

Present:

Mr. Justice Md. Atoar Rahman

And

Mr. Justice Md. Ali Reza

Death Reference No. 58 of 2018

The State

.....Petitioner

-Versus-

Md. Rubel Miah

.....Condemned-Prisoner

With

Criminal Appeal No. 5326 of 2018

Md. Rubel Miah

.....Condemned-Prisoner-Appellant

-Versus-

The State

.....Respondent

With

Jail Appeal No. 168 of 2018

Md. Rubel Miah

.....Condemned-Prisoner-Appellant

-Versus-

The State

.....Respondent

And

Criminal Appeal No. 8793 of 2018

Md. Ashraful and another

.....Condemned-Prisoner-Appellants

-Versus-

The State

.....Respondent

Mr. Md. Monzurul Alam Sujan, Deputy Attorney General
with

Mr. S M Younus Ali Robi, A.A.G

Mr. Md. Zobaidur Rahman Babu, A.A.G

Mr. Md. Mashiur Rahman (Riad), A.A.G

Mr. Khalilur Rahman, A.A.G and

Mr. Amran Hossain, Assistant Attorney General
.....for the State

Mr. Md. Jahangir Alam with
Mr. Sanjoy Kumar Kundu and
Ms. Shamima Nasrin, Advocates
.....for Condemned-prisoner

Mr. S.M. Mahbubul Islam, Advocate
.....for Condemned-Prisoner-Appellants Md. Ashraful and another

Heard on: 24.04.2025, 22.05.2025 and 29.05.2025

Judgment on: 03.07.2025.

Md. Ali Reza, J:

Under section 374 of the Code of Criminal Procedure (hereinafter referred to the Code) the proceedings of this case has been submitted to this Court by the learned Sessions Judge, Netrokona for confirmation of death sentence passed against condemned prisoner Md. Rubel Miah by judgment and order dated 16.05.2018 in Sessions Case Number 317 of 2016 convicting him under sections 302 and 34 of the Penal Code. The condemned-prisoner Md. Rubel Miah also preferred Criminal Appeal Number 5326 of 2018 as well as Jail Appeal Number 168 of 2018 against judgment and order of conviction passed against

him sentencing him to death by hanging. Ashraful and Monir Hossain also preferred Criminal Appeal Number 8793 of 2018 against conviction of sentencing them to suffer rigorous imprisonment for life. This reference and appeals are taken up and heard together and disposed of by this common judgment.

The case of the prosecution is that victim Ripon Mia used to carry passengers for hire on his own motorbike. In the afternoon on 14.06.2011 accused Rubel called Ripon and hired his bike for a trip to the house of Rubel's friend named Shamim and intended to return on the following morning. But Ripon did not come back. His father PW-1 called him on 15.06.2011 over cell phone but that was switched off. He kept on searching. On 18.06.2011 PW-1 went to the house of Rubel's father-in-law named Alimuddin in Bishkakuni village and found Ripon's motorbike there. Then he went to the house of Helal who is the father of Rubel. PW-1 told Helal that he found the motorbike in Alimuddin's house but could not find Ripon

there. Helal promised to produce his son Rubel within next 24 hours and accordingly he produced him before Purbadhala police station on 20.06.2011. On interrogation of police Rubel confessed that he took Ripon to the Elenbari hill at Bijoypur and killed him with a pre-planned scheme of capturing his motorbike with the help of Shamim, Ashraful, Monir, Kashem and left his deadbody in a ditch down at the foothills and went away with the motorbike to the house of his father-in-law. After having such knowledge PW-1 as informant lodged the First Information Report (FIR) on 20.06.2011 with the allegations brought under sections 302/201/34 of the Penal Code.

The next day on 21.06.2011 accused Rubel made confessional statement before the magistrate under section 164 of the Code.

The investigating officer after investigation submitted police report number 143 on 30.11.2011 against Rubel recommending trial under sections 302/201/379/34 of the

Penal Code and against Ashraful, Monir, Ruhul Amin, Al Amin, Shamim under sections 302/201/34 of the Penal Code and they were placed on trial before the Sessions Judge, Netrokona on 21.09.2016 who framed charges against them on 15.05.2017 to which they pleaded as not guilty and demanded trial. Charges could not be read over to accused Rubel and Ruhul Amin being absconded.

The prosecution examined as many as 9 witnesses out of 24 witnesses mentioned in the police report. After conclusion of examination of prosecution witnesses accused Rubel, Shamim, Al Amin restated their innocence and false implication while they were examined under section 342 of the Code on 09.05.2018.

On consideration of evidence and other materials on record the learned Sessions Judge passed the judgment and order of conviction and sentence as aforesaid and sent the reference to this Court.

Mr. Md. Monzurul Alam Sujan, learned Deputy Attorney General along with Mr. S M Younus Ali Robi, Mr.

Md. Zobaidur Rahman Babu, Mr. Md. Mashiur Rahman (Riad), Mr. Khalilur Rahman and Mr. Amran Hossain, Assistant Attorneys General appearing on behalf of the State and in support of the death reference conveys us through the materials on record as well as the impugned judgment and submits that the prosecution has been able to bring home the charge leveled against the accused by adducing proper and trustworthy evidence and the impugned judgment being reasonably passed is immune from interference. He further submits that the confession made by accused Rubel can safely be used against other co-accused persons and his extra judicial confession being voluntary and properly corroborated carries significant weight in proving guilt beyond reasonable doubt. He further submits that the extra judicial confession made by accused Rubel is testified by independent witnesses what carries strong presumption as to his guilt. He finally submits that in the instant case the extra judicial confession and the confessional statement made by accused Rubel being true

and voluntary are correctly relied upon by the Court below because those can unimpededly form the basis for conviction and the impugned judgment stands good and proper.

Mr. Md. Jahangir Alam, learned Advocate along with Mr. Sanjoy Kumar Kundu and Ms. Shamima Nasrin appearing on behalf of the condemned prisoner Rubel in Criminal Appeal 5326 of 2018 and Jail Appeal 168 of 2018 submits that the confessional statement made by condemned prisoner Rubel is apparently exculpatory in nature showing his nonparticipation in such murder which cannot be used against him and the impugned judgment causing miscarriage of justice relying upon such confession is unwarranted and liable to be set aside outright. Referring to the evidence of PW-3 he submits that Anisul Haq being an important witness to the charge sheet has got to be examined by the prosecution to prove the case beyond reasonable doubt but prosecution did neither bother to examine him nor explained away for his non-production

which falls under the provision laid down in section 114(G) of the Evidence Act to protect the integrity of the judicial process. He strongly submits that the prosecution failed to recover any incriminating article coupled with forensic evidence used in commission of such unseen murder which creates irresistible doubt in the case of prosecution thus the impugned judgment and order of conviction and sentence is liable to be set aside. He takes us through the entire evidence and finally submits that since the prosecution failed to examine any independent and disinterested witness to establish the case the reference is liable to be rejected and the appeals may be allowed.

Mr. SM Mahbubul Islam, learned Advocate appearing on behalf of the accused-appellants Ashraful and Monir draws our attention to the confessional statement made by co-accused Rubel and points out that such confession cannot form the basis of conviction of the appellants inasmuch as the same is exculpatory in nature so far it relates to the commission of murder of the deceased and the Court

failed to appreciate that substantive corroborative evidence must be independent and confessional statement itself is never a corroboration. He lays much emphasis in his submission that if the prosecution fails to produce any substantive corroborative evidence to support a co-accused's confession a conviction based solely on that confession is unlikely to be upheld. Legal sources state that a confession by a co-accused is not considered substantive evidence and cannot be the sole basis for convicting another accused. Corroboration or independent evidence linking the accused to the crime is crucial for a conviction. He finally submits that since the case of the prosecution lacks physical evidence or eyewitness testimony or other reliable circumstantial evidence linking the appellants to the crime other than the confessional statement of co-accused Rubel showing its nature as exculpatory the judgment passed by the trial Court is really frustrating and liable to be struck down and the appeal may be allowed.

The FIR was lodged by PW-1 named Ahmad Ali who is the father of the deceased Ripon. It was stated in the FIR that Helal produced his son Rubel in the police station wherein Rubel confessed that he along with Ashraful, Monir, Shamim, Kashem took deceased Ripon to the place of occurrence where in furtherance of common intention they killed the deceased with premeditation. This is extra judicial confession made in the police station by accused Rubel. An extra judicial confession has limited but meaningful value and carries significant weight if the same is clear and convincing and passes the tests of voluntariness and credibility with corroboration. In the instant case PW-1 the father of the deceased, PW-2 the second cousin of the deceased, PW-3 the brother of the deceased, PW-4 the brother-in-law of the deceased in a substantially similar manner stated in examination-in-chief that Rubel's father handed Rubel over to the Purbodhala Police Station where Rubel confessed in front of the police that he killed Ripon at Bijoypur Hill with the help of Shamim, Ashraful, Monir

and Kashem and the deadbody was recovered at the place pointed out by him but none of the witnesses were cross-examined on this very crucial point but only confronted suggestion. If the statement of an extra judicial confession is led during examination in chief but not challenged in cross-examination it can have important legal consequence. When the defence does not cross examine the witness who testifies about the extra judicial confession the Court is not sluggish to presume that the defence accepts the truth of the statement according to the provisions laid down in sections 27 and 58 read with section 137 of the Evidence Act following the principle that what is not denied is deemed to be admitted. An unchallenged statement gains greater credibility and evidentiary value and failure to cross examine strengthens the prosecution case and such confession may be considered to be voluntary and reliable in the absence of rebuttal. It has been decided in the case of U.P. vs. Nahar Singh reported in AIR 1998 SC 1328 that if a witness is not cross examined on a material point it amounts

to an implied acceptance of his testimony on that point and failure to challenge the credibility or correctness of extra judicial confession by cross examination leads to a presumption of acceptance. This extra judicial confession thus itself becomes strong corroborative evidence against its maker that he has committed the wrong.

Accused Rubel gave confessional statement under section 164 of the Code and the same was tendered and proved by PW-5 and marked in evidence as exhibit 4 wherein the accused gave a different version in certain respects. The confession mainly embodies that he, Ashraful and Monir went to the hill riding on Ripon's motorcycle and had tea at a shop near the hill. After having tea they went close to the hill. Ashraful and Monir by luring Ripon with the promise of a woman took him up the hill while he stayed below to watch over the motorcycle. He then heard screaming from the hill and saw Kashem coming towards to catch him. At that point he took the motorcycle and went to Shibganj Bazar. Later three or four people held him captive

in a place for three days. Eventually he managed to escape. After fleeing he went to his in-laws' house and saw that Ashraful had left the motorcycle there. Then PW-3 went to his in-laws' house looking for Ripon and saw the motorcycle. Everyone then started blaming him. He then went home and told his father everything and came to the police station. The police arrested him and took him to Durgapur Police Station for interrogation and then took him to the hill where he had gone earlier and there they found Ripon's deadbody.

The confessional statement of accused Rubel imports the meaning that he was not involved in or with the commission of murder and he avoided his personal hand in such killing. But from a close reading of exhibit 4 (confessional statement) it appears that he is one of the notorious personages in the realm of deceit and craftiness. Notwithstanding all his efforts to evade culpability the accused has made certain specific admissions that unmistakably establish his involvement in the offence of

killing. Firstly he admitted to using Ripon's motorbike; secondly he stated that he went to Shibganj Bazar on that motorbike; thirdly the same motorbike was subsequently recovered from his father-in-law's residence and fourthly the deceased's body was recovered pursuant to his disclosure and indication.

It is a matter of reasonable inference and ordinary prudence to raise the question as to how accused Rubel after bringing the motorcycle to Shibganj Bazar and being detained by several individuals for three days was able to later observe at his father-in-law's residence that Ashraful had left the motorcycle there. This is particularly perplexing in the light of the unequivocal statement of Rubel who stated that at the time he left the hill with the motorcycle Ashraful remained at the hilltop. On this basis it is highly improbable that Ashraful could have known of the motorcycle's presence at Shibganj Bazar or that Rubel had abandoned it there. Moreover a further pertinent question arises as to the means by which the accused acquired

knowledge of the precise location on the hill where the deceased's body was recovered when he himself has stated earlier that he had left the place with the motorcycle beforehand. These inconsistencies cast serious doubt on the credibility of the accused's portrayal and lend support to the prosecution's case regarding his involvement in the offence. The inquest report exhibit 2 is proved in evidence by PW-3 and PW-4. The seizure list number 2 which contains the motorcycle is marked in evidence as exhibit 3 and PW-3 Farid Mia, PW-7 Shahid Mia, PW-8 Salam are witnesses to exhibit 3.

Upon a comprehensive examination of the evidence on record and the confessional and circumstantial elements presented in the case it is evidently established that the accused Rubel was directly connected with the commission of the alleged offence. His own admissions coupled with corroborating evidence such as the recovery of the deceased's motorcycle from his father-in-law's house and the discovery of the deadbody at the place identified by him

lead to a clear inference of his active participation in the crime. Therefore, the finding and reasoning offered by the trial court in implicating and convicting accused Rubel are just and in accordance with law.

Now let us turn to the case of the accused-appellants Ashraful and Monir. At the very outset of its discussion the learned trial court rightly referred to the settled principle of law that a co-accused cannot be convicted solely on the basis of the confession of another co-accused unless there is independent corroboration of such confession as against the said co-accused. Despite acknowledging this principle the trial Court proceeded to convict the present appellants and sentenced them to imprisonment for life primarily on the ground that since the victim's decapitated body was recovered and such an act could not have been carried out by a single individual it is possible that these two appellants were involved in the commission of the offence. The trial court further treated this possibility as circumstantial corroboration and on that basis held them legally liable.

This line of reasoning is inherently self-contradictory, legally erroneous and unsustainable in law. A mere assumption of physical impossibility or probability unsupported by tangible independent evidence cannot amount to corroboration as required under law. Even after a thorough examination of the entire record no corroborative material has been found against these two appellants. The finding of the trial Court therefore is not only unjustified but also deeply disappointing and fatally flawed in its legal reasoning.

Accordingly the conviction and sentence passed against these appellants Ashraful and Monir are held to be unsustainable in law and are hereby set aside and quashed.

From perusal of exhibits 1 (FIR) and 4 (confessional statement) it appears that the accused Rubel was 22 years of age at the time of commission of the offence. That is a stage of life where emotional maturity and cognitive judgment are still on the process of development. It is an established principle in sentencing jurisprudence that youthfulness is a

mitigating factor which must be afforded due consideration. Upon a thorough scrutiny of the case record no material could be found to conclusively prove that the accused Rubel himself with his own hands inflicted a knife injury to the victim's throat resulting in decapitation. The pre-conviction and previous record status of the accused is clean as apparent from the police report dated 30.11.2011. There is no material on record indicating any prior animosity or motive of revenge against the victim. The incident appears to be devoid of premeditation rooted in personal enmity. Furthermore it is undisputed that the convict has been languishing in the condemned cell for over seven years during which he has endured the psychological torment associated with the imminence of execution which is a form of suffering judicially acknowledged as an aggravating hardship. A prolonged incarceration in the death row amounts to cruel and inhuman punishment which may itself be a valid ground for commutation and this principle has been recognised by our Honourable Appellate Division in

the case of Shukur Ali vs. State reported in 74 DLR(AD) 11 where death sentence has been commuted on similar considerations. In order to secure ends of justice this Court is of the view that the present case does not fall within the “rarest of rare” doctrine that would mandate capital punishment. The retributive objective of sentencing can be adequately fulfilled by imposing a sentence of rigorous imprisonment for life to be served for the remainder of the convict’s natural life subject to any statutory remission or executive clemency under constitutional or legal provisions.

Therefore the Court deems it just, equitable and legally tenable to commute the sentence of death by hanging into one of life imprisonment.

Accordingly this Death Reference is rejected and the Criminal Appeal Number 5326 of 2018 preferred by Md. Rubel Miah is dismissed with modification and Jail Appeal Number 168 of 2018 preferred by Md. Rubel Mia is disposed of. The concerned jail authority is directed to shift the convict named Md. Rubel Miah, son of Md. Helal

Uddin Akondha of Village Goruwakanda of Police Station Purbadhala of District Netrokona to normal jail from the condemned cell forthwith. The Criminal Appeal Number 8793 of 2018 preferred by Ashraful, son of Nurul Haque of Village Kakrakanda of Police Station Durgapur of District Netrokona and Monir Hossain, son of Tofazzal alias Mofazzal of Village Kakrakanda of Police Station Durgapur of District Netrokona is allowed. Ashraful and Monir Hossain are hereby acquitted of the charge leveled against them under section 302 of the Penal Code and they be set at liberty forthwith if not wanted in any other cases.

Send down the lower Court's record along with the copies of this judgment to the concerned Court and the jail authority at once.

Md. Atoar Rahman, J:

I agree.