

Present:

Mr. Justice S.M. Emdadul Hoque  
and  
Mr. Justice Ashish Ranjan Das

Death Reference No.100 of 2016.

The State

..... The petitioner.

-Versus-

Siddique Vandari (Absconding) and others.

..... The condemned-convicts.

Mr. Md. Fazlur Rahman Khan, D.A.G with  
Mr. Md. Rezaul Karim, D.A.G. with  
Mr. Md. Sharifuzzaman Majumder, A.A.G with  
Mr. Ashikuzzaman Bablu A.A.G with  
Mr. Abu Naser (Swapan), A.A.G  
..... for the State.

Ms. Mst. Hasna Begum, Advocate

.... the State Defence Lawyer.

**Heard on 24.05.2022, 25.05.2022, 26.05.2022,  
29.05.2022, 02.06.2022 and Judgment on: 01.11.2022.**

**S.M. Emdadul Hoque, J:**

The learned Additional Sessions Judge, 1<sup>st</sup> Court, Gazipur has made this death reference under Section 374 of the Code of Criminal Procedure for confirmation of the sentence of death awarded upon the condemned-convict namely (1) Siddique Vandari (Absconding), son of late Munsur Ali (2) Tareq @ Murad Hossain (Absconding), son of Siddique Vandari and (3) Ayesha Khatun (Absconding), wife of Siddique Vandari under Sections 302/379/34 of the Penal Code in Sessions Case

No. 171 of 2009 arising out of Joydebpur Police Station Case No. 64(5)08 dated 15.05.2008 corresponding to G.R. No. 554 of 2008 sentencing them to death and also to pay a fine of Tk. 10,000/- (ten thousand) each by its judgment and order of conviction and sentence dated 03.08.2016 and the learned Judge also convicted them under section 379 of the Penal Code and sentencing them to suffer rigorous imprisonment for 3 (three) years and also to pay a fine of Tk. 5,000/- each.

The prosecution case as made out by the informant Md. Jamir Hossain Paik, the P.W-1, in short, is that the occurrence took place on 14.05.2008 at about 5:00 p.m. His wife Most. Safia Begum went out for a walk from her house at about 5:00 p.m. on 14.05.2008 since she was a Diabetic patient but did not return back. They searched for her in several places but could not find out. Further case is that on the next morning on 15.05.2008 at 5:00 a.m. they found the dead body of the victim which was laying on north-western side of the house of Hamida with several injuries in the neck, ear, nose, tongue, face and body. At the time of missing she had wearing necklace and some gold ornaments of her nose. Thereafter

with the help of local people they brought the victim to the Sultan General Hospital in Board Bazar, Gazipur and the doctor declared her to death. Thereafter, they informed the police and the police prepared the inquest of the dead body and sent the corpse to the morgue for autopsy. The ornaments may be taken away by unknown persons and perhaps she was killed for taking the said ornaments. Hence the case.

The case was initially investigated by Shahinur Alam, S.I, Joydebpur Police Station who visited the place of occurrence, prepared the sketch map along with separate index, conducted the inquest of the dead body and sent the corpse to the morgue for post-mortem, seized alamats and prepared the seizure list, examined some of the witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure.

But due to his transfer the case was again investigated by S.I. Sazib Datta, who again visited the place of occurrence, examined some witnesses and arrested three accused persons and among them accused Tareq alias Murad Hossain and Ayesha Khatun made confessional statements. Subsequently

on 18.12.2008 he could arrest accused Siddique Vandari, prepared the sketch map along with separate index and also seized some alamats from the house of Akkas Ali and after completing all the formalities of the investigation found *prima-facie* case against the accused-persons and submitted the charge-sheet being No.111 dated 26.02.2009 under Sections 302/ 379/34 of the Penal Code.

The case record ultimately came to the file of the learned Additional Sessions Judge, Court No.1, Gazipur, who took cognizance and thereafter framed charge against the accused-persons under section 302/379/34 of the Panel Code on 08.07.2009 which was read over to the accused who were on the dock to which they pleaded not guilty and claimed to be tried.

At the trial the prosecution examined as many as 13 (thirteen) witnesses among the 20 (twenty) charge sheeted witnesses. The defence also examined 1 witness as D.W.1.

The trial court thereafter examined the accused who were on the dock under section 342 of the code of criminal

procedure, which was read over to them to which they reiterated their innocence again.

The defence case as could be gathered from the trend of cross examination of the prosecution witnesses and the examination under section 342 is total denial of the prosecution case. Their further case is that the deceased Shafia Khatun may be killed by some other miscreants and she has been suffering from some diseases and also had attacked by Jin and she was killed by the said Jin.

After close of the trial the learned Additional Sessions Judge, 1<sup>st</sup> Court, Gazipur found the accused guilty of the charge leveled against them and convicted and sentenced them as aforesaid.

Thereafter the learned Additional Sessions Judge, 1<sup>st</sup> Court, Gazipur Made this death reference under section 374 of the Code of Criminal Procedure for confirmation of the sentence of death and sent all the records to this court.

Since all the three condemned-convicts are absconding the Government engaged the learned Advocate Ms. Hasna

Begum as the State Defence Lawyer to conduct the case on behalf of the absconding condemned convicts.

Mr. Abu Naser (Swapan), the learned Assistant Attorney General takes us through the Ejahar, the charge, the inquest report, the post mortem report, the seizure list, deposition of the witnesses, the impugned judgment and the papers and documents as available on the record.

Mr. Md. Rezaul Karim, the learned Deputy Attorney General in support of the reference submits that in the instant case an innocent lady was killed and she had no enmity with anyone. He submits that the prosecution succeed to prove the case beyond all reasonable doubt by adducing sufficient evidence. He further submits that though no eye-witness in the instant case but the condemned-convict Tareq alias Masud and Ayesha Khatun made confessional statements under section 164 of the code of criminal procedure and disclosing the facts of murder and implicating themselves along with the condemned convict Siddique Vandari. He further submits that the magistrate who recorded the confessional statement as

P.W.2 proved the confessional statement and disclosed that which were true and voluntary.

He further submits that on the discloser and identification of accused Siddique Vandari the police recovered sofa-set and a gamcha from his house and which was proved by the P.W.12 Abdul Malek and above are the substantial evidence and the two convicts disclosed that the seized materials were used for killing the victim and also supported by the confessional statement of two condemned convicts. He submits that the prosecution able to prove the case beyond all reasonable doubt. He prayed for acceptance of the death reference.

On the contrary Ms. Hansa Begum, the learned State Defence lawyer submits that the prosecution measurably failed to prove the charge leveled against the condemned convict beyond all reasonable doubt. She submits that the trial court without considering the material evidence on record passed the impugned judgment. She submits that this is a case of no evidence and none of the witnesses deposed that the victim was killed by the condemned convicts.

She further submits that trial court only considering the confessional statements of accused Tareq alias Murad and Ayesha Khatun convicted the accused but the confessional statement of Ayesha Khatun was purely an exculpatory confession and the confessional statement of Tareq alias Murad was not true and voluntary. She further submits that on perusal of the two confessional statements it is found that the magistrate without following the procedure of section 164 and 364 of the code of criminal procedure recorded the confessional statements. She further submits that all the column of the confessional statement are blank and not filled up by the magistrate even not mentioning that in whose custody the accused were staying the room of Magistrate and from where it is proved that the magistrate did not give sufficient time for reflection, furthermore nothing was mentioned that when the confessional statement was recorded and concluded and no mentioning that the accused was released or sent to Jail authority from his room. He further submits that the magistrate P.W.2 in his deposition stated that: "He gave 30 minutes time to the accused Tariq alias



Murad” but in cross examination he also stated that he examined the accused Tareq alias Murad immediately after he brought to his room. She further submits that the mandatory requirements that the magistrate to certify or state affidavit about the truth and fairness of the confessional statement but the said mandatory requirement has not made by the magistrate in such a case the confessional statements recorded violating the provisions of section 164 and 364 of the code of criminal procedure. She further submits that even in support of the said confessional statement no substantive evidence produced by the prosecution and as such the conviction of the condemned-convicts should not be sustained.

She further submits that though the convicts faced the trial but after conclusion of the 342 examination, they did not appear before the court and the aforesaid absconsion does not means the guilty mind of the accused.

She submits that on perusal of the two sketch maps it is found that the prosecution sifted the place of occurrence of recovery of the dead body. She prays for rejection of the death reference.

Let us discussed the evidence of the prosecution witnesses.

P.W.1, Md. Jamir Hossain Paik, the informant of the case and the husband of deceased Shafia, deposed that the occurrence took place on 14.05.2008 at about 5:00 p.m. and the victim Most. Safia Begum went out for a walking from his house at about 5:00 p.m. as she was a Diabetic patient but did not return back and they searched for her in several places but could not trace her out. He deposed that on next morning on 15.05.2008 at 5:00 a.m. they found the dead body which was laying on north-western side of the house of Hamida with several injuries on her neck, ear, nose, toungue, face and body. He further deposed that at the time of missing she was wearing necklace and some gold ornaments on her nose and thereafter with the help of local people they brought the corpse at Sultan General Hospital in Board Bazar, Gazipur and the doctor declared her as dead. He further stated that he informed the matter to the police and the police prepared the inquest of the dead body and sent the corpse to the morgue

for autopsy and the wearing ornaments may be taken away by unknown persons and she was killed for the said ornaments.

P.W.2, Rigan Chandra Dey, Judicial Magistrate of Gazipur deposed that on 17.12.2008 the investigating officer Mr. Sazib Datta brought accused Ayesha Begum before him and she was given sufficient time for her reflection. He recorded the confessional statement under section 164 of the Code of Criminal procedure and the confessional statement was true and voluntary. He proved the confessional statement which marked as Ext-2 and his signatures wherein marked as Exts-2/1, 2/2, 2/3 and 2/4.

P.W.3 Md. Rafiqul Islam, a neighbour of the informant and the witness of the inquest. He proved the inquest report and he put his signature in the said statement. He deposed that the accused persons were staying in the alleged house as a tenant and the police requested all the neighbours of the informant not to leave their house and he came to know that the accused persons made confessional statement about the murder of the victim Safia Begum.

P.W.4, Abdur Rahim, a neighbour of the informant also did not mention anything but only mentioned that they came to know that three condemned-convict killed the victim Safia.

P.W.5, Md. Hamidul Islam (Rabin), a neighbour of the informant deposed that on the next morning he saw the dead body lying on the road and deposed that the victim was killed by some unknown persons for snatching gold ornaments of the victim.

P.W.6, Md. Sahab Uddin, son of the informant deposed that his mother was killed and the dead body was found in the road. He stated that the police directed all the neighbours to stay their respective house but after 4 days of occurrence the accused persons left their house and fled away from the area and they made confessional statements implicating of the killing of the victim. But in cross examination he stated that at that time he was staying in abroad and after one month of the occurrence he come back from abroad.

P.W.7, Abdul Mannan, deposed stated that on 15.05.2008 at morning the dead body was found in front the house of Akkas Ali and deposed that he came to know that the

accused persons also made confessional statements implicating themselves of the killing of the victim.

P.W.8, Md. Arju, one of the neighbour of the informant deposed that the dead body was found in front of the house of Hamida. He deposed that the police requested them not to leave the house but after 4 days of the occurrence the condemned-convicts fled away from the said area and subsequently he came to know that the accused made confessional statement before the magistrate.

P.W.9, Sadiqur Rahman alias Tipu, deposed that the dead body of the victim was found on 15-05-2018 at the morning in front of the house of Akkash Ali. The police requested all the neighbour of the informant not to leave the house but subsequently the condemned-convicts fled away from the said area left the house vacant.

P.W.10, Md. Shahinur Alam, Sub-Inspector of Police, the 1<sup>st</sup> investigating officer deposed that he held the inquest of the dead body and prepared the inquest report, prepared the sketch map along with separate index and examined some of the witnesses and recorded their statements under section

161 of the code of criminal procedure and he handed over the case docket to officer-in-charge due to his transfer.

P.W.11, Dr. Md. Ali Haider Khan, Medical Officer of Gazipur Sadar Hospital, deposed that he held the autopsy of the deceased Safia Begum and prepared the post-mortem report. He made opinion that: *“Death was due to violent esphyxia which was due to strangulation (throatling) which was antemortem and homicidal in nature.”* He proved the same.

P.W.12, Malik, one of the tenant of the occurrence house as a seizure list witness deposed that the police seized a Sofa and a gamcha from the rented house of Siddique Vandari and he put his signature in the seizure list. He proved the said seized materials as material Exhibit No.I. He further deposed that subsequently he came to know that the condemned-convicts killed the victim.

P.W.13, Sazib Datta, Sub-Inspector of Police and the 2<sup>nd</sup> investigating officer deposed that he was entrusted to investigate the case and again visited the place of occurrence and again prepared the separate sketch map along with index.

He examined some of the witnesses and recorded their statement under section 161 of the Code of Criminal Procedure and arrested the three accused persons among them accused Tareq alias Murad made confessional statement and found the prima-facie case against the accused persons and submitted the charge sheet. He did not mention that he seized some materials from the house of accused Siddique Vandari.

These are all about the evidence on record as adduced by the prosecution.

We have heard the learned Deputy Attorney General and the learned State Defence Lawyer, perused the Ejaher, the charge sheet, the inquest report, the seizure list, the post mortem report, the confessional statement, the impugned judgment and the papers and documents as available on the record.

Admittedly the victim was killed any time from 5:00 p.m. on 14.05.2008 to 5:00 a.m. on 15.05.2008. The dead body was recovered in front of the road of the house of one Akkas Ali. No dispute about the date and time of killing. On perusal of

the initial sketch map that the dead body was recovered from the house of one Hamida but on perusal of 2<sup>nd</sup> sketch map it is found that the police sifted the place of occurrence since the police only mentioned the room of the condemned-convict Siddique Vandari that the victim was killed in the said room but did not mention from where the dead body was recovered and on perusal of the 1<sup>st</sup> and 2<sup>nd</sup> sketch map it is found that in the 1<sup>st</sup> sketch map the road mentioned adjacent of the house of one Hamida but in the 2<sup>nd</sup> sketch map it is found that the investigating officer did not mention from where the dead body was recovered and mentioning the road but which is adjacent to the house of Akkash Ali and there are several houses mentioned in the sketch map specially the house of Akkash Ali. So, on perusal of the two sketch map and the evidence of the witnesses it is difficult to ascertain the actual place from where the dead body was recovered and it is our considered view that the subsequent investigating officer failed to prepare the proper sketch map and the subsequent sketch map was prepared on 18.12.2008 i.e. after 7 months of the incident.



We have considered the evidence of the prosecution witnesses, the P.W.1 the husband of the deceased who did not mention anything about the fact that his wife was killed by the condemned-convicts but in cross examination he stated that the place of occurrence house was given as rent to the condemned-convicts and the earlier tenant was Shafique and in cross examination he stated that he could not tell how many days the condemned-convicts were living in the said house as tenant and also mentioned that he could not hear the accused persons committed theft before the incident.

He never disclosed that the accused persons were involved with the alleged offence and they committed the murder but one stage he stated that he only came to know that the accused Tareq alias Murad and Ayesha Khatun made confessional statement before the magistrate involving themselves of the killing nothing more.

P.W.3 a neighbour of the informant, is the witness of the inquest report and he identified the inquest report and he put his signature thereon. One stage he stated that the accused persons were living at the alleged house as a tenant and the

police requested all the neighbours of the informant not to leave their house but he came to know that the accused persons made confessional statement.

P.W.4 a neighbour of the informant also did not mention anything but only mentioned that they came to know that three condemned-convict killed the victim.

The P.W.5 a neighbour of the informant only deposed that on the next morning he saw the dead body lying on the road and deposed that the victim was killed by unknown persons for snatching the gold ornaments from the victim.

The P.W.6 son of the informant deposed that his mother was killed and the dead body was found on the road. One stage he stated that the police directed all the neighbours to stay at their respective house but after 4 days of occurrence the accused persons fled away from the area and they confessed to implicating them in the murder. But in cross examination he stated that at that time he was in abroad and after one month of the occurrence he came back from abroad.

P.W.7 in his deposition stated that on 15.05.2008 at morning the dead body was found in front of the house of

Akkas Ali and he came to know that the accused persons also made confessional statement implicating themselves in the murder.

P.W.8 also the neighbour of the informant and he deposed that the dead body was found on the road in front the house of Hamida and he deposed that the police requested them not to leave the house but after 4 days of the occurrence the condemned-convicts fled away from the said area and he came to know that they made confessional statement before the magistrate.

P.W.9 also deposed that the dead body was found in the morning on the road in front the house of Akkash Ali and the police requested all the neighbours of the informant not to leave the house but subsequently the condemned-convicts fled away from the said area.

P.W.11 the doctor who held the post-mortem of the victim Safia Begum and proved the same. He made the following opinion: *"Death was due to violent esphyxia which was due to strangulation (throatling) which was antemortem and homicidal in nature."*

P.W.10 the 1<sup>st</sup> investigating officer who only conducted the inquest of the dead body and prepared the inquest report, proved the sketch map along with separate index and examined the witnesses and recorded their statements under section 161 of the code of criminal procedure and since due to his transferred he handed over the case docket to the officer-in-charge.

P.W.12, is the seizure list witness who deposed that the police seized a Sofa and a gamcha from the rented house of Siddique Vandari. He identified the said seized materials as material Exhibit-I. He stated that he came to know that the condemned-convicts killed the victim.

P.W.13 the 2<sup>nd</sup> investigating officer who submitted the charge sheet and deposed that he made separate sketch map and also examined some witnesses and recorded their statements under section 161 of the Code of Criminal Procedure and arrested three accused persons among them accused Tareq alias Murad made confessional statement and thereafter he submitted charge sheet. He did not mention that

he seized some materials from the house of accused Siddique Vandari.

From the above evidence on record it is clear that no direct evidence that the accused persons killed the victim Safia Begum. Some witnesses stated that they only came to know that the two accused made confessional statement implicating themselves to the murder.

It also appears that in the instant case the defence side also examined one witness the accused Tarek alias Murad. In his deposition he stated that he could not know nothing about the murder but after 7 months of the incident the police arrested them and kept them in the police custody for two days and thereafter the police brutally tortured him and forced him to make confessional statement. After that police forcefully recorded his statement under section 161 of the code of criminal procedure and as per 161 statement the magistrate recorded the same.

On perusal of the evidence it is found that no direct evidence that the condemned-convicts killed the victim Safia Begum. The material evidence for conviction are the

confessional statements of the condemned-convict Tareq alias Murad and Ayesha Khatun the seized materials the Sofa-set and a Gamcha allegedly which was seized from the house of Siddique Vandari and which was used for killing the victim.

The confessional statement was recorded by the P.W.2 Rigan Chandra Dey, the Judicial Magistrate, Gazipur. He proved the said confessional statements in his testimony. In cross examination he denied the suggestion of the defence that he did not record the confessional statement on the basis of the 161 statement which was procedure by the police before him. In cross examination this witness could not say that when the accused Tareq alias Murad was brought to his Ejlash and when he was brought to his chamber and stated that the accused Tareq alias Murad was brought before him at 4:00 p.m. and he himself received the accused and gave him one hour time and in cross examination he stated that the accused was given 30 minute time for his reflection but one stage he stated that he recorded the confessional statement immediately after the accused was brought before him. He denied the suggestion

that: “৪৮ ঘন্টা *police custody* তে রেখে অমানুষিক নির্যাতন করে আসামীকে ধরাধরি করে আমার চেয়ারে নিয়ে আসে।”

From the aforesaid facts it is found that only from the confessional statement of accused Tareq alias Murad and Ayesha Khatun the case of murder of the deceased Shafia was brought it to light.

The confessional statement of accused Ayesha Khatun as under: “ঘটনার তারিখ ১৪/০৫/২০০৮ মার্গরিবের আযানের পূর্বে সাফিয়া বেগম আমাদের বাড়িতে আসে। আমি সাফিয়া বেগমকে খালা বলে ডাকি। সাফিয়া বেগম আমার নাটিকে দেখার জন্য আসে। এ সময় আমার স্বামী আমার ছেলের কাঁধ থেকে গামছা নিয়ে সাফিয়া বেগমের গলায় পেঁচিয়ে ধরে। এ সময় সাফিয়া বেগম মারা যায়। এরপর লাশটা আমার স্বামী সোফার নিচে রাখে। পরদিন ভোরে আমার স্বামী ও আমার ছেলে পাশের এক বাড়ীর গোসলখানার সামনে রাস্তার পাশে ফেলে রাখে। আমার স্বামী এই হত্যার পরিকল্পনা করে। এই আমার বক্তব্য।”

We have perused the said confessional statement of Ayesha from where it is found that the magistrate did not fulfill all the column such as when the accused was brought before him and on which date the accused was arrested by the police and in whose custody she was during the period of reflection as given by the magistrate, even no memorandum was made

by the magistrate to that effect that the said confessional statement was true and voluntary and it is also not written that when the accused was sent to the Jail custody. It also appears that the aforesaid confessional statement purely is an exculpatory confession.

The confessional statement of the accused Tareq alias Murad as under: “ঘটনার তারিখ গত ১৪/০৫/০৮ মাগরিবের আযানের পূর্বে। এ সময় সাফিয়া বেগম আমাদের বাড়িতে আসে। এ সময় আমি আমার আক্কা ও আমার আন্মা বাড়িতে ছিলাম। এ সময় আমার আন্মা অথবা আমার আক্কা গেট আটকে দেয়, এরপর আমার আক্কা আমার কাধের থেকে গামছা নিয়ে সাফিয়া বেগমের গলায় পেঁচিয়ে ধরে। আমি ও আমার আন্মা সাফিয়া বেগমকে ধরে রাখি। এরপর সাফিয়া বেগমের নিশ্বাস বন্ধ হয়ে মারা গেলে আমাদের বাসার সোফার নীচে রাখি। আমার আক্কা সাফিয়া খাতুনের গয়না শরীর থেকে খুলে পরদিন বিক্রি করে। পরে লাশটি আমার আক্কার নির্দেশে আমি ও আমার আক্কা মিলে সেদিন রাতে আমাদের গেটের বাইরে রাস্তার ওপারে ফেলে আসি। আমার পিতা এই হত্যার মূল পরিকল্পনাকারী। এই আমার বক্তব্য।”

On perusal of the confessional statements it is found that the magistrate did not fulfill column No. 1, column No. 2, column No. 3 and no memorandum was made by the magistrate as required by law and did not write that the said confessional statement was true and voluntary. He also did not



mention the time when he completed the recording of the confessional statement. It is a mandatory provision that the magistrate should record the statement following the procedure of section 164 and 364 of the code of criminal procedure. Sub-section 2 of section 364 specifically mentioned that: *“when the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the magistrate or judge of such court, and such magistrate or judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.”*

We have already considered the 164 statements of two accused and it is found that the magistrate did not fulfill all the mandatory provision of law in recording the confessional statements. Even nothing was written that in whose custody the accused were kept during the period of their reflection and no memorandum was given by the magistrate to the effect that the statements were true and voluntary. Furthermore it is

found that the confessional statement of the accused Ayesha Khantun is purely an exculpatory confession.

Though in the confessional statement of the accused Tareq alias Murad at one stage stated that: আমার আব্বা আমার কাধের থেকে গামছা নিয়ে সাফিয়া বেগমের গলায় পেচিয়ে ধরে। আমি ও আমার আম্মা সাফিয়া বেগমকে ধরে রাখি। এরপর সাফিয়া বেগমের নিশ্বাস বন্ধা হয়ে মারা গেলে আমাদের বাসার সোফার নীচে রাখি।

And also stated to the effect: আমার আব্বা সাফিয়া খাতুনের গয়না শরীর থেকে খুলে পরদিন বিক্রি করে।

From the aforesaid version it is also found that he also implicated himself with the offence and disclosed that his father Siddique Vandari pulled on a Gamcha around the neck of the victim Shafia Begum and took away her gold ornaments. It appears that accused Tareq alias Murad also took part to commit the offence. But it has already been considered that the aforesaid confessional statement was not recorded provided under section 164 and 364 of the code of criminal procedure.

Furthermore, it is well settled principle that confession of a co-accused cannot be treated as substantive evidence

against the other person to find him guilty of the offence charged with and it would require other evidence whether direct or circumstantial linking such a person with the crime, before a confession made by a co-accused can be adverted to be adjudging the guilt of that person.

In the case of The State –vs. Abdul Kader @ Mobile Kader and others, reported in 67 DLR (AD)-6, in majority view that: *“If there is no other evidence against co-accused except the confession, then, the confession by itself being merely a matter to be taken into consideration, and not being an evidence under section 3, no conviction of the co-accused could not be given relying on such confession.”*

And in the case of Saley Akram alias Polash –vs. The State, reported in 73 DRL (AD)-264, wherein the principle laid down that: *“The confession made by a co-accused cannot be said that it is corroborated by other evidence and, as such, it cannot be the sole basis of conviction of another co-accused.”*

Furthermore, none of the witness deposed that Siddique Vandari committed the offence. Even no evidence that the gold ornaments was sold to anyone as stated by the accused

Tareq. Even the alleged seized Gumcha by which the victim was killed. In cross examination by the defence the doctor who held the autopsy stated that: “*Abrasion injury* “হাত ব্যবহৃত হয়েছে। গলাটিপে হত্যার ক্ষেত্রে হাতের চিহ্ন দেখিনি।” He further stated that: “আঘাতের ধরন দেখে বুঝা যায় যে, *blunt weapon* ব্যবহার করা হয়েছে।”

So, from the evidence of doctor who held the autopsy contradict the confession as made by the accused Tareq.

Considering the aforesaid facts and the discussions as made above it is our view that the conviction was awarded against the condemned-convict Siddique Vandari without any evidence. And without any substantive evidence the conviction cannot be sustained.

In the case of Ibrahim Mollah –Vs. The State, reported in 40 DLR (AD)-216 and the case of Delower Hossain -vs. The State, reported in 5MLR (AD)-27, the principle laid down that in order to form the basis of conviction the confessional statement of accused must be inculpatory implicating the maker with commission of the offence. And the exculpatory confession cannot be the basis of the awarded conviction without any substantive evidence. Furthermore, in the said

case the appellate division took view that in such a case it is better to make him as witness.

So, from the aforesaid decision and discussion it is our considered view that the conviction of accused-condemned-convict Ayesha Khatun is also without any evidence.

We have already considered the confessional statement of accused Tareq alias Murad and it has been discussed that the said confessional statement was recorded by the magistrate P.W.2 without fulfillment of all the procedure provided under section 164 and 364 of the code of criminal procedure. In the case of State –Vs. Babul Miah, reported in 63 DLR (AD)-10, wherein the principle set-up held that: *“The provision of sub-section 3 of section 164 is mandatory and therefore the magistrate is required to fill-up the column No.7 of the form for recording confession”*

We have perused the confessional statement and found that the magistrate did not fill-up the said column No. 7 in his hand and did not certify that the said confessional statement was true and voluntary and no evidence that the accused

Tareq alias Murad was involved regarding the alleged offence except the confessional statement.

Furthermore it is found that the police did not prove the seizure list and which are only the incriminating materials as seized such a Sofa-set and a Gamcha. As such it could not be presumed that the said Gamcha was used for murder, even no one except P.W.12 proved the same. But P.W.12 did not mention the date and time when the said seizure list was prepared by I.O. and who prepared the said seizure list.

It is also found from the prosecution case that become of snatching the ornament from the body of the victim the accused-persons killed the victim. But no such evidence that the said ornament was sold to anyone. Though in the confessional statement of accused Tareq alias Murad it is mentioned that his father Siddique Vandari sold the said ornament but the investigating officer did not take any step to seize the said sold ornament.

Admittedly the three condemned-convicts had faced the trial and after conclusion of examination under section 342 of the code of criminal procedure the accused persons did not

present at the date of pronouncement of the judgment. But on the basis of the same the accused could not be found guilty for the offence.

Since we have sitting here to dispose of the Death Reference under section 376 of the code of criminal procedure in such a case when this court found that there is no evidence to convict the accused and the prosecution measurably failed to prove its case this court then has authority to dispose of the case on the basis of the evidence on record.

Considering the entire provision of law and the discussions as made above, since the prosecution measurably failed to prove the charge leveled against the accused persons beyond all reasonable doubt, in such a case the moral conviction cannot be awarded.

Having considered the facts and circumstances of the case and the discussions as made above we find force of the argument of the learned State Defence Lawyer.

In the result, the death reference is rejected. The conviction and sentence passed by the Additional Sessions Judge, 1<sup>st</sup> Court, Gazipur under Sections 302/379/34 of the

Penal Code in Sessions Case No. 171 of 2009 arising out of Joydebpur Police Station Case No. 64(5)08 dated 15.05.2008 corresponding to G.R. No. 554 of 2008 sentencing the condemned-convicts to death by its judgment and order of conviction and sentence dated 03.08.2016 and also to pay a fine of Tk. 10,000/- (ten thousand) each and the learned Judge also convicted the condemned-convicts under section 379 of the Penal Code and sentencing them to suffer rigorous imprisonment for 3 (three) years and also to pay a fine of Tk. 5,000/- each is hereby set-aside.

Communicate the judgment and transmit the lower Court records at once.

**Ashish Ranjan Das, J:**

I agree.

M.R.