

Present:

Mr. Justice S.M. Emdadul Hoque
and
Mr. Justice K M Zahid Sarwar

Death Reference No.82 of 2016.

The State

..... Petitioner

-Versus-

Nibas Chandra Shil

..... Condemned-Prisoner.

with

Criminal Appeal No.10665 of 2016.

with

Jail Appeal No. 147 of 2016

Nibas Chandra Shil

..... Appellant

-Versus-

The State

..... Respondent

Mr. Harunur Rashid, D.A.G with

Mr. Zahid Ahammad (Hero) A.A.G with

Mr. Mohammad Shaiful Alam, A.A.G

..... for the State.

(In the reference and respondents of all the appeals)

Mr. Md. Tariqul Islam, Advocate with

Mr. Purnindu Bikash Das, Advocates

..... for the appellant.

(In criminal appeal and Jail Appeal)

**Heard on 28.03.2022, 29.03.2022 and Judgment on:
30.03.2022.**

S.M. Emdadul Hoque, J:

The learned Sessions Judge, Pirojpur has made this death reference under Section 374 of the Code of Criminal Procedure for confirmation of the sentence of death of the

condemned-prisoner Nibas Chandra Shil, son of late Sukha Ranjan Shil awarded upon him under Section 302 of the Penal Code in Sessions Case No. 39 of 2014 arising out of Nazirpur Police Station Case No.03 dated 09.09.2013 corresponding to G.R. No. 93 of 2013 by its judgment and order of conviction and sentence dated 15.06.2016 with a fine of Tk.20,000/- (twenty thousand).

The prosecution case as made out by the informant Shamol Kumar Shil the P.W-1, in short, is that he was working in a saloon shop in Khulna and his father Hemlal Shil used to live in Sholsa village, Nazirpur, Pirojpur and on 09.09.2013 at about 4:10 PM one Bajon Shil informed him through mobile phone that his father was killed and getting the said information he came to his house from Khulna then his grandmother Suchitra Rani Shil and aunt Paddo Rani Shil informed him that on 08.09.2013 the accused Nibas Chandra Shil came to their house at evening and after taking meal he went to sleep with his uncle the deceased Hemlal Shil. On the next day after taking lunch he took rest with the deceased Hemlal Shil in his dwelling hut and then on getting sound of groaning the

P.W.3 Suchitra Rani Shil and P.W.2 Paddho Rani Shil rushed to the place of occurrence room and saw that the accused Nibas had cut Hemlal's throat with a knife and showing them, he quickly runaway and jumped into a canal and at that time one Tapan and Nazmul caught hold the accused. The victim was taken to Nazirpur Upazila Health Complex wherein the doctor declared him dead. The police being informed arrested the accused from the place of occurrence. Thereafter he lodged the Ejaher with Nazirpur police station at about 18:35 p.m. Hence the Nazirpur police station case No. 03 dated 09.09.2013 was started.

The case was investigated by Sub-Inspector Abdul Gaffar Mollah of Nazirpur Police Station who held the inquest of the dead body and sent the dead body to the morgue for autopsy. Thereafter, he visited the place of occurrence, prepared the sketch map along with separate index, seized the alams and prepared the seizure list, examined the witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure. The accused was also brought before the magistrate for recording his confessional statement and after

completing all the formalities of the investigation he found *prima facie* case against the condemned prisoner Nibas Chandra Shill and submitted the charge-sheet being No.93 dated 30.11.2013 under Section 302 of the Penal Code.

The case record ultimately came to the file of the learned District and Sessions Judge, Pirojpur, who framed charge against the condemned prisoner under section 302 of the Penal Code, on 24.03.2014 which was read over to him to which he pleaded not guilty and claimed to be tried.

At the trial the prosecution side examined as many as 14 (fourteen) witnesses among the 18 (eighteen) charge sheeted witnesses and they were duly cross examined by the defence. But the defence examined none.

After close of the prosecution witnesses the accused was examined under section 342 of the code of criminal procedure, which was read over to him to which he reiterated his 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.

Further case was that his mother was the cousin of the deceased Hemlal and she inherited the property of his grandfather as life state measuring 18 decimal of land along with the dwelling hut and the informant side possessed the same and ultimately his mother came into a contract with the deceased and his brother at a consideration of Tk. 70,000/- among which only Tk. 7,000/- was paid but they did not pay the rest money and for grabbing the said land the prosecution side implicated him in this false case. Further case is that the confessional statement was not true and voluntarily which was collected by coercion, intimidation and torture.

The learned District and Sessions Judge, Pirojpur after consideration of the evidence on record found the condemned prisoner guilty of the charge leveled against him and convicted and sentenced him to death by its judgment dated 15.06.2016.

Thereafter, the learned District and Sessions Judge, Pirojpur Made this death reference under section 374 of the

Code of Criminal Procedure for confirmation of the sentence of death and sent all the papers and documents to this court.

Mr. Md. Shafiquzzaman (Rana), the learned Assistant Attorney General takes us through the Ejahar, the charge sheet, the charge, the inquest report, the post mortem report, the seizure list, the evidence of the witnesses, the impugned judgment and other papers and documents as available on the record.

Mr. Harunur Rashid, the learned Deputy Attorney General for the State submits that this is a brutal murder and the prosecution adduced reliable and sufficient evidence to prove the case. He further submits that there is no dispute regarding the date, time, the place of occurrence and the manner of occurrence. He further submits that the condemned prisoner was caught red-handed while he tried to run away from the place of occurrence after committing the offence and the local people the P.W.4 and P.W.5 apprehended him and subsequently the police took him in their custody and no denial about the said facts.

He further submits that the police also seized the used knife and the condemned prisoner brought the same while he came to the said house and thus it is proved that the murder was preplanned.

He further submits that immediately after the occurrence the local people rushed to the place of occurrence and in presence of them the accused himself admitted that he killed the victim and the said extra-judicial confession was supported by the P.W.6 and P.W.11.

He submits that the P.W.2 and P.W.3 are the eye-witnesses of the occurrence and on their shouting the accused tried to flee away from the place of occurrence then the P.W.4 and P.W.5 apprehend him and the P.W.6 to P.W.11 also rushed to the place of occurrence on hearing hue and cry and saw the incident and in presence of them the appellant confessed the matter though the defence cross examined them but could not find any contrary to their evidence as such it can be safely said that the prosecution able to prove the charge leveled against the condemned prisoner beyond all reasonable doubt.

He further submits that on the next day the accused was brought before the magistrate and he made confessional statement before the magistrate under section 164 of the code of criminal procedure and the magistrate after fulfillment of all the formalities and the procedure of law recorded the confessional statement and who as P.W.14 also proved the said confessional statement and deposed that which was true and voluntary. He submits that if the confessional statement of the accused is to be proved true and voluntary then the same may be the sole basis for conviction of its maker. In support he cited the decision of the case of The State –vs. Md. Tofayel Ahmed, reported in 71 DLR (HCD)-57, the case of Anower Hossain –vs. The State, reported in 74 DLR (AD)-55 and the case of The State –vs. Haris-Son, reported in 71 DLR(AD)-15.

He lastly submits that in 164 statement the condemned prisoner stated that when the victim refused to pay the rest amount of the sold land of his mother even did not pay the amount of Tk. 200/- for his conveyance and then he only dealt a knife blow and he has no intention to kill but same should not be considered in the instant case, since the accused came

to the said house on the previous day with a knife and on the next day he inflicted the said knife in the vital part of the body of the deceased which the victim succumbed to his injuries. In support of his argument the learned Deputy Attorney General cited the decision of the case of Ayub Ali –Vs. The State, reported in 7 BCR(AD)-66 and the case of The State –Vs. Tayeb Ali and others, reported in 7 BLD(1987)(AD)-265.

He prays for accepting the death reference and upholding the judgment and order of conviction and sentence.

Mr. Tariqul Islam the learned Advocate with Purnindu Bikash Das, Advocate appearing on behalf of the appellant submits that the prosecution measurably failed to prove the charge leveled against condemned prisoner. He submits that the learned Sessions Judge, without properly evaluation the evidence on record and the provision of law passed the impugned judgment. He further submits that though the date, time, the place of occurrence and the manner of occurrence has been proved and the accused was apprehended by the local people but none saw that he had committed the offence.

He further submits that the P.W.3 claimed as eye-witness but the investigating officer in his cross examination admitted that the P.W.3 did not disclose to him that she saw accused cut the throat of the victim and also the P.W.2 though claimed that she saw the occurrence but she rushed to the place of occurrence responding the calling of P.W.3 while she had washing utensils in the pond thus from the above facts it can be safely said that no eye witness in the instant case.

He further submits that in cross examination the P.W.13 the Investigating Officer stated that P.W.2 did not disclose to him that the accused cut the throat of the victim by knife and the P.W.3 also did not disclose that she saw accused cut the throat of the victim by knife as such the said facts that the accused cut the throat of the victim by knife is not proved.

He further submits that the P.W.4 and P.W.5 though claimed that they apprehended the accused but it is admitted facts that he was the son of the cousin-sister of deceased Hemlal who came to the said house one the previous day of the occurrence for receiving the unpaid money of the sold property of her mother from the victim and the learned

Advocate submits that many people came to the said house after the occurrence and the case was started thereafter, so, there is a probability of falsely implication of the accused but the trial court did not properly evaluate the evidence on record and wrongly convicted the accused.

He further submits that the extra judicial confession is not proved since the P.W.4 and P.W.5 stated that the accused was apprehended by them and to save him from the attack of the local people the P.W.5 confined the accused in his room and thereafter he was handed over to the police in presence of the local people and it is clear that none could see the said accused before arrest as such the evidence of P.W. 6 and P.W.11 cannot be sustained.

He further submits that the confessional statement of the accused was not true and voluntary since the accused was arrested on 09.09.2013 at about 5:00 p.m. but he was produced before the magistrate on 10.09.2013 at about 8:00 p.m. and he was under the police custody and in the confessional statement the accused disclosed that he was seriously tortured by the police and also showing his injury to

the magistrate, wherein the magistrate recorded his statement without giving him assurance from the fear of the police. He submits that though he stated that which was committed by the local people but on close reading of the evidence of the witnesses that he was confined in a room of P.W.5 and he was handed over to the police after 2 hours of his apprehension and in such circumstances of the facts since no witnesses disclosed that he was tortured by the local people, so, it may be presumed that the accused was seriously tortured by the police while he was in the police custody and as such the said confessional statement cannot be said true and voluntary.

He further submits that in the instant case no evidence against the accused except confessional statement and on perusal of the confessional statement it is clear that the accused has no intention to kill the victim, furthermore, it is clear that there may be some short of altercation between the accused regarding the payment of money of the sold land and only one injury was present on the person of the deceased from the aforesaid facts it can be presumed that he has no intention to kill the victim by the accused and as such the case

may be turned as culpable homicide not amounting to murder and the offence should be fall under section 304 part-II of the Penal Code since the act was done with the knowledge likely to cause death but without any intention to cause death and as such the conviction and sentence under section 302 of the penal code should not be sustained. The learned Advocated prays for rejection of the death reference and allowing the appeal.

Let us discuss the main contention of the evidence of the prosecution witnesses.

P.W.1 Shamol Kumar Shil, the informant and the son of the deceased Hemlal Shil deposed that on 09.09.2013 he was in Khulna and at about 4:10 p.m. he received a phone call from Bhajon Shill that his father was killed and then he came to his house from Khulna. His grandmother Suchitra Rani Shil and aunt Paddho Rani Shil informed him that accused Nibas Chandra Shil came to their house on 08.09.2013 at evening and after taking meal he went to sleep with his father, and on the next day after taking lunch they took rest in their dwelling hut and hearing the sound of groaning his grandmother the

P.W.2 Suchitra Rani Shil and the P.W.2 Padma Rani Shil rushed to the said room and saw that the accused Nibas cut the throat of his father by a knife. The accused tried to flee away and jumped into a canal and at that time witness Tapan and Nazmul caught hold the accused. The victim was taken to Nazirpur Upazila Health Complex and the doctor declared him to dead. After getting information the police came to the place of occurrence and arrested the accused. Thereafter he lodged the Ejaher with the Nazirpur police station at about 18:35 p.m. He proved the said Ejaher as Exhibit-1 and his signature as Exhibit-1/1.

He further deposed that the accused was brought before the magistrate and he made confessional statement. The police prepared the inquest report, he proved the said inquest report as Exhibit-2 and his signature as Exhibit-2/1. He further deposed that the accused claimed the compensation of the land sold of his mother in favour of the deceased Hemlal and she who inherited the same from her father and since his father the deceased could not pay the same the accused killed him. He identified the accused on the dock.

In cross-examination by the defence this witness stated that the accused was the resident of Tona village of Pirojpur District and the present house was his grandfather's house. This witness admitted that the mother of the accused obtained the property since accused's grandfather Ananta had no son and she claimed the property from her father and there was a dwelling hut of Ananta but which was uninhabitable and they had no dwelling house and they occupied the land of the mother of accused from very beginning. He admitted that the accused's mother had 18 decimal of land and an agreement was made between his father and the mother of the accused and the compensation of that land was fixed for Tk. 70,000/- among which only Tk. 7,000/- had been paid and the accused now used to live in Toothpara, Khulna.

In cross-examination of the defence he further stated that his mother came to his rented house of Khulna before 3 days of the occurrence for treatment. His father was in the house alone and the accused came to their house and accompanied with his father for three days. He admitted that accused has a wife and a minor daughter and he has no sibling.

He stated that when he went to the Thana saw that the accused was setting in the room of the Officer-in-Charge.

He denied the defence suggestion that none of the witness saw that after taking lunch the accused and his father took rest in their room and the accused cut the neck of his father and he was not apprehended by the witnesses when he was running away after commission of the offence. He denied the suggestions that accused was falsely implicated in this case for not paying the compensation of the sold land by the mother of the accused and to grab all the property of the accused. He further denied that it is not true that due to torture the accused was constrained to make confessional statement and since he came to visit their house they falsely implicated him in this case and deposed falsely.

P.W.2 Padma Rani Shil, deposed that on 09.09.2013 at about 3:30 to 4:00 PM her mother-in-law found sound of groaning and rushed to the place of occurrence and saw the incident and made shouting that: $\text{ଓଁ} \text{ଏGLbl Avmbv, vbevn tn v}$
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She further deposed that thereafter the victim was brought to the Baburhat by boat and from where he has taken to Nazirpur Hospital by Tomtom and the doctor declared him dead and after getting information the police came to the place of occurrence and brought the accused to the Thana. The police examined her and she told the above facts to the police.

In cross-examination of the defence this witness stated that at the time of occurrence she was washing dishes in the pond situated in the north side of the dwelling hut and kitchen room. She further stated that the accused came to their house on the previous day and he was staying in their dwelling hut. She had no knowledge whether he demanded money from her husband. She further stated that the accused was in their room on previous night and took dinner and she could not say who possessed the land of the mother of the accused and the accused came to their house with a bag. In cross examination she stated that after taking lunch he went out from her room but could not say when accused entered into the room of

Hemlal and also could not say anyone was present in the room of Hemlal.

She denied the suggestion that she did not disclose to the police that: ~~Ôny#-v #S" vi " ði eð ð c`¥GLbl Avnbv ðevn~~
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She did not see that the local people had beaten accused Nibas.

She denied the suggestion that they tried to grab the property of the mother of the accused and also denied the suggestion that the accused did not cut the throat of the deceased with a knife and falsely implicated him in the instant case and deposed falsely.

P.W.3, Shuchitra Rani Shil deposed that she knew the informant and the deceased the father of the informant and the accused was the nephew of the deceased Hemlal Shil and the incident took place on 09.09.2013 at about 4:00 PM and at that time she was in dwelling hut and getting sound of groaning she went there and saw through the window that: ~~Ôbevn tn v ð i v yi #v v | Aw v #S" vi " ið c`¥i v x Av ð |~~
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She further deposed that the police brought the accused to the Thana. The police prepared the inquest report and she put her signature in the inquest report. She proved her signature present in the inquest report as Exhibit-2/2.

She further deposed that the police brought her before the magistrate and she disclosed the above facts to the magistrate. She proved the said statement and her signature as Exhibit- 3 and 3/1 respectively. She identified the accused in the dock.

In cross-examination of the defence this witness stated that her dwelling hut adjacent west side to the dwelling hut of deceased Hemlal and which is only 4/5 cubits. She denied the suggestion that she did not disclose to the police that she saw accused cut the throat of the victim with the knife and Hemlal occupied the land of the mother of the accused. She denied the suggestion that 30e (4564567489 vL; (w i L w e " v A b y b < = 44 / w " v i m t n v f i / f i t v b x i > ? f o t m L v b v v b e v % b v v * @

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This witness denied the suggestion that she as a tutor witness deposed before the magistrate and which statement was prepared by the police. She denied the suggestion that it is not a fact that since they occupied the land of the mother of the accused and for that reason she deposed falsely.

P.W.4, Md. Nazrul Islam, deposed that he knew the informant and the accused and the occurrence took place on 09.09.2013 at about 4:00 p.m. He was in his house and after hearing shouting he get out from his room and saw that accused Nibas tried to flee away jumping on the canal and then and then he and Tapan Kumar Chakraborty apprehended the accused. Thereafter he came to know that the accused was running away after killing the deceased Hemlal. He informed the matter to the police and thereafter police came to the place of occurrence and brought the accused in the Thana. He saw the victim with throat cut injury and they brought him in Nazirpur Hospital for treatment but the doctor declared him dead.

He further deposed that he came to know that the mother of accused sold some property to victim Hemlal and she received some amounts and since Hemlal did not pay the rest amount, for that reason the accused killed him. He further deposed that on 10.09.2013 the police seized some materials including the knife from the place of occurrence and prepared the seizure list and he put his signature in the seizure list. He proved the said seizure list as Exhibit-4 and his signature as Exhibit-4/1. He also proved the seized materials as material Exhibit Nos. I, II, III, IV, V.

In cross examination of the defence this witness stated that his house is adjacent west side of the canal and no bridge in the said canal and there was a road towards east to west from the south side of the canal. After getting sound he came out from his house and while the accused tried to flee away within the garden then he along with Tapan Chakraborty caught hold him and confined the accused in a room of Tapans house.

He admitted that he came to know that the mother of the accused sold some property to the victim Hemlal and she

received some amounts and some is still unpaid and came to know that the said amount may be paid after registration.

He denied the suggestion that the accused did not jump into the canal and they did not apprehend the accused from the said canal. He also denied the suggestion that the seized materials were not recovered from the place of occurrence on 10.09.2013. He denied the defence suggestion to the effect:

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He denied the suggestion that the case is only for depriving the accused from getting compensation of the land which was sold by his mother to the victim and deposed falsely.

P.W.5 Tapan Kumar Chakraborty, deposed that he knew the informant Shyamal Kumar Shil and the accused Nibas Shil. His house is 150 yards south of Shyamal's house across the canal. The occurrence took place on 09/9/2013 at 4.00 PM

then he was at his house and hearing screaming and shouting Murder/marder from Syamals' house he came out from his house and saw that the accused Nibas Chandra Sheel was running and jumped into the canal. When Nibas got up from the canal and started running, he and Nazrul caught him near his house and brought him inside the house and locked him in a room so that no one could beat him. He then informed the incident to the police. The police came and took him away. Hemlal was sent to Nazirpur hospital by a boat with his throat cut injuries. He heard that the doctor has declared him dead. He heard that the accused Nibas came to the victim's house for receiving money for the treatment of his mother and he maybe killed the victim for not paying the said money. He told the same to the investigating officer.

In cross examination of the accused this witness stated that his house is 150 yards south of Hemlal's house. There is a road on the north side of his house. He did not go inside Hemlal's house after hearing the screaming. He saw that the accused came to that house of victim before the occurrence and was staying in the said house. He detained the defence

suggestion that the accused was confined in his living room for twenty to forty five minutes of his arrest. At that time about 10/12 people gathered outside the said house. It is not true that he did not say to the police about the hearing sound Murder/marder and caught hold the accused. It is not true that he and Nazrul did not caught hold the accused after he get out of the canal or locked him in his room or handed him over to the police. It is not true that he does not have a house or a road in the south or that he did not come out after hearing the screaming. It is not true that he gave false testimony on the investigation of Bimal.

P.W. 6 Anil Chandra Shil, deposed that he knew the informant Shyamal Kumar Sheel and accused Nibas Chandra Sheel. The occurrence took place on 09.09.2013 at about 4:00 P.m. when he was working in the land near his house. Then a young boy said that Hemlal was killed and then running away on Hemlal's house and saw that Hemlal's throat was cut and many people rushed to the place of occurrence and they said that Nibas cut Hemlal's throat. They sent victim Hemlal to Nazirpur Hospital by boat. He also saw that Nibas was held by

people and then the police came and took him to the Thana. After being taken to the hospital, the doctor declared him dead. He had heard that Nibas's mother would get the land and because of dispute over payment of money for that land, the accused Nibas killed Hemlal. He identified the accused in the dock.

In cross- examination on behalf of the accused this witness stated that his house is 150 yards north of Hemlal's house. On the north side of Hemlal's house is Bimal and Hemlal's cattle house. It is not true that the garden is on the north side of this cowshed and his house is on the north side of it. It is not true that he told the police that when Hemlal was taken to the hospital, he also went to the hospital with him. He did not enter into the Hemlal's room when he went to the spot. In cross examination he stated that sitting on the street, accused Nibas confessed to everyone that he killed Hemlal. He does not know who informed the police. It is not true that he did not tell the investigating officer that he saw the dead body of Hemlal with his throat cut. He stated that Bimal previously bought the land from the mother of the accused.

It is not true that on the date of incident he was working in his land or went to the spot after hearing the screams. It is not true that Nibas did not confess that he cut the throat of Hemlal. It is not true that Nibas killed Hemlal due to a dispute over land sale money. It is not true that he falsely implicated Nibas in this case and deposed falsely.

P.W.7 Milon Kumar Shil, deposed that he knew the informant Shyamal Kumar Sheel and the accused Nibas Chandra Sheel. On 09/9/2013 about 4.00 p.m. while he was working in a shop he was informed that Hemlal Sheel was killed. Hemlal was taken to the hospital and he went there and saw the dead body of Hemlal. The Police prepared the inquest report of the deceased Hemlal and he put his signature in the inquest report. He proved his signature in the inquest report as Exhibit 2/3.

He further deposed that the police seized a blood-stained lungi, mud, a blood- stained pillow, a wooden chowki, a knife in presence of him and he put his signature in the seizure list. He proved his signature marked as Exhibit 4/2.

Among the seized materials except Chowki, the rest are in the court. He identified the accused in the dock.

In cross- examination of the defence he stated that he returned back to the home from the hospital around 7.00 pm and entered into the Hemlal's room with the police. He cannot say whether Hemlal had a pillow cover or a bed sheet. He had seen the seized knife. It is not true that the police did not seize the alamats in presence of him nor did he sign the seizure list. It is not true that he did not hear Nibas killed Hemlal by cutting his throat with a knife. He denied the suggestion that he deposed falsely.

P.W.8 Bakul Rani Chakraborty, deposed that she knew the informant Shyamal Kumar Sheel and accused Nibas Chandra Sheel. The occurrence took place on 09/9/2013 at about 4.00 p.m. then she was at his house and after hearing screams outside the house she went to Hemlal's house and saw Hemlal with his throat cut. They took Hemlal to Nazirpur hospital, wherein the doctor declared him dead. Accused Nibas killed his uncle when Hemlal did not pay the price of the land

sold by his mother to Hemlal. She was examined by the police officer. She identified the accused on the dock.

In cross- examination of the defence she stated that she was not there when Nibas was arrested. She entered into the Hemlal's room and saw him lying in front of the door with his throat cut. Witness Tapan Chakraborty was her son. Witness Bimal was her debor. It is not true that she went to Hemlal's house on hearing the screams and accused Nibas committed murder. It is not true that Bimal was the conspirator or she has given false testimony.

P.W.9 Nirmol Bepari, deposed that he knew the informant Shyamal Kumar Shil and accused Nibas Chandra Shil and the deceased Hemlal Shil. Accused Nibas was niece of deceased Hemlal. The occurrence took place on 09/9/2013 at Hemlal's house then he was not at home and he was in his chamber in Baburhat Bazar. His neighbor Ranjit Mallik told him on mobile that Hemlal was murdered by his niece Nibas Sheel. He went there and saw that Hemlal was being taken to the police station. He did not know why the accused killed Hemlal.

He later heard that the accused Nibas killed Hemlal and he identified the accused on the dock.

In cross- examination of the defence this witness stated that he heard that Hemlal resided in the house of the mother of Nibas and Nibas came to that house sometime. He did not see the incident. He could not remember whether he disclosed to the investigating officer that Ranjit told him the incident over phone. It is not true that no one told him that Nibas killed Hemlal. The informant's house is in the same village. It is not true that he has given false testimony and the accused has been falsely implicated in this case.

P.W.10 Shakhawat Hossain stated that he knew the informant Shyamal Kumar Sheel, accused Nibas Chandra Sheel and deceased Hemlal Sheel. On 09/9/2013 at 4.00 pm he was at his home and heard sound of a groaning. Hearing that sound, he ran to Hemlal's house and found Hemlal was lying down and blood coming out of the throat. He squeezed the wound with his hand to stop the bleeding and quickly hired a boat and sent him to the hospital for treatment and while he was brought to the hospital, the doctor declared him dead.

This witness deposed that he learned that accused Nibas came to the house of his uncle Hemlal and Bimal to receive money for treatment of his mother since they have no money and his mother sold the land to them and thus claiming the selling money. He also learnt that the accused Nibas made a plan in advance that if the money was not paid, he would kill one of the two. When Hemlal felt asleep after having lunch, the accused entered to the residence of Hemlal and slaughtered him. Even when he went to that house, the accused was still standing there. He then ran out of the house and jumped into a canal and then the witnesses caught hold him. On getting information the police came and they handed over the accused to the police. He told the same to the investigating officer. He indentified the accused in the dock.

In cross-examination of the defence this witness stated that he was examined by the investigating officer on 10/9/2013. There was a pond and small garden behind the western side of Hemlal's house and there was a canal north-south to the west of the garden. There is a dirt road next to the canal and his house is on the west side of that road. Master

Aftab Uddin's house is next to his house. He stated that mother of the accused was a co-owner of the dwelling house. The land was supposed to be bought by Hemlal and Bimal and there was no deed but it is true that some price was tendered. He does not know if there was any settlement regarding the transaction price. When he went to Hemlal's house, none was present except the residents of that house.

He further stated that his wife was staying in Hemlal's house but she was not there at the time of the incident. Before the incident, Hemlal's wife went to Khulna the house of the informant. He learnt that the accused Nibas planned to murder, as he had brought a knife in a bag. He did not tell the police that Nibas had planned and brought a knife in a bag. He did not tell the investigating officer that the residents were still there when he went to that house, which is not true. He did not tell the truth to the investigating officer that Nibas jumped into the canal to escape and people caught him.

It is not true that he did not go to Hemlal's house after hearing the groaning and did not caught hold Hemlal's throat with his hand to stop the bleeding or send Hemlal to the

hospital or hear that Nibas slaughtered Hemlal. It is not true that he deposed against the accused because he wanted to buy the land of Nibas's mother or because she was not willing to sell it to him. It is not true that the accused did not kill Hemlal or he gave false testimony.

P.W.11 Ranjit Mollik, deposed that he knew the informant Shyamal Kumar Sheel and his house is 200/300 feet east of his house. The incident occurred on 09/09/2013 at about 3.30/4.00 pm and at that time he was eating rice and hearing the commotion he ran to the Shyamals' house. He saw that Hemlal was bringing to Nazirpur Hospital and Hemlal's throat was cut and also saw that 2/3 people were holding the cut throat with rags. He deposed that when the accused was crossing the canal, people caught him and locked him in a house. After getting information the police came to the spot and arrested the accused. Accused Nibas claimed money for treatment of his mother and killed the victim for not giving it. The accused Nibas confessed that he killed Hemlal. He was examined by the police. He identified the accused in the dock.

In cross-examination of the defence this witness stated that the house of Suchitra on the east side of Hemlal's house, behind that house there were ponds and gardens but no paddy fields. Bimal Sheel's house is on the north side of Hemlal's house. It is true that there is no other house between Hemlal and Suchitra's house. It is not true that he has no house on the east side of Hemlal's house. House of Sonaram Chakraborty on the south of the canal. He stated that the accused admitted his guilt before arrival of the police. The police took the accused from Sonaram's house. The accused was in Sonaram's room about half an hour.

He stated that it is not true that his house is not 200/300 feet away from Hemlal's house or he did not go to Hemlal's house after hearing screaming or see Hemlal being held by the neck with a rag and taken to the boat nor the accused Nibas confessed the murder before them. This is not true that he gave false statement against the accused.

P.W.12 Dr. Md. Nizam Uddin, Medical Officer of Pirojpur Sadar Hospital, deposed that on 10/9/2013 the dead body of deceased Hemlal was brought before the hospital morgue in

connection with Nazirpur police station case No. 03 dated 09/9/2013 and he held the autopsy of deceased Hemlal Sheel aged 55 years at 01:45 hrs.

In his examination he found the following injuries:

- (1) **One transverse cut throat wound at the lower part of the left side of the neck cutting skin, under laying soft tissues, muscles, vessels, up to bone measuring 3½ inch x ¾ inch X up to bone.**

On dessection: Congestion, multiple small haematoma, extravasated clotted blood found along and around the cut throat wound. Brain, liver, lungs, kidneys, spleen were found healthy and pale. Heart was healthy and empty. All other internal organs were found as mentioned above in specific columns.

And thereafter he made the following opinion: **“In our opinion, the death was due to haemorrhage and shock caused by above mentioned cut throat wound which was ante-mortem and homicidal in Nature.”**

He further deposed that the autopsy was done through a Medical Board. He proved the post- mortem report and his signature marked as Exhibit Nos. 5 and 5/1.

In cross- examination on behalf of the defence he stated that he found the respiratory tract of the dead body was healthy. He reviewed the inquest report before conducting the post- mortem. In the inquest report, the measurement of cut throat injury was written as 3 ½ inch X ½ but the depth is not written and the injury were written separately in the dissection column but did not write the age of injury in the autopsy report. This witness denied the suggestion that he didn't prepare the postmortem report properly.

P.W.13 Sub Inspector (ret.) Md. A. Gaffar Mollah deposed that on 09/9/2013 he was attached at Nazirpur Police Station of Pirojpur District and in view of the written complaint of the informant Shyamal Kumar Sheel, Nazirpur Police Station Case No. 03 Dated 09/01/2013 under section 302 of the Penal Code was started and the Officer-in-Charge Md. Abdul Khalek Hawladar recorded the said case and filled up the F.I.R form.

above knife the accused killed the victim Hemlal. The seized knife and other seized materials have already been exhibited as material exhibits. The knife was broke while cutting the throat of Hemlal.

He stated that the accused Nibas Chand Shil was apprehended by the local people and he arrested him. On questioning, the accused confessed that he killed deceased Hemlal Shil slaughtering his throat by a knife. The accused was brought before the Senior Judicial Magistrate Mr. Md. Ahsan Habib on 10-09-13 wherein he made confessional statement.

He examined the witnesses, and recorded their statements under section 161 of the Code of Criminal Procedure. He also sent the eye-witness Suchitra Rani Sheel to the learned Senior Judicial Magistrate Mr. Md. Ahsan Habib along with an application to record her statement under Section 164 of the Code of Criminal Procedure. The learned Senior Judicial Magistrate recorded the statement on 10.09.13.

He stated that for verifying the details of the accused, he sent E.S. to the officer-in-charge of the respective Thana and collected the information.

He deposed that after completing all the formalities of the investigation he found prima-facie case against the accused and submitted the charge sheet being No. 96 dated 30/11/2013 under section 302 of the Penal Code.

In cross- examination on behalf of the defence he stated that witness Suchitra Rani Shil was present when he held the inquest. During holding the inquest, the people present were asked about the cause of death. He did not mention the comments of any witness who saw the incident in inquest report. He recorded the statement of the witness Suchitra Rani Sheel under section 161 of the code of criminal procedure on 09.09.13.

He further stated that he described the rooms of the incident house separately on the draft map and index. The knife was found inside the room. On the draft map he has shown the house of Suchitra Rani Sheel marked as 'kha', in front of the place of occurrence marked as 'ka'. He did not show any other house on the eastern side of the place of occurrence i.e. "Ka" except the house marked as "kha". The garden situated in the west followed by the canal. Sonarum's

house is not shown in the sketch map. He did not mention in the charge sheet that the local people have handed over the accused to the police from a specific place, but GD No. 336 dated 09-09-13 was mentioned and the G.D. has not been mentioned in the charge sheet. However, it was mentioned in the CD.

He stated that at the time of the incident, the accused and Hemlal was alone in the room. Hemlal's wife and his son were not at home that day, they were in Khulna. He did not examine any person from the place where Hemlal's wife and son were in Khulna. Accused Nibas was in police custody for one night. He did not mention the throat cut injury in the inquest report. He mentioned the knife which he seized the head of knife was broken. The seized knife now could not be used due to rust but at the time of seizure which was serviceable. He has not mentioned in the seizure list or the charge sheet that the head of the knife was broken while cutting Hemlal's throat.

He stated that Suchitra did not tell him that she made shouting and says "c`¥GL#v Avmbv vbevn tng jvtj jv Qv

embtQ . Suchitra also did not tell him that she saw Nibal slaughtering Hemlal's throat through the window, but the window and door were open. He did not get the information that the accused was kept in the house of Tapan Chakraborty and was confined in one room.

He stated that it is not true that the accused was kept in illegal custody or tortured by the witnesses or he was mentally forced the accused to make confession to the Magistrate. It is not true that he made Suchitra Rani as eye witness and it is not true that his investigation is not true and proper. It is not true that he submitted a false charge sheet or the accused is innocent.

P.W.14 Md. Ahsan Habib, deposed that he was attached as Senior Judicial Magistrate of Pirojpur Judiciary. On 10.9.2013 the Investigating Officer produced the accused Nibas Chandra Sheel before him for recording his confessional statement at 2.00 p.m. He followed all the rules and regulations and explained all the legal points to the accused and after questioning the accused in details he recorded the confessional statement of the accused under Section 164 of

the Code of Criminal Procedure. After recording the statement, he put his signature and the same was read over to the accused and being true the accused also put his signature to it. He proved the confessional statement as Exhibit No. 10 and his signature as exhibit Nos. 10/1, 10/2, 10/3, 10/4 and 10/5.

He further deposed that on the same date he recorded the statement of witness Suchitra Rani Sheel under section 164 of the Code of Criminal Procedure. The statement was read over to the witness and find true she put her signature and thereafter he put his signature to the said statement. He proved the said 164 statement and his signature marked as Exhibit No. 3 and 3/2.

In cross-examination on behalf of the accused this witness stated that it was written that the accused was waiting in his stenographer's room before recording the confessional statement and he met the accused at 2.00 pm on 10-09-13. He did not mention the time of recording the confessional statement as there is no column in the printed form. At 5.00 p.m., the accused was sent to the District Jail. The accused has given sufficient time for his reflection but which has not been

written in the form. In his statement the accused disclosed that he was caught and beaten up by the villagers after the incident. In column no. 9 it was not mentioned that he made any complaint of torture, beating or intimidation by the police. It was written that the accused was arrested at 5.00 pm on 09.01.13 and taken to Nazirpur police station at 6.00 pm. He asked the accused whether he had been intimidated, but he did not ask him where he was on the previous night. He did not fill up the column No. 04. This is not true that the accused did not voluntarily give an inculpatory statement to him. It is not true that the police tortured him or that the incriminating statement was recorded by him as taught by them. It is not true that he did not record the confessional statement as per the rules.

This witness stated that before recording the statement of Suchitra Rani Sheel he did not receive a copy of her statement under section 161. He admitted that it is not mentioned in the statement of Suchitra Rani Shil that after reading and listening the statement, she put her signature find

its true. It is not true that he recorded the taught statement of Suchitra Rani Shil.

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

Before pertaining the facts of the case, we would like to considered the confessional statement of the condemned prisoner. The confessional statement of the condemned prisoner Nibas as under:
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We have examined the confessional statement and found that the accused was arrested on 09.09.2013 and he was brought to the magistrate at about 2:00 p.m. and sent him to the Jail Hajat at about 5:00 p.m. It is also found that the magistrate after observing all the procedure of law recorded the confession. It is also found that the magistrate made a memorandum and wrote that the confession was true and voluntary.

We have heard the learned Deputy Attorney General and the learned Advocate of the appellants, 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.

The prosecution case is that the informant lodged the Ejaher with Nazipur police station stating that on 09.09.2013 at about 4:10 PM one Bajon Shil informed him that his father was killed through mobile phone and getting such information he came to his village house from Khulna, then his grand-mother Suchitra Rani Shil and aunt Paddho Rani Shil informed him that on 08.09.2013 the accused Nibas Chandra Shil came to their house at evening and after taking meal he went to sleep with deceased Hemlal Shil and on the next day after taking lunch he took rest with the deceased Hemlal Shil in his dwelling hut and then on getting sound of groaning the P.W.3 Suchitra Rani Shil rushed there and saw that accused Nibas cut the throat of Hemlal by a knife, then on her shouting P.W.2 Paddho Rani Shil also came there and thus became a witness of the occurrence, then the accused tried to run away and jumped into a canal and at that time P.W.5 Tapan and P.W.4 Nazrul Islam caught hold the accused. The victim was taken to Nazirpur Upazila Health Complex wherein the doctor declared him dead.

To prove the case the prosecution side examined 14 witnesses, among them P.W.3 hearing sound rushed to the dwelling house where the victim was taking rest and saw that accused Nibas cut the victim's throat by a knife and then her calling P.W.2 also came and on their shouting the accused was running away. The P.W.4 and P.W.5 getting sound came out from their house and saw that the accused was running away and jumped into a canal then they caught hold him and confined him in the room of P.W.5 Tapan that the people could not tortured him and getting information police came to the said house and taken him in the police station. Thereafter P.W.6, P.W.8, P.W.10 and P.W.11 who are the neighbours of the informant getting sound rushed to the place of occurrence and saw the victim Hemlal with throat cut injury and they brought him to the Nazirpur Hospital wherein doctor declared him dead. P.W.12 the doctor who held the autopsy of the deceased Hemlal, P.W.14 the magistrate who recorded the confessional statement of accused Nibas Chandra and proved the said confessional statement. The P.W.1 the son of the deceased Hemlal is the informant of this case, at that time he

was in Khulna and getting information came to his house and after consultation with P.W.2 and P.W.3 lodged the Ejaher.

The prosecution case is that the accused came to their house on the previous day and went to sleep with the victim Hemlal. He is the son of the cousin sister of Hemlal and admittedly the dwelling house wherein the incident took place belonged to the mother of accused. The victim Hemlal and his brother made an agreement to purchase the said land and compensation was fixed and she received Tk. 7,000/- out of 70,000/- as part payment. The accused came to the said house to receive the said compensation.

No evidence that why the accused cut the throat of the victim Hemlal. But on considering the confessional statement of the accused it is found that he demanded the unpaid compensation for the treatment of his mother, but the victim did not pay the same and thus he cut his throat with the knife. It appears that P.W.3 was her room and getting sound of groaning rushed to the said room and saw that the accused slaughtered the throat of the victim and it also appears that

the P.W.2 was in the pond for washing the utensils and on calling the P.W.3 she also came there and saw the incident and they made shouting then the accused tried to fled away.

Hearing shouting the P.W.4 and P.W.5 get out from their house and saw that the accused was running away and jumped into the canal to flee away after the incident then they caught hold the accused. The P.W.4 and P.W.5 in their deposition also stated that on getting sound they came out from their room and saw that the accused was running away and then jumped into the canal and they caught hold the accused.

The other witnesses the P.W.6, P.W.8, P.W.10 and P.W.11 are the neighbours of the informant and getting sound they also rushed to the place of occurrence and saw the victim with throat cut injury and brought the victim to Nazirpur Hospital and doctor declared him dead.

Furthermore the accused made a confessional statement before the magistrate and the magistrate P.W.14 proved the said confessional statement.

Admittedly, the accused came to the house of the victim Hemlal on the previous day of the occurrence and went to sleep with the victim and on the date of occurrence he took lunch and went to take rest in the place of occurrence room with the victim Hemlal, so from the aforesaid facts it is proved that accused Nibas came to the house of the victim on the previous day of occurrence and was in the said house accompanied with the deceased Hemlal.

On perusal of the evidence it is found that the P.W.3 hearing screams rushed to the place of occurrence and saw that the accused was in the said room with a knife and saw the throat cut injury of the victim and blood was coming and then the P.W.2 also came there and when the accused saw them he tried to flee away but could not succeed, since the P.W.4 and P.W.5 caught hold him when he was running away. The other witnesses also rushed to the place of occurrence immediately after the incident.

So, considering the evidence on record, it can be safely said that none but the accused cut the throat of the victim.

Furthermore, the accused made confessional statement before the magistrate the P.W.14 and who proved the said confessional statement. We have perused the said confessional statement and found that the accused was arrested on 09.09.2013 and brought before the magistrate on 10.09.2013. Furthermore, the magistrate after observing all the procedure of law recording the confessional statement of the accused and the magistrate made a memorandum stating that which was true and voluntary. We have examined the confessional statement and on perusal of the evidence of the P.W.14 the recording magistrate it is our view that which was true and voluntarily.

We have considered the evidence on record and the facts and circumstances of the case it is our considered view that the prosecution succeed to prove the case against the condemned prisoner Nibas Chandra Shil that who is only the person to commit the offence.

The learned Advocate of the appellant submits that through the accused was apprehended by the P.W.4 and P.W.5

when he running away immediately after the occurrence and the P.W.2 and P.W.3 claimed that they are the eye-witnesses of the occurrence. But on perusal of their evidence it is clear that they did not see that the accused cut the throat of the victim Hemlal with knife and since the P.W.3 in her chief stated that after getting sound of groaning she rushed to the place of occurrence and claimed that she saw that accused dealt knife blow on the throat of the victim and on her shouting the P.W.2 who was in the pond for washing utensils came there and saw the incident. Furthermore, the P.W.13 the investigation officer in cross examination stated that the P.W.3 did not disclose to him that she saw the incident throw window. The learned Advocate thus submits that from their evidence it can be safely said that immediately after the incident they rushed to the occurrence house and saw the accused and submits that they cannot be said as eye witnesses.

He submits that considering the evidence on record and the confessional statement of the accused and the other evidence on record though it can be said the accused alone had committed the murder but since no preplanned and

intention to kill the victim, furthermore, there was a probability of the sudden altercation due to nonpayment of unpaid sold money of the land in such a case it cannot be safely said that the same was not culpable homicidal amounting to murder but culpable homicide not amounting to murder.

We have considered the submission of the learned Advocate, the evidence on record and the confessional statement of the accused it appears that the victim Hemlal was killed and the allegation is that the accused Nibas Chandra cut the throat of the victim by a knife and P.W.3 also after hearing the groaning rushed to the occurrence of house and claimed that the accused was standing with a knife in his hand and also claimed that he cut the throat of the victim Hemlal. It also appears that P.W.3 called the P.W.2 while she was washing utensils in the pond and then she also came to the place of occurrence and showing then the accused running away from the occurrence house. It also appears that when the accused was running away and crossing the canal jumping into the

canal then hearing the sound the P.W.4 and P.W.5 came out from their house and caught hold the accused.

It is found from their evidence that then and then the accused was confined in a room of P.W.5 to save him from the aggression of the local people and after getting information the police came to the said area and they handed over the accused to the police. It also appears from the aforesaid facts that the prosecution able to prove that the accused committed the offence and he caught hold by the P.W.4 and P.W.5.

Some of the witnesses specially the P.W.11 disclosed that when the accused Nibas was apprehended then he disclosed that he killed the victim Hemlal. But on perusal of the evidence of P.W.4 and P.W.5 it is found that after apprehension of the accused those two witnesses confined him in the house of P.W.5 and they informed the police and the police came to the said place of occurrence. On perusal of the other evidence of witnesses it appears that when he handed over to the police then the accused disclosed that he committed the offence, so, from the aforesaid facts if the same

can be considered as extra judicial confession but on perusal of the evidence that the same was disclosed in presence of the police and any material if admitted in presence of police then it cannot be said that the said confessional statement is to be treated as extra judicial confession.

However, it is found that immediately after his arrest on the next day the investigating officer produced the accused before the magistrate for recording the confessional statement and the accused made confessional statement before the magistrate on the next day that is on 10.09.2013.

It also appears that the said magistrate as P.W.14 proved the said confessional statement and also deposed that he after fulfillment of all the procedure of law recorded the confessional statement and also stated that the said confessional statement was true and voluntary.

We have already taken view that the magistrate after observing all the formalities of the case recorded the confessional statement and it cannot be said that which was not true and voluntary even the accused did not retract the

said confessional statement. Furthermore, he also did not mention anything in his examination under section 342 of the code of criminal procedure regarding any torture or coercion or intimidation by the police but he disclosed to the magistrate that the local people tortured him after apprehension by the P.W.4 and P.W.5 but on considering the evidence of P.W.4 and P.W.5 it is found that they specifically mentioned that none of the local people could torture or beat the accused since they immediately after caught hold the accused confined him in a room of the P.W.5 and then the police came there and they handed over the accused to the police and in such a case it is found that the allegation as made by the accused before the magistrate that the local people tortured him has some doubt rather there is a probability of torture by the police while he was in the police custody in the earlier night when he was under custody of the police.

But we have already considered the confessional statement of accused and found that which was true and voluntary even no allegation regarding on torture by the police having been disclosed at the time of the examination under

section 342 of the code of criminal procedure, even no retraction by him however he was found injured at the time of recording confessional statement by the magistrate but since he categorically stated that he was tortured by the local people in such a case it is our considered view that the said confessional statement was true and voluntary.

Now, it is to be considered whether the offence committed by the accused is culpable homicide amounting to murder or culpable homicidal not amounting to murder.

On meticulous examination of the evidence on record and the confessional statement we have already considered that immediately after the occurrence the P.W.2 and P.W.3 saw him and on their shouting immediately after the occurrence the other witnesses also came to the said place of occurrence and saw neck cutting injury of the victim and brought the victim to Nazirpur Hospital and on perusal of the evidence of P.W.4 and P.W.5 it is also found that the accused was apprehended when he was running away from the place of occurrence. But we have already considered that no one

saw the actual facts of the occurrence that why the accused cut the throat of victim Hemlal but since it is admitted facts that the accused running away from the place of occurrence and the P.W.4 and P.W.5 also apprehended him when he was running away from the place of occurrence and thereafter he made confessional statement in such circumstances of the facts we cannot took any other view that he did not commit the offence.

However, on perusal of the evidence on record and the confessional statement it is found that no preplanned or any intention to kill the victim by the accused. It is also admitted that the victim resided in the dwelling house of the mother of the accused and it is also admitted that said house and other land property was belonged to the mother of the accused and it is also found that his mother made an agreement with the victim Hemlal and his brother to sale the said property at the compensation of Tk. 70,000/- among which only Tk. 7,000/- was paid earlier.

It is also found that accused came to the said house for receiving the unpaid amount and accused also stated that his mother was ill and he claimed the said amount to the victim for her treatment. It is also found that all the witnesses admitted that the said dwelling house where the victim was killed and the other land belonged to the mother of accused and it also admitted that there was an agreement among the victim and his brother and the mother of accused and in such a case the dispute regarding for nonpayment of money is proved. Admittedly the victim was the cousin of the mother of accused and they have good relations and the accused came to the said house before one day of occurrence and both took meal and lunch and went to sleep in the same room and none disclosed that any altercation was happened before the incident. It is also found that none was present except the P.W.2 and P.W.3 in the said house.

If we considered the confessional statement from where it is found that no intention to kill the victim and no preplan to cause the offence. In such circumstances of the facts it is our

view that the accused committed the offence without any intention.

Having considered the facts it is our considered view that it cannot be said that the offence is culpable homicide amounting to murder provided under section 300 of the Penal Code.

Considering the case of Jatin Chandra Sil –vs. The State, reported in 43 DLR(AD)-223 and the case of Nibir Chandra Chowdhury and others. –vs. The State, reported in 53 DLR (AD)-130 we are of view that it is better to convict the condemned prisoner under section 304 Part-II of the Penal Code.

The provision of section 304 of the Penal Code as under:
“Whoever commits culpable homicide not amounting to murder, shall be punished with for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death.

Or with imprisonment of either description for term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

Having considered the facts and circumstances of the case it is our considered view that it is better to convict the condemned-prisoner Nibas Chandra Shil under section 304 part-II of the Penal Code since he has committed the offence with the knowledge that it is likely to cause death but without any intention to cause death and he is sentence to imprisonment for 10 years.

It is also found that condemned-prisoner is in jail custody from the date of occurrence that is from 09.09.2013 and is in death cell for more than 5 years that is from 15.06.2016 from the date of judgment.

Thus on perusal of the record the condemned prisoner is in the Jail custody for more than 9 years and as per provision of Jail Code it is presumed that the sentence has already been served out as imposed by this judgment.

In the result the Death Reference is rejected.

The impugned judgment and order of conviction and sentence dated 15.06.2016 passed by the learned Judge, Sessions Judge, Pirojpur in Sessions Case No. 39 of 2014 arising out of Nazirpur Police Station Case No.03 dated 09.09.2013 corresponding to G.R. No. 93 of 2013, convicting the condemned-prisoner under Section 302 of the Penal Code and sentencing him to death along with a fine of Tk.5,000/- (five thousand) is hereby set-aside with the modification of conviction and sentence.

The Criminal Appeal No.10665 of 2016 is dismissed with modification of the judgment and order of conviction and sentence. The condemned prisoner **Nibas Chandra Shil** is found guilty of the charge leveled against him under section 304 part II of the penal code instead of section 302 of the Penal Code and he is sentenced to suffer rigorous imprisonment for 10 years and also to pay a fine of Tk. 2,000/- in default to suffer imprisonment for 2 (two) months more. Considering the provision of law and the record the sentence

imposed upon the condemned prisoner has already been undergone.

The condemned prisoner **Nibas Chandra Shil** be set at liberty forthwith if not wanted in connection with any other cases.

The Jail Appeal No. 147 of 2016 is hereby disposed of.

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

K M Zahid Sarwar, J:

I agree.

M.R.