, it appears that the finger prints of the robber appearing on the drawer cabinet from where money was robbed away. These finger prints were identical with the specimen finger prints of the appellant. P.W.10 was examined before the Court.

Moreover, the appellant in his confessional statement confessed that after committing robbery, he brought the money to his village and kept it underneath of the floor of his house. Leading to his confession the robbed money was recovered from his village by police and at the time of recovery of money P.W.2, SMA Sabur

and P.W.7, Khairul Alam were present. P.Ws.2 and 7 in their depositions stated that the robbed money was recovered underneath of a land at a little distance from the appellant's house. Leading to the confession of the appellant a shabol which he used to commit murder was seized by police hidden behind a signboard at office building.

From the confessional statement, it appears that the statement recording magistrate had complied with all the legal formalities instructed to be followed before recording the confessional statement. The learned Magistrate informed him that he was not bound to make confessional statement and if it was made, it would be used against him. The appellant was given three hours time to rethink whether or not he would make confessional statement. It also appears that the appellant did not make confessional statement out of fear or due to any threat rather he made the confessional statement voluntarily. However, the appellant Rafique retracted his confessional statement by filing an application as well as during his examination under section 342 of the Code of Criminal Procedure, 1898. It is well settled that the confessional statement should be retracted at the very earlier opportunity and the belated retraction of confessional statement during examination under section 342 had of no value if it appears before the Court that the confessional statement was made voluntary and it is true. This view was taken by this Division in

The State vs. Lalu Miah and another [39 DLR(AD) (1987) 117]

“Retraction of a confession at an earliest opportunity may lend support to the defence plea that the confession was not voluntary one, but from a belated retraction of a confession no inference adverse to the accused can be made.” In the case of *Amir Hossain Howlader and others Vs. State* [37 DLR(AD) 139] it was held that, *“retraction of a confession does not cancel the confession if it is found that when the confession was made, it was made voluntarily and that it is true. A retracted confession, like the one which is not retracted, may form the sole basis of conviction of its maker.”* In the case of *State Vs. Fazu Kazi alias Kazi Fazlur Rahman and others* [29 DLR(SC) 271] it is held that, *“a conviction of the confessing accused based on a retracted confession even if uncorroborated is not illegal, if the Court believes that it is voluntary and true.”* In view of the above settled principle it can be said that of course, even a retracted confessional statement can be the sole basis of conviction if it is made voluntarily and is true.

Now let us scrutinize whether the confessional statement of the appellant is voluntary and true. P.W.13, Md. Aminul Islam, is the Magistrate who recorded the confessional statement of the appellant. In his deposition, he stated that he had recorded the confessional statement of the appellant following all legal formalities required by law to be followed and the confessional statement of the appellant was made voluntarily. He stated that he

found no marks of injuries on the persons of the appellant. We are of the view that Rafique made the confessional statement voluntarily and it is true.

Long after recording the confessional statement, the appellant filed an application retracting his confessional statement and claimed that he had made no statement before learned Magistrate. During examination of the appellant under section 342 of the Code of Criminal Procedure, 1898 he also did not claim that due to torture of police he was compelled to confess rather he claimed that he had not confessed about his committing offence before Magistrate. In this scenario, the High Court Division has correctly opined that, **"It cannot be conceived of that the Magistrate fabricated the confessional statement though the accused made no statement to him."** In the confessional statement the occurrence narrated by the appellant clearly shows that the statement was made by the appellant. The injuries inflicted with shabol on the persons of the deceased persons as narrated by the appellant in the confessional statement are supported by the inquest report and medical report. Moreover, leading to the confession of the appellant the keys of the main gate of occurrence building, a shabol used to kill Mohammad Ali and Jakir Hossain, which was hidden behind a signboard of the building and the robbed money, which was taken away breaking the drawer cabinet were recovered by police (P.W.16) in presence of the witnesses.

P.W.16 was corroborated by P.Ws.2, 7 and 15. The finger print examination report revealed that the finger print found on the drawer cabinet is identical with the specimen finger prints of the appellant. So, we are of the view that the confessional statement was made voluntarily and it is true and the above mentioned circumstances corroborated the confessional statement of the appellant.

In consideration of the matters discussed above, we are of the view that the prosecution could prove beyond reasonable doubt that the appellant has committed the offences of murder of two security guards, Mohammad Ali and Jakir Hossain punishable under section 302 and committed offence of robbery punishable under section 394 of the Penal Code, 1860. The trial Court has correctly convicted the appellant with murder and sentenced him to death under section 302 of the Penal Code, 1860 as well as the High Court Division has correctly confirmed the conviction and sentence passed by the Metropolitan Additional Sessions Judge, 4th Court, Dhaka.

From the materials on record, it appears that the appellant was a young boy of 19 years old at the time of occurrence which has attracted our trembling thought and at the same time, the appellant had been in condemned cell for more than 17 (seventeen) years suffering the pangs of death. However, the length of period spent in the condemned cell by a convict-appellant cannot be a

ground for commutation of sentence of death. But where the period spent in the condemned cell is inordinately long and it is not due to any fault of the convict-appellant, it can be a ground for commutation of sentence of death. In the case of *Nazrul Islam (Md) vs. State* reported in 66 DLR(AD) 199 it was held that, *"Lastly with regard to the period of time spent by the accused in the condemned cell, there are numerous decisions of this Division which shed light on this aspect. In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death."* In view of the decision cited above as well as the age of the appellant at the time of commission of offences and the circumstances of this case, we are of the view that justice would be sufficiently met if the sentence of death of the appellant Md. Rafiqul Islam alias Rafique be commuted to one of imprisonment for life.

Accordingly, the Criminal Appeal No.117 of 2013 is **dismissed with modification of sentence.**

The conviction of the appellant, Md. Rafiqul Islam alias Rafique, son of Entaj Ali Mondal of Village-Golabari, Police Station-Bhuapur, District-Tangail. At present: Security Guard,

Shild Bangladesh Ltd. 153, Monipuripara, Police Station-Tejgaon, District-Dhaka under section 302 of the Penal Code is upheld, however his sentence of death is commuted to imprisonment for life and also to pay a fine of Tk.10,000.00 (ten 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, 1898 in calculation of his sentence.

The concerned Jail Authority is directed to move the appellant to the normal jail from the condemned cell forthwith.

J.

J.

J.

J.