

**District: Mymensingh.**  
**In the Supreme Court of Bangladesh**  
**High Court Division**  
**(Criminal Appellate Jurisdiction)**

**Present:**  
**Mr. Justice Syed Md. Ziaul Karim**  
**And**  
**Mr. Justice K.M. Emrul Kayesh**

**Death Reference No. 148 of 2017**

The State  
-Versus-  
Md Saiful Islam  
----- Condemned-Prisoner.

**With**

**Criminal Appeal No. 12872 of 2017**

Md. Saiful Islam  
-vs-  
The State

Mr. Bibhuti Bhushan Sarker, Advocate with  
Mrs. Mahjerin Musharraf, Advocate.  
Md. Ziaul Alam, Advocate

---- For the Condemned-appellant

**with**

**Jail Appeal No. 464 of 2017**

Md. Saiful Islam  
----- Condemned-appellant.

-Versus-  
The State

----- Respondent.

Mr. Mohammad Monirul Islam, Deputy-Attorney-General  
with

Mr. Robiul Islam, Assistant-Attorney-General,

Ms. Ayesha Flora, Assistant-Attorney-General

Mr. Md. Jahir Ahmed, Assistant-Attorney-General

---- For the State-Respondent.

**Heard on: 05.12.2023, 06.12.2023**  
**and**  
**Judgment on: 11.12.2023**

**K.M. Emrul Kayesh, J:**

(1) This Death Reference under section 374 of the Code of Criminal Procedure (hereinafter referred to as Code) has been made by the learned Bicharak Nari-O-Shishu Nirjatan Doman Tribunal, Mymensingh (Briefly as Bicharak) for confirmation of sentence of death of condemned prisoner passed in Nari-O-Shishu Case No.01 of 2016.

(2) By the above appeals have challenged the legality and propriety of the judgment and order of conviction and sentence dated 05.11.2017 passed by the learned Nari-O-Shishu Nirjatan Doman Tribunal, Mymensingh, in Nari-O-Shishu Case No. 01 of 2016 arising out of Kotowali Police Station Case No.80(03)15 corresponding to G.R. Case No.303 of 2015, convicting the condemned prisoner Md. Saiful

Islam under section 9(2) of the Nari-O-Shishu Nirjatan Doman Ain 2000(as amended on 2003) (Briefly AIN) and sentencing him to death and also to pay a fine of Tk.1,00,000/-(one lakh only).

(3) The death reference and the above appeals having arisen out of a common judgment, these have been heard together by this court are being disposed of by a single judgment.

(4) The prosecution case in short is that one Md. Siraj Miah being the informant lodged an First Information Report (Briefly FIR) with Kotwali Police Station, Mymensingh on 30.03.2015 at 3.35 P.M stating interalia that on 23.01.2015 at 4.00 P.M, the condemned prisoner is the step brother of the informant. The informant is a mike operator by profession. In the date of occurrence at 10.00 a.m he went out for work. His wife with her three and a half year old son named Jubayair at 11.00 a.m went to the Barera Mosque for performing Jumma prayer and his

mother also left for her work. Upon getting alone of the deceased in the place of occurrence at 4.00 P.M the condemned prisoner raped and killed her. While at 5.00 P.M informant's wife returned back home and found the dead body hanging from a bamboo made beam of her house. Whereupon the police arrested the condemned prisoner under section 54 of the Code vide G.D No.1160 dated 23.01.2015. Then the informant's mother and step father told him to wait till getting of post mortem examination report. Thereafter one S.I Reazul Karim of Kotwali Police Station went to the place of occurrence and prepared an inquest report and sent the death body to Mymensingh Medical Collage and Hospital for autopsy through constable No.1015 Mirza Fazlul Hoque and obtained post mortem report of the deceased. Whereafter the informant lodged the FIR with Kotwali Police Station dated 30.03.2015 thereby Kotwali Police Station Case No. 80(3)2015 was started. Upon lodgment of an FIR, the officer in-charge of

Kotwali Police Station filled up the FIR column and entrusted one Sub-Inspector Atiqur Rahman for holding investigation of the case. On being responsibility the investigation officer visited the place of occurrence and examined the witnesses under section 161 of the Code. After investigation the police finding prima facie case submitted charge-sheet being No. 763 dated on 14.09.2015 under section 9(2) of the Nari-O-Shishu Nirzatan Doman Ain 2000(as amended 2003) against the condemned prisoner Md. Saiful Islam.

(5) Ultimately the case was taken up for trial by the learned Judge, Mymensingh wherein the accused on dock is called upon to answer the charge levelled under section 9(2) of the Ain to which he pleaded not guilty and claimed to be tried.

(6) To bring home charge, the prosecution examined as many as 10 (ten) witnesses out of 12 (twelve) charge-sheet named witness.

(7) After closure of the evidence of prosecution the accused on dock was again examined under section 342 of the Code when the court drew incriminating evidences in his notice appearing against him and he further pleaded not guilty and reiterated his innocence but led no evidence in defence.

(8) The defence case as it transpires from the trend of cross-examination of the prosecution witnesses are that of innocence and false implication. It was further divulged in defence that the paramour (Mohiuddin Bachu) of victim's mother killed the deceased as she (deceased) saw them an unpleasant condition in absence of the informant from his house. The accused has been implicated by foisting a false case to save the paramour of his wife.

(9) After plenary trial the learned Judge by the impugned judgment and order of conviction and sentence convicted the prisoner as aforesaid holding.

(a) The prosecution has successfully proved the charge levelled against the condemned prisoner by producing corroborative evidence.

(b) The evidence against the appellant is consistent, uniform and clinching in nature.

(10) Feeling aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence, herein the condemned prisoner preferred the instant appeal.

(11) Mr. Mohammad Monirul Islam, the learned Deputy Attorney General assisted by Mr. Robiul Islam, Ms. Ayesha Flora, and Mr. Md. Jahir Ahmed the learned Assistant Attorney Generals appearing on behalf of the State supports the reference and opposes the appeal and submits drawing our attention through the First Information Report, impugned judgment, charge-sheet, evidence and material on record. He next submits that the witnesses categorically disclosed the material facts, manner of occurrence and the injuries

sustained by the victim which was inflicted by the accused. The entire episode was so brutal and the witnesses by their consistent, uniform and clinching evidence successfully proved the same with all material particulars. He further submits that the learned Judge discarded the plea of alibi, in view of the evidence on record and also the fact and circumstances of this case. He adds that the learned court below rightly discarded the age of minor of the appellant relying upon the ossification test report held by Mymensingh Medical College and Hospital. He lastly submits that the conviction and sentence of the condemned prisoner is based on the evidence on record and material particulars which calls for no interference by this court in appeal.

(12) In supports of his contention he refers a case of Abdul Quddus -Vs- The State, 43 DLR(AD)(1991) 234. Wherein your lordships observed as under:



**Section 45**

“Medical evidence is only corroborative in nature- Ocular evidence of the eye witness which substantially corroborates the major injuries on the person of the deceased must be accepted.”

(13) On the other hand Mr. Bibhuti Bhushan Sarker, the learned advocate appearing for the condemned prisoner has sought for impeachment of the impugned Judgment and order of conviction and sentence on the following grounds:

Firstly: The case is no eye witness because the incident of rape and murder took place in the dwelling hut of the informant and no inmates of the house was present in the dwelling hut except the deceased at the relevant time.

Secondly: The prosecution has completely failed to prove the manner of occurrence and material particulars of the case.

Thirdly: The Post Mortem report does not support the inquest report. The Post Mortem report does not

contain any injury mark on the body of the deceased except her private parts which is contradictory with the prosecution story.

Fourthly: The condemned prisoner was a minor boy which has been substantiated issuing a certificate by the Madrasha authority where he was a student, but the trial court did not take into consideration of the same rather came to a findings relying upon the Post Mortem report.

Fifthly: The prosecution could not establish the case against the condemned prisoner by producing impartial and disinterested witnesses of this case.

Sixthly: The condemned prisoner was not present in the place of occurrence rather he was attending his class in his Madrasha.

Seventhly: He has made an alternative submission to commute death sentence one to imprisonment for life of condemned prisoner.

(14) In support of his contention he refers a case of Shafiqul Islam –Vs- State reported in 73 DLR(AD)(2021) at page 189. Wherein your lordship held as under.

“Code of Criminal Procedure (v of 1898)

Section 164(3)

If the confessional statement of the appellant made under section 164 of the Code is considered in conjunction with other evidence on record then it cannot be said that his confessional statement is true and voluntary.”

(15) He further submits relying upon a decision Mahadeo -Vs- State of Maharashtra (2013)14 SCC at page 637.

“A. Penal Code, 1860- Ss.376 and 363-Kidnapping and rape-Age of prosecutrix/victim-Determination of Yardstick for –Certificates of age from schools or Local Authorities vis-a-vis medical evidence-Held, statutory provision in Juvenile Justice (Care and Protection of Children) Rules, 2007, R. 12(3) is also applicable to determine age of young prosecutrix/victim – Hence, it should be determined by matriculation or equivalent certificates or date of birth certificates from school

first attended or birth certificate by Corporation/Municipal authority or Panchayat and only in absence of such documents medical opinion can be sought for-Therefore, reliance placed upon school certificates to arrive at age of prosecutrix to be below 18 yrs was perfectly justified.”

(16) In order to appreciate their submissions and other materials on record all the points raised by the learned Advocate for both the parties are taken up together for the convenience of discussion and brevity. In addition, we have gone through the record and given our anxious consideration to their submissions.

(17) Let us now weigh and sift the evidence on record as adduced by the prosecution to prove the charge.

(18) PW.1 Siraj Miah deposed that he is the informant of the case. The deceased was his daughter. She had only  $6\frac{1}{2}$  (six and a half) years old at the time of occurrence. The condemned prisoner is his step brother. On 23.01.2015 at 4.00 in the morning he went out his

work place. His wife Morzina went to perform her Jumma prayer at Barera Mosque along with her another child named Jubair and his mother also went to her Job. On the date of occurrence his wife returned to his house and found her (deceased) dead body hanging from a bamboo beam of his dwelling hut. On her screaming neighbours rushed to the place of occurrence and brought the dead body down from the hanging position and neighbours started whispering the condemned prisoner raped and killed her. Thereafter local Chairman came to the place of occurrence and informed the police regarding the murder of the deceased. On receiving information about killing of the deceased police came to the place of occurrence and prepared a inquest report. He proved the inquest report and his signature thereon marked as Ext. 1 and 1/1 respectively. Then the police sent the dead body of her daughter for autopsy in Mymensingh Medical College and Hospital and took the accused Md. Saiful Islam into

custody. On getting the Post Mortem report he filed the case and therefore delay was caused in lodging the First Information Report. He proved the FIR and his signature thereon as marked Ext.2 and 2/1 respectively. The police seized wearing apparels of the daughter by preparing seizure list. He proved the seizure list and his signature thereon as marked Ext.3 and 3/1 respectively.

He identified the accused on dock.

(19) In cross-examination he stated that he lodged an First Information Report with Kotwali Police Station around two months and seven days after the date of incident.

(20) He denied a suggestion that the character of his wife was questionable, and that the paramour of his wife killed the deceased, as the deceased found his wife an unpleasant condition with her paramour. He further denied that his wife used to involve herself with nefarious activities in local area, and was deposing falsely against the condemned prisoner.

(21) P.W.2 Mohiuddin Bacchu stated in his deposition that the informant and the deceased was known to him. On 23.01.2015 at 4.00 P.M the incident took place at Guccho Gram inside the dwelling hut of Saleha Khatoon. He also the resident of Guccho Gram. On hearing hue and cry he rushed to the place of occurrence at that time an elite person named Asaduzzaman came to place of occurrence while the accused Md. Saiful Islam was watching T.V sitting inside of the hut. On interrogation he admitted his complicity with the rape and murder of the deceased Sumya Akhter. Thereafter the police on information came to the place of occurrence and prepared an inquest report and took his signature on it which has been marked as Ext. 1/2.

(22) In reply to cross-examination he stated that he is a businessman by profession. He denied a suggestion that the accused was handicapped person, and the mother of the informant asked him to visit her

house. He further denied the suggestion that he had illicit connection with the wife of Siraj, which was seen by the deceased and thereby he killed the deceased with help of the wife of Siraj.

(23) PW-3, Morzina Khatoon stated in her examination in Chief that the informant Siraj is her husband. The accused Md. Saiful Islam was her step brother in law (দেবর). The incident took place of her mother in law's house at Government Guccho Gram project. She returned from having Jumma prayer at Barara Mosque to her house and found the dead body of her daughter hanging from a bamboo beam of the said hut. On her screaming locals rushed to the place of occurrence and saw the incident of hanging dead body of the victim. At that time the accused was watching T.V in her dwelling hut.

(24) On interrogation he admitted his complicity with rape and killing of the victim. Thereafter on information police came to the place of occurrence and



prepared inquest report and took the dead body of the deceased. She identified the accused on dock.

(25) In cross-examination she admitted that the accused Md. Saiful Islam was a student of a madrasa. She denied a suggestion that the accused Md. Saiful Islam was mentally sick. She further denied that she is a questionable woman and killed the deceased by using her paramour on the date of occurrence. She was deposing falsely against the condemned prisoner.

(26) P.W-4 Dulal Miah stated that the incident took place at a Government Guccho Gram project. On 23.01.2015 at 5.00 P.M the incident took place in the house of the informant. After hearing the news of incident of murder Sumaiya came to place of occurrence while the accused was watching T.V in the said place of occurrence hut. On interrogation he admitted his involvement with rape and murder of the deceased. Thereafter the police came to place of occurrence and prepared an inquest report over the

cadaver and took her signature thereon marked as Ext. 1/3.

(27) In cross-examination he denied a suggestion that he did not tell to police about killing of deceased by the accused Md. Saiful Islam. He denied a suggestion that Morzina Khatoon is a woman of questionable character and the witness Morzina Khatoon killed the deceased with help of her paramour Mohiuddin Bacchu.

(28) P.W.-5 Abul Kashem stated that he was sitting in front of a tea stall nearby place of occurrence. After hearing hue and cry rushed to place of occurrence and found the dead body of the deceased Sumaiya Akhter. The accused in presence of him admitted his involvement with rape and murder of the deceased. He proved his signature on inquest report which has been marked and Ext.1/4 and seized some wearing apparels of the deceased and prepared a seizure list and his

signature on it marked as Ext. 3/2 and alampats as materials Ext. I and II respectively.

(29) In cross-examination he denied that the mother of the deceased and Saleha Khatun had strained relation for which the accused has been falsely implicated of this case.

(30) He denied a suggestion that the mother of the deceased is a woman of questionable character and she killed the deceased after managing her paramour.

(31) P.W-6 Md. Shahanor Rahman Sohag stated that he was sitting of a tea stall nearby place of occurrence. On hearing hue and cry he rushed to the place of occurrence and saw the dead body lying in the veranda of the place of occurrence but while the accused admitted his involvement with raping and killing of the deceased. He proved his signature on the inquest report marked as Ext. 1/5.

(32) He denied a suggestion that the deceased saw the nefarious activities of her mother with paramour

and thereby the deceased was killed by the paramour and his cohort.

(33) P.W-7 Doctor A.N.M Al-Mamun stated in his deposition that he was working at Mymensingh Medical College and Hospital in Forensic Medicine Department. He performed the post mortem examination on the cadaver of Sumaiya Akhter and found the injury mark “One (01) inch broad ligature mark which was transverse, continuous, below the level of the thyroid cartilage without any gap encircle the whole neck.”

মৃত্যুর কারণ সম্পর্কে নিম্নরূপ মতামত দিয়েছি

“Considering the autopsy findings and the police inquest report. I am of the opinion that the cause of death was due violent asphyxia resulted from strangulation by ligature followed by forceful sexual intercourse which was antemortem and Homicidal in nature.”

He proved the post mortem examination report and his signature thereon marked as Ext.4 and 4/1.

(34) He denied a suggestion that he did not perform his duty properly and he prepared the post mortem examination report without perusing the inquest report.

(35) P.W-8 Md. S.I Md. Atiqur Rahman stated that on 30.03.2015 he was working as S.I Kotwali Police Station Mymensingh. After lodging FIR, the officer in charge of the Kotwali assigned him as investigating officer. The signature of the officer in charge was known to him. He proved the FIR form and put his signature thereon marked as Ext. 5 and 5/1. On being entrusted to investigate the case he visited the place of occurrence and prepared a sketch map and index. He proved the Sketch map and index and his signature thereon marked as ext. 6 and 7 respectively and his signature thereon marked as ext. 6/1 and 7/1 respectively. One police officer seized wearing apparels

of the deceased by a G.D entry being on 1160 dated 23.01.2015. Whereupon a proceeding was started under section 54 of the Code finally it was ended by submitting a report. After lodgment of First Information Report he arrested the accused Md. Saiful Islam and produced him before the Magistrate for recording his confessional statement and he examined seven persons under section 161 of the Code. He prepared a Memo of evidence after perusal of material on record. On his transfer S.I Suman Talukder was further entrusted to hold the rest investigation of the case. He submitted charge-sheet with the permission of his higher authority C.S being No.763 dated 14.09.2015 under section 9(2) of the Nari-O-Shishu Nirjatan Ain 2000(as amended 2003) against the condemned prisoner. He identified the alamats which has been marked as material earlier.

(36) In cross-examination he admitted that the relative of the deceased did not make any complaint in between on 23.01.2015 to 30.03.2015. The accused was

arrested first under section 54 of the code and then he was discharged from the proceeding under section 54 of the Code.

(37) He denied a suggestion that the deceased was killed by the paramour of Morzina, at the instigation of mother of the deceased. He further denied a suggestion that he submitted charge-sheet without investigating the case properly and was deposing falsely being influenced by the informant and his men.

(38) P.W-9 Sabbir Yasin Ahsan Chowdhury stated that he was posted as Senior Judicial Magistrate in Chief Judicial Magistrate Court, Mymensingh. On 31.03.2015 the investigating officer produced the accused before him for recording his confessional statement. He recorded his confessional statement observing all legal formalities provided under section 164 and 364 of the Code. The confessional statement of accused Md. Saiful Islam is reproduced below:

“ আমার নাম মোঃ সাইফুল ইসলাম । পিতার নাম আব্দুল আজিজ, সাং-ঈশ্বর দিয়া, বেড়ী

বাধ সৎলগ্ন সরকারী গুচ্ছ গ্রাম, থানা - কোতায়ালী, জেলাঃ-ময়মনসিংহ। গত ২৩.০১.২০১৫ তারিখে বিকাল আনুমানিক ৪.০০ টায় আমার ভাতিজি সুমাইয়া আজার বাড়িতে একা ছিল। আমার ভাই সিরাজ। কাজের জন্য বাহিরে যায়। আমার ভাবি মর্জিনা তার ছোট ছেলে জুবায়েরকে নিয়ে বাড়েরা মসজিদে জুম্মার নামাজ পড়তে যায় ঘটনার সময় সুমাইয়া বাড়িতে একা ছিল। আমি বাড়ির অন্য ঘরে ছিলাম। সুমাইয়া যে ঘরে ছিল সে ঘরে যাই। তাকে জিজ্ঞেস করি তার মা কোথায় গেছে। সে বলে তার মা বাড়িতে নাই। তাকে বলি আমি তার সাথে গড়াগড়ি করব, সে যেন কাউকে না বলে। সে বলে, সে বলে দিবে। তবু আমি তাকে ধাক্কা দিয়ে বিছানায় ফেলি। তার সাথে বিছানায় গড়াগড়ি করি। সে চিৎকার করা শুরু করলে হাত দিয়ে নাক মুখ চেপে ধরি। আমি ভয় পাই যে, সে আমার ভাতিজি এবং সে তার বাবা কে বলে দিবে। আরো জোড়ে মুখ চেপে ধরি। সুমাইয়া তখন নড়াচড়া বন্ধ করে দেয়। বুকে কান লাগাই কিন্তু কোন শব্দ শুনতে না পেয়ে বুঝতে পারি সে মরে গেছে। ঘরেই আলনায় আমার ভাবি মর্জিনার ওড়না রাখা ছিল। সে ওড়না সুমাইয়ার গলায় পেচিয়ে ঘরের চালের বাঁশের ওড়না রাখা ছিল। সে ওড়না সুমাইয়ার গলায় পেচিয়ে ঘরের চালের বাঁশের সাথে লাশ ঝুলিয়ে দেই। আমি ঘর থেকে বের হয়ে অন্য ঘরে যেয়ে টেলিভিশন দেখা শুরু করি। মাগরিবের পর আমার মা সুমাইয়াকে খোঁজা শুরু করে। এমন সময় আমার ভাবি এসে ঘরে ঢুকে ঝুলানো অবস্থায় লাশ দেখতে পায়। কান্নাকাটি শুরু করলে লোকজন আসে এবং আমি একা বাড়িতে ছিলাম তার জন্য আমাকে মারপিট করে কিন্তু আমি ঘটনা স্বীকার করি



না। পরে আমাকে পুলিশে দেয়। এই আমার  
জবানবন্দি”।

(39) From plain reading of the confessional statement that the motive of killing of the deceased developed in the place of occurrence because the accused thought if she (deceased) would survive she would disclose the incident of rape to her parents for which he killed her brutally in the place of occurrence.

(40) He denied a suggestion that the accused reported to him that he was tortured by the police before producing him (Magistrate).

(41) In cross-examination he further stated that he did not ask the accused whether he was tortured or not. He further denied that he recorded his confessional statement as per information given by the police.

(42) P.W-10 S.I Suman Talukder stated that one S.I Atiqur Rahman was assigned to as investigating officer on his transfer. He took the responsibility to hold the rest investigation of the case. After receiving the responsibility of investigation of the case he visited

the place of occurrence and found the sketch-map and index are similar and the statement recorded are similar as prepared by the previous investigating officer and statement recorded under section 161 of the Code are found to be similar. Thereafter he submitted charge sheet against the accused Md. Saiful Islam under section 9(2) of the Nari-O-Shishu Nirjatan Doman Ain 2000 (As amended on 2003) charge sheet being no 763 dated 14.09.2015.

(43) He admitted in his cross-examination that the informant and his witnesses did not make any complaint against the accused about killing of deceased during investigation. He denied a suggestion that he did not investigate the case properly.

(44) These are all materials and evidence as adduced by the prosecution to prove the charge leveled.

(45) Now the question call for consideration how far the prosecution proved the charge leveled against the condemned prisoner.

(46) We have heard the submissions of the learned Advocates for both the parties and perused all relevant papers submitted with the record. All the points raised by the learned Advocate for both the parties are taken up together for the sake of convenience of discussion and brevity. The prosecution has examined in all 10 (ten) witnesses. First of all we have categorized the witnesses produced by the prosecution. P.W-1 is the father of the deceased, P.W-2 Mohiuddin Bacchu and also the neighbour of the informant, P.W-3 Morzina Khatun is the mother of the deceased, P.W-4 Dulal Miah is also the neighbour of informant, P.W-5 Abul Kashem is also neighbour of the informant, P.W-6 Shahanoor Rahman shohag is the resident of Guccho Gramm project, P.W-7 is the Post Mortem examination performing doctor, P.W-8 S.I Md. Atiqur Rahman is the first investigating officer, P.W-9 Sadbir Yasin Ahshan Chowdhury is the Senior Judicial Magistrate, Mymensingh, and also confessional

statement recording magistrate and P.W-10 S.I Suman Talukder is the second investigating officer. All the witnesses have been examined in court. Of them none claimed to be eye witness of the incident of murder. Admittedly, there is no eye witness of the case. P.W-1 stated in his deposition that he came to place of occurrence after hearing the news of death of her daughter and he saw the dead body of the deceased lying inside his dwelling hut. All the witnesses have stated in one voice that the victim was killed on 23.01.2015 in the dwelling hut of Saleha Khatoon, grandmother of the deceased. But FIR was lodged on 30.03.2015 with Kotwali Police Station Mymensingh. P.W-2, P.W-3, P.W-4, P.W-5 and P.W-6 have stated in their deposition that the condemned prisoner confessed before them as to how he killed the deceased after committing rape on 23.01.2015. On the date of occurrence Kotwali Police arrested him out of suspicion under section 54 of the Code. Then the accused was

released and the proceeding initiated under section 54 of the Code was ended by submitting a report. In spite of his extra Judicial confession as to rape and killing of the deceased the informant did not lodge the First Information Report with concerned Police Station because of his parents asked him to wait till submission of post Mortem examination report. It appears from plain reading of evidence on record that the condemned prisoner was none but the step paternal uncle of the deceased. As their relation was sacrosanct for which the informant was waiting for submission of postmortem examination report. The learned court below clearly observed that the extra Judicial confession was difficult to believe as the witnesses of the case did not bring the law into motion. After submission of post mortem examination report it was clear to the informant of the case. Thereafter the father of the deceased lodged an FIR with Kotwali Police Station in relation to rape and murder of the deceased. On the basis of the FIR the

Police arrested him further and produced him before the Magistrate for recording of his confessional statement under section 164 of the Code. Accordingly the confessional statement was recorded by the Magistrate. P.W-9 Sadbir Yeasir Ahashan Chowdhury, Senior Judicial Magistrate, under CJM, Mymensingh clearly stated in his deposition that he recorded his confessional statement observing all legal formalities on 21.08.2017, when he did not raise any objection that he was tortured by the police or anybody else. On 17.08.2015 the condemned prisoner filed an application seeking for retraction of his confessional statement wherein he stated that he was tortured by the police whereupon we have perused the evidence of P.W-9 and his application for retraction of confessional statement placing those side by side. It appears that the Magistrate being satisfied upon questioning the accused as provided in column 6 to the confessional statement and under section 164 of the Code. The accused made

confessional statement without any threat or coercion or torture. So the learned Magistrate being satisfied the memorandum was given in relation to its true and voluntariness of his confessional statement. On a careful consideration of the evidence of P.W.-9, wherein he stated that three hours time was given to the accused for reflection. So the Magistrate recorded the confessional statement of the accused. The condemned prisoner except giving suggestion to the Magistrate could not taint or dent of the confessional statement. P.W-9 stated further in his deposition that the confessional statement of the accused was true and voluntary.

Wherein we may refer a decision, State. . . . .  
Appellate -Vs- Babul Miah . . . . Respondent reported in  
63 DLR (AD)10. Wherein your lordship observed as  
under:

Confessional statement Voluntary:

Code of Criminal Procedure (V of 1898)

**Section: 164(3)**

“It is a mandatory requirement that after recording a confessional Statement the recording Magistrate is required to make a memorandum to the confession containing a clause to the effect that he had warned the accused that he was no bound to make a confession, that he makes a confession, it would be used against him, that the statement was true and voluntary, that it was recorded as perversion of the maker and that it was read over to the maker after his statement was recorded which was true and correct version and it contained a full and true account to the Statement made by the maker.”

**Section 164(2) Crpc**

“The out of recording confession is a very solemn act and in discharging his duties, the Magistrate must taken care to see that the requirements of Sub-section (2) of section 164 are fully Satisfied.”

**Section 164 (3)**

“The provisions of Sub-Section (3) of Section 164 is mandatory and therefore he is required to fill up Column-7 of the form for recording a brief statement of the Magistrate reason for believing that the statement was voluntarily made.”



(47) In the case on hand the learned Magistrate recorded confessional statement of accused Saiful thereafter the learned Magistrate gave a memorandum endorsing that he being satisfied questioning to accused the confessional statement was true and voluntary. So, the fact and the decision referred above is completely holding good with the fact and circumstances of the case.

(48) The evidence of the prosecution witnesses that they are not the eye witnesses of the incident of rape and murder of the victim. The condemned prisoner made extra Judicial confession to the prosecution witnesses that he killed the victim and then he hanged her body to simulates it as suicide, when we have to peruse the confessional statement of the accused. The confessional statement of the condemned prisoner is consisted with the extra judicial confession made to the witnesses P.W-2, P.W-3, P.W-4, P.W-5 and P.W-6 and we further peruse the inquest report ext.1 wherein there

was no injury mark found on the face and mouth of the deceased. As ext.1 is not congruent with the confessional statement. Because the inquest report (Ext-1) does not supports the confessional statement of the condemned prisoner. It appears from the record a Sub-Inspector of A.K.M Rezaul Karim of Kotwali Police Station under Mymensingh District prepared an inquest report over the dead body of the victim upon a G.D entry of Kotwali Police Station being No.1160 dated 23.01.2015, wherein the said Sub-Inspector of Police clearly mentioned that there was no external injury found on the body of the deceased except a black spot around the neck of the deceased.

(49) The condemned prisoner Md. Saiful Islam made a confessional statement wherein he clearly stated that he made physical relationship (ভিকটিম এর সহিত গড়াগড়ি করি) with victim Sumaiya Akhter. When she started shouting, he killed the victim (since deceased) by pressing her face and mouth. Then he hanged the

dead body of the deceased from a bamboo made beam roof of the dwelling hut of the place of occurrence simulating it as suicide. Thereafter, he was watching T.V. sitting inside of the said hut whereupon we have carefully perused the deposition of the P.W.9, who recorded the confessional statement of the condemned prisoner. P.W.9 Sadbir Yasir Ahasan Chowdhury, Judicial Magistrate of CJM court Mymensingh stated that the condemned accused was produced before him on 31.03.2015. It further appears that the condemned prisoner was arrested on 30.03.2015 by SI. Md. Atiqur Rahman of Kotwali Police Station under Mymensingh District. On a careful scrutiny of the evidence of P.W.9 Judicial Magistrate who stated that the condemned prisoner was produced before him on 31.03.2015. Thereafter he recorded the confessional statement of the condemned prisoner observing all legal formalities as envisaged under sections 164 and 364 of the Code. Over and above we have carefully scrutinized the

confessional statement recording form (ext.8, 8/1). Where column No.6 has given some terms and condition to be followed by the Magistrate before recording of confessional statement. Wherein the confessional statement recording Magistrate put some question as provided in the column No.06 to the form and section 164 of the Code. The Magistrate after questioning the confessing accused being satisfied given a Memorandum to the effect that the confessing accused without raising any objection voluntarily confessed his guilt connecting himself with the offence of murder. But the accused filed an application on 17.08.2015 for retraction of his confessional statement. Wherein he stated that he was not in the dwelling hut at the relevant time. Rather he stated that he was present in his Madrasha situated at Mymensingh. He further stated in her retraction petition that he under compulsion and threat of life he made confessional statement at the instruction of the investigating officer.

But the Magistrate who has given memorandum to his satisfaction that the confessing accused voluntarily made confessional statement and the learned Magistrate on questioning being satisfied given memorandum so the confessional statement was voluntarily made. Moreover it further appears from the confessional statement that the accused was given three hours time for reflection to think over the matter. In spite of that the condemned prisoner made confessional statement which was inculpatory in nature.

(50) It further appears from plain reading of the confessional statement made by the condemned prisoner, that he pressed the face and mouth of the victim Sumaiy Akhter. At one stage she became motionless. Thereafter he suspended her from a beam of the roof of dwelling hut simulating it to suicide which does not support the inquest report because the inquest report (ext.1) does not contain any injury mark on the face and mouth of the deceased. But post

Mortem examination report (Ext.4) wherein the doctor clearly opined that “considering the autopsy findings and the inquest report prepared by police. I am of the opinion that the cause of death was due violent asphyxia resulted from strangulation by ligature followed by forceful sexual intercourse which was antemortem and homicidal in nature”.

(51) It appears from plain reading of the Post Mortem report (Ext.4) that the cause of death has been mentioned as violent asphyxia resulted from strangulation. Which indicates that the death was caused pressing throat by using her hand or any other object as defined “strangulation” in the Jurisprudence and toxication written by Modi. If we consider the inquest report and post mortem report placing side by side that inquest report is not consistent with the Post Mortem report.

(52) At this juncture we find support from a case of Syed Nurul Azim Babar –vs-State reported at in

1BLC(AD) at page 161. Where in your Lordship observed as under:

**Section 3 and 45 of the Evidence Act (I of 1872)**

“If there is conflict between the inquest report and the Post Mortem report. The Post Mortem report and the evidence of the doctor must prevail upon the inquest report and the evidence of the investigating officer. The High Court Division and the learned Session Judge committed no illegality in convicting the petitioner relying upon the evidence of P.W.8 and this Post Mortem report.”

(53) In the above cited case there was conflict between the inquest report and the Post Mortem report in such a situation the Post Mortem report will prevail.

(54) In the case in hand the inquest report does not support the confessional statement of the accused but Post Mortem report supports the confessional statement of the accused. As the Post Mortem report is congruent with the confessional statement of the accused. So the confessional statement is true. Moreover the Magistrate being satisfied recorded his confessional statement by enabling the accused an

opportunity as provided under section 364 of the Code. So the confessional statement of the accused was true and voluntary.

(55) The postmortem report ext.4 wherein postmortem performing Doctor clearly mentioned the cause of death was due violent asphyxia. The confessional statement where the accused clearly mentioned that he killed the victim first pressed the mouth and nose of the victim by his hand. So the confessional statement was made in terms with the postmortem examination report the court observed that the confessional statement of the accused was consistent with the postmortem examination report. Therefore the confessional statement of the accused was true and voluntarily. In this regard a case may be cited in the following State -Vs- Abdul Kader @ Mobil Kader (Criminal) 67 DLR at page 6. Wherein your lordship observed as under:

“If the confessional statement is found true and voluntary, it can form



the basis for conviction even if retracted so far the maker is concerned but it cannot be used against co-accused.”

(56) The retraction of confessional statement which would not create any negative impact over the acceptance of the confessional statement if it is recorded treating it as true and voluntary. In this context we also refer a case reported The State -Vs- Fazu Kazi alias Kazi Fazlur Rahman and others 29 DLR (AD) page 271.

“It is to be observed that a conviction of the confessing accused based on a retracted confession even if uncorroborated is not illegal, if the Court believes that is voluntary and true.”

(57) The learned court below clearly observed that the confessional statement was true and voluntary. So the retraction of the confessional statement has got no negative impact upon the confessional statement.

(58) Now we come to next point the accused was minor at the time of trial. Whereupon ossification test was held for determining his age, but the radiologist was not examined in court. As the ossification test report is the expert opinion as such it can be taken into consideration under section 510 of the Code. The radiologist specifically mentioned his age was 19 to 20 and the accused was examined on 13.03.2016. So the age of the accused was 18 to 19 at the time of commission of offence. In this juncture, submitted by the learned Advocate for the appellant that a certificate was issued by the Madrasha of the accused wherein it was mentioned that he was minor. But the certificate issuing authority was not examined in court.

(59) In support of his contention he refers a decision Mhahdeo –Vs- State of Maharashtra and another (2013) 14 Supreme Court Cases at page 637.

“A. Penal Code, 1860- Ss.376 and 363-Kidnapping and rape-Age of prosecutrix/victim-Determination of Yardstick for –Certificates of age from

schools or Local Authorities vis-a-vis medical evidence-Held, statutory provision in Juvenile Justice (Care and Protection of Children) Rules, 2007, R. 12(3) is also applicable to determine age of young prosecutrix/victim – Hence, it should be determined by matriculation or equivalent certificates or date of birth certificates from school first attended or birth certificate by Corporation/Municipal authority or Panchayat and only in absence of such documents medical opinion can be sought for-Therefore, reliance placed upon school certificates to arrive at age of prosecutrix to be below 18 years was perfectly justified.”

(60) The Madrasha authority did not issue the certificate according to Board Certificate or Madrasha Board authority. As per ossification test the age was above 18 years of the accused at the time of trial of the case. So, the accused was minor at the time of trial of the case, which has fallen through in view of the ossification test of the accused.

(61) The next point to be considered that the prosecution has completely failed to prove the manner of occurrence of the murder of the deceased. The death

of occurrence was taken place on 23.01.2015, and found the dead body of the victim inside of dwelling hut, which has been clearly mentioned by the P.W-2, P.W-3, P.W-4, P.W-5 and P.W-6 even it appears from the inquest report (Ext.1). The dead body was recovered from the dwelling hut of the informant and the accused was arrested on 23.01.2015 from the place of occurrence and P.Ws-2, 3, 4, 5 and 6 clearly stated in their deposition that the accused confessed before them that he killed the victim which we find supports from the postmortem report. The accused clearly stated in his confessional statement that he raped the victim first. When the victim started shouting and therefore he killed her brutally. As per confessional statement he was staying at the relevant time with deceased at the dwelling hut in the place of occurrence. Thereafter he forcefully raped and killed her and he was arrested from the place of occurrence out of suspicion. As he was arrested by the police on 23.01.2015 from the place of

occurrence so he is to explain as to how the victim had met with death. But the defence has not offered any plausible explanation how the victim had met with death while the victim was along with him in the place of occurrence.

(62) The defence further raised that the accused was not present in the place of occurrence rather he was available in Madrasha in the relevant time. In support of his contention no oral or documentary evidence was produced before the trial court. It is admitted in adversarial system of trial the defence has a burden to establish the defence plea by discarding the evidence of prosecution witnesses. Mere suggestion is not sufficient to discard the evidence of the prosecution witnesses the postmortem report ext.4. Wherein P.W-7 stated vaginal wall posterior found lacerated. It is admitted the victim is a very minor girl of only  $6\frac{1}{2}$  (six and a half) years old. So the nefarious act was committed by the accused upon the deceased before killing her which was

abominable in nature. We further peruse the postmortem report ext.4. Wherein the postmortem performing doctor clearly stated that “Blood clots found around the vagina canal”. As per postmortem report, blood was emitted from the private parts of the victim thereafter it turned into clotting. It further appears from the confessional statement that he committed rape on the person of the victim at 4.00 P.M and inquest report was prepared on 23.01.2015 at 22.30 P.M ext.1. So, it is very quite event to turn into clotting the blood. The witness of prosecution was not just next door neighbour, but public witnesses used to live in the Gguccho Gram project. The condemned prisoner has given a suggestion that the mother of the victim had illicit relation with P.W-2 Mohiuddin Bacchu. Who also lives in the Guccho Gram project. But his wife did not raise any complaint before any lawful authority. The husband of P.W-3 has not made any sorts of suspect in relation to the character of the P.W-3. As the

witnesses of prosecution that are all resident surrounding the place of occurrence. So the P.Ws are very natural witness and their evidence cannot be disbelieved. The condemned prisoner could not corrode the evidence of the prosecution witnesses by establishing his defence case. The sole duty of the prosecution is to prove its case beyond reasonable doubt against the accused. Even the prosecution will not get any benefit from the weakness of the defence case. In this context a decision cited by the learned Advocate. In the case in hand the prosecutions have been able to prove the charge beyond reasonable doubt.

Weakness of the defence

The Prosecution will not get any benefit

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. . . . . Appellant.

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“Manu/SC/0111/1984: (1984) 4.S. CC 166 has held that, the prosecution must stander fall on its own legs and it cannot derive any strength from the weakness of the defence.”

(63) The facts cited decision is not applicable with the fact and circumstances of the case because the prosecutions have been proved the case by giving cogent and clinching evidence beyond reasonable doubt.

(64) In the case in hand the prosecution has examined 8(eight) public witness of them none was the eye witness of the incident. They established the circumstances by giving cogent, reliable and clinching evidence against the accused which supports the post mortem report and the confessional statement also supports the post mortem report. It further appears from a careful scrutiny of the impugned judgment. Wherein the trial court came to specific findings that the victim was so little for which it was not possible to commit suicide herself. The condemned prisoner has not taken any such type of defence. So the prosecution has established the case by producing material particulars and the evidence of the prosecution witnesses are



consistent with each other. We have further minutely perused the post mortem examination report of the victim was raped before committing murder. The learned court below came to a specific finding that the victim started shouting at the primary stage of rape for which profuse bleeding was not emitting from the private parts of the victim but post mortem report supports rape committed on the persons of the victim. The prosecution has completely proved the charge leveled against the condemned prisoner beyond reasonable doubt. The learned advocate for the condemned prisoner submits the case may send remand setting aside the judgment, on the ground that the trial court has completely failed to realize that the accused was minor at the time of trial. Which has fallen through completely in view of the ossification test of the condemned-prisoner. So the submission led by the learned advocate for the condemned prisoner has got no substance to rely on. Furthermore the decision

Mahahdeo-vs-State of Maharashtra another (2013) Supreme Court (supra) cited by the learned advocate for the condemned prisoner has got no manner of application with the fact and circumstances of the instant case.

(65) In a careful consideration of the fact and circumstances of the case the condemned prisoner was only 18/19 years old boy at the time of commission of crime. On the other hand the victim deceased was only  $6\frac{1}{2}$  (six and a half) years old impeccable minor girl. The condemned prisoner committed the offence on the person of the victim without considering her age and his relation. But the condemned prisoner jumped upon her out of his Madness of youth. The condemned prisoner showed beastly attitude upon the victim only to fulfill his carnal desire. The learned court below was justified in convicting the accused and sentencing under section 9(2) of the Nari-O-Shishu Nirjatan Doman Ain 2000 (as amended 2003) and awarded death sentence of

the condemned prisoner. But it appears from the record the condemned prisoner is the first time offender and he is a very young boy, and he has been in condemned cell since the pronouncement of Judgment in the year 2017 for which justice would be best served if his death sentence is commuted one to imprisonment for life and also to fine of Tk. 100000/- (one lakh). In this context we may rely on a decision Nalu –Vs-State 17 BLC (AD)(2012) at page 204.

Code of Criminal Procedure (v of  
1898)

Section 376

“Conviction under section 302 of the Code was rightly imposed upon the condemned prisoner. Considering the mitigating circumstances, commute the sentence of the death to one of imprisonment for life.

Mitigating circumstances- However, on the facts and in the circumstances of the case, the mitigating circumstances are:-

- (a) The condemned-prisoner has no significant history of prior criminal activity.

- (b) Youth of the condemned-prisoner at the time of commission of the offence.
- (c) Record reveals that the condemned prisoner would not be likely to commit acts of violence if released.
- (d) Confinement of the condemned –prisoner in the condemn cell for more than 7 years during which period the sword of death has been hanging on his head.”

(66) Considering the fact and circumstances of this case and the discussion made above and citation referred to above by both the parties. We are of the view that the impugned judgment and order of conviction and sentence of the condemned prisoner does not suffer from legal infirmities which call for interference by this court on appeal. The judgment and order of conviction and sentence dated 05.11.2017 passed by the learned Nari-O-Shishu Nirjatan Doman Tribunal, Mymensingh is hereby maintained. Thus the death reference and the appeals having no merit, fail.

**(67) In the result:-**

- (a) The Death reference No.148 of 2017 is rejected with modification of sentence one to imprisonment for life with fine of Tk.1,00,000/- (one lakh). The Jail authority is directed to shift the condemned prisoner from condemned cell to normal cell at once.
- (b) The Criminal Appeal No.12872 of 2012 and the Jail Appeal No.464 of 2017 are dismissed with modification of sentence.

(68) The appellant will get the benefit of section 35A of the Code undergone in calculating the sentence already been served in connection of this case.

(69) The Office is directed to send down the lower court records along with a copy of the Judgment communicate at once.

**(Justice K.M. Emrul Kayesh)**

**Syed Md. Ziaul Karim, J:**

I agree.