

Present:

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

Death Reference No.161 of 2016.

The State

..... Petitioner

-Versus-

Sujan @ Bagha Sujan @ Tiger
(absconding) and others.

..... Condemned-Convicts.

With

Criminal Appeal No.4869 of 2022.

(arising out of Jail Appeal No. 147 of 2018)

Arshad

.....appellant.

-Versus-

The State

..... respondent.

Mr. Harunur Rashid, D.A.G with
Mr. Zahid Ahammad (Hero) A.A.G with
Mr. Md. Altaf Hossen Amani, A.A.G with
Mr. Mohammad Humayun Kabir, A.A.G
..... for the State.

(In the reference and respondent of the appeal)

Mr. Fazlul Huq Khan Farid with

Mr. Mohammad Abul Hasnat with

Mr. Sheikh Md. Shamsuzzaman, Advocates
..... for the appellant.

Mr. S.M. Shafiqul Islam, Advocate appointed
as State Defence Lawyer.

..... For the Condemned-Convicts.

Heard on: 05.09.2022, 07.09.2022, 12.09.2022

and Judgment on: 20.09.2022.

S.M. Emdadul Hoque, J:

This Death Reference has been made by the learned Additional Sessions Judge, Narsingdi under Section 374 of the Code of Criminal Procedure for confirmation of the sentence of death of the condemned-convicts namely, (1) Sujan @ Bagha Sujan @ Tiger (absconding) (2) Shohag @ Shohag Chandra Das (absconding) (3) Saddam (absconding) (4) Samir @ Samir Chandra Das (absconding) (5) Bimal (absconding) and (6) condemned-prisoner Arshad sentence awarded upon them under Sections 302 of the Penal Code by its judgment and order of conviction and sentence dated 29.11.2016 in Sessions Case No.261 of 2012 arising out of Narshingdi Police Station Case No.01 dated 01.09.2008 corresponding to G.R No.606 of 2008, the learned Additional Sessions Judge also sentenced them to pay a fine of Tk.10,000/- (ten thousand) each, the learned Judge also convicted them under Section 201 of the Penal Code and sentenced them to suffer rigorous imprisonment for 03 (three) years more.

The prosecution case as made out by the P.W-1 the informant and the father of the deceased Md. Ayub contending *inter-alia* that his son deceased Ayub was a worker of an Ice Mill of one Md. Kabir situated at Muslim Uddin Supper Market wherein accused Sujon @ Tiger was also a work in the said Ice Mill. The further case is that the owner of the Ice Mill appointed the deceased Md. Ayub instead of Sujon for that reason accused Sujon @ Tiger decided to take great harm and as such made a good relationship with him. That on 29.08.2008, at about 03:00 P.M Sujon phoned to his son Md. Ayub again and again and then informant asked his son that who called him in reply he stated that accused Sujon called him and accordingly at about 05:00 P.M he went out from his house but did not return back within 10:00 P.M. Then they searching the victim in several places and phoned him through Mobile number but which was found switched off. Thereafter, they also searched him in several places of his relatives but could not find him. On 01.09.2008 they got information that a beheaded dead body was floating in River Meghna, near the house of Joyal Mollah of village Damer Bawa accordingly the informant and their relatives rushed to

the said place at about 12:00 P.M and getting information Police came to the place of occurrence and held the inquest of the dead body and the informant could identify the said dead body seeing left finger ring and also a black spot in the middle finger which was caused on pressure when he operated the machine. Thereafter, the Police sent the dead body to the morgue for autopsy and he lodge the ejahar. Hence the case.

The case was initially investigated by S.I Omar Faraque of Narsingdi Sadar Police Station who held the inquest, sent the dead body to the morgue for autopsy, prepared the sketch map along with separate index, examined the witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure. He arrested accused Sujan @ Bagha Sujan @ Tiger, Shohag @ Shohag Chandra Das, Bimol, Arshad and Saddam and taken them remand and thereaftr brought them before the Magistrate for recording their confessional statement.

Thereafter the case was further investigated by Sub-Inspector Abdul Baset, of the Narsingdi Sadar Police Station.

But subsequently through Memo No.4834 dated 19.10.2008 Sub-Inspector SI Rafiqueel Islam of DB was entrusted to investigate the case. He again taken the accused Arshad and Saddam for three days remand and then accused Saddam made confessional statement and after completing all the formalities of the investigation he found *prima-facie* case against the six accused persons and accordingly submitted the charge-sheet being No.513 dated 20.11.2008 under Section 302/201/34 of the Penal Code.

Against the said charge-sheet the informant filed naraji application and which was allowed and the case was gain investigated by S.I Imam Hossain of CID. Who after completing all the formalities of investigation also found *prima-facie* case against the accused persons and submitted supplementary charge-sheet being No.351 dated 03.08.2010.

Against the said supplementary charge-sheet the informant again filed a naraji petition and which was allowed and the case was investigated by ASP of CID, Narshingdi. During the investigation he seized the silver Ring which was recovered from the dead body by the 1st investigating Officer and which

was preserved in the Narshingdi Sadar Police Station and prepared the seizure-list but could not find out the identity of the boatman in whose boat the victim was killed who after completing all the formalities of the investigation found *prima-facie* case against the accused persons and accordingly submitted supplementary charge-sheet being No.32 dated 17.01.2012.

The case record was transmitted to the learned Additional Sessions Judge, Narshingdi for trial who framed charge against the accused persons under Section 302/201/34 of the Penal Code on 13.09.2012 which was read over to the accused persons who were on the dock which they pleaded not guilty and claimed to be tried. But the charge could not be read out to the accused Bimol since absconding.

At the trial the prosecution examined as many as 09 (nine) witnesses among the 22 (twenty two) charge-sheeted witnesses and they were duly cross examined by the accused persons. But the defence adduced none.

After close of the prosecution witnesses the accused persons were examined under Section 342 of the Code of Criminal Procedure which was read over to them to which they claimed their innocence again.

The defence case as could be gathered from the trend of cross-examination of the prosecution witnesses and the examination under Section 342 of the Code of Criminal Procedure is total denial of the prosecution case. Further, case is that the confessional statement collected by the Inspector of DB by torture, intimidation and coercion and which were not true and voluntary. The accused persons had no involvement in the alleged offence.

After conclusion of the trial the trial Court considering the evidence on record found the accused persons guilty of the charge leveled against them and convicted them as aforesaid by its judgment and order of conviction and sentence dated 30.11.2016 and thereafter made this reference under Section 374 of the Code of Criminal Procedure and sent the record to this Court.

In this case the condemned-convict Bimol is all along absconding. The five accused persons were arrested and among them except Arshad the four other accused persons made confessional statement under Section 164 of the Code of Criminal Procedure but subsequently the condemned-convicts Sujan @ Bagha Sujan @ Tiger, Sohag @ Sohag Chandra Das, and Saddam retracted their confessional statement and forwarded the same to the Court through Jail authority. Accused Sujan and Sohag retracted their confessional statement immediately after their confessional statement but Saddam retracted his confessional statement long after two years of his confession. But the condemned-prisoner Samir @ Samir Chandra Das did not retract his confessional statement.

The five accused were arrested and subsequently they obtained bail and also faced the trial but before the pronouncement of judgment they were absconded. But subsequently the condemned-prisoner Arshad surrendered before the Court and filed Jail Appeal No.147 of 2018 and thereafter which was converted as regular Criminal Appeal No.4869 of 2022.

The Criminal Appeal No.4869 of 2022 preferred by condemned-prisoner heard together with the Death Reference No.161 of 2016 and disposed of by this single judgment.

Mr. Zahid Ahammad (Hero), the learned Assistant Attorney General takes us through the FIR, the charge-sheet, along with the supplementary charge-sheet, the charge, inquest report, postmortem report, the deposition of the witnesses, the 342 examination, the impugned judgment and the papers and documents as available on the record and stated the facts as disclosed by the prosecution as well as by the defence.

Mr. Harunur Rashid, the learned Deputy Attorney General appearing on behalf of the State in support of the reference submits that no dispute regarding the date, time and place of occurrence. He further submits that the deceased Md. Ayub a tendered age boy was killed in such a heinous way that the accused-persons beheaded him and threw the dead body as well as the head and other incriminating materials into the River Meghna and it could not be collected but fortunately the dead body was subsequently floating at River Meghna. He further submits that though without the head it could be difficult to

identify the dead body but from the very beginning the informant the father of the deceased Md. Ayub could identify the dead body showing the Ring present in the left Ring finger as well as by a black spot present in the middle finger since which was caused on pressure of the machine when he worked in the Ice Mill and the said Ring was subsequently seized by the investigating officer and the seizure-list was proved by the witnesses in such a case it can safely be said that which was the dead body of the deceased Ayub.

He further submits that though the earlier investigation officer inadvertently did not prepare the seizure-list of the recovered Ring from the dead body but subsequently the informant filed a naraji application and the said ring was seized by the subsequent Investigation officer since which was preserved in the thana hefajat from the date of recovery of the dead body and no case that the said Ring was not the Ring of deceased Ayub and as such the prosecution succeed to prove the identification of the dead body beyond reasonable doubt.

He further submits that admittedly no eye witness in the instant case and the case solely based on the circumstantial

evidence and the informant from very beginning suspected the two accused persons mentioning their name in the first information report that the victim may be killed by them with the help of 3/4 other accused and which was also corroborated by the P.W-2, 3 and 4. The Deputy Attorney General submits that the informant stated that since apart from Sujon the victim Ayub was appointed as worker of the Ice Mills and since he lost his job and the deceased Ayub was substituted and for that reason he killed the victim. The learned Deputy Attorney General submits that the said statement though did not support by the P.W-2, 3 and 4 but father from the initial stage stated the same facts of the case so it could not be said that the father falsely implicated the said accused.

He further submits that four condemned-convicts voluntarily made confessional statement before the magistrate under Section 164 of the Code of Criminal Procedure and the recording magistrate P.W-5 and P.W-6 proved the said confessional statements. He submits that though the same were retracted by the accused Sujon, Sohag and Saddam but when it

is found that the confessional statement was true and voluntary then retraction has no manner for consideration.

The learned Deputy Attorney General submits that the two condemned-convicts Arshad and Bimol did not make confession but Bimol was all along absconding and since all other accused in their confession implicated them and no cross from them that those accused persons implicated them in this case due to enmity in such a case the accused Arshed and Bemol could not be escaped from the charge of murder. In support of his argument the learned Deputy Attorney General cited the decision of the case of *Shukur Ali (Md) and another Vs. State reported in 74 DLR (AD)-11*, the case of *Noor Mohammad alias Kalu alias Kalu Chor alias Kalo Dakat Vs. State reported in 74 DLR (AD)-170* and the case of *Khalil Mia Vs State reported in 4 BLC (AD)-223*. He submits that the prosecution succeed to prove the charge of murder beyond all reasonable doubt against all the accused. He prayed for acceptance of the death reference and for dismissal of the appeal.

On the contrary, Mr. A.K.M Fazlul Haque Khan (Farid), the learned Advocate along with Mohammad Abul Hasnat,

Advocate appearing on behalf of the appellant Arshad submits that the trial Court convicted the appellant without considering the evidence on record. He submits that the conviction can be based on consideration of the circumstantial evidence but the same should be such that there is no any other hypothesis but to guilt the accused. He further submits that the prosecution measurable failed to prove the charge level against the condemned-prisoner Arshad. He submits that the trial Court convicted the appellant only relying upon the confessional statement of the other co-accused without any substantial evidence, even none of the witness disclosed that he had any involvement of the incident and no incriminating evidence could bring against him in such a case the judgment of the trial Court purely on surmise and conjecture. He submits that the vital facts regarding the calling out of the deceased Ayub by the condemned-convict Sujana over telephone has not been proved. Furthermore, the informant specifically mentioned the Sim number of accused Sujana by which he phoned to the victim has not been proved since Police did not submit the call list as

evidence the very initiation for calling out of the deceased Ayub by accused Sujon has not been proved.

He further submits that no case that the accused persons and the victim were gathering in the alleged area as stated in the confessional statement of the convicts and no evidence that the victim was taken to the boat even the said boatman has not been identified in such circumstance of the facts it can be safely said that the prosecution measureable failed to prove the case of accompany of the condemned-prisoner and other accused with the victim at the relevant time and as such the impugned judgment is absolutely without any evidence.

He further submits that the motive of the case is that the victim Ayub was replaced by the accused Sujon as worker in the Ice Mill of P.W-2 and for that reason he killed the victim but the said motive of the case has not been proved since the P.W-2 the owner of the Ice Mill specifically stated that both the accused Sujon as well as victim Ayub were working in his Ice Mill and the same was also corroborated by P.W-3 and P.W-4 the two brothers of the deceased Ayub. He submits that if the prosecution made out the case of motive then the same ought

to have proved by the prosecution. He relied upon the decisions of the case of *The State Vs. Giasuddin and others* reported in 7 BLT (AD)-108 and the case of *State Vs. Sarowaruddin* reported in 5 BLC (HCD)-451.

The learned Advocate submits that in the instant case the conviction based solely on the confessional statements of the condemned-convicts but which were not true and voluntary. He further submits that on close reading of the confessional statement it is found that the accused persons were brought before the magistrate from Police remand and subsequently they retracted the same and vividly narrated the facts that why they constrained to make the confessional statements and submits that our Apex Court decided that when the accused was brought before the magistrate from Police remand then the said confessional statement cannot be said voluntary. He cited the decision of the case of *Sikha Rakshit Vs. Paritosh Rakshit and others* 70 DLR (AD)-1.

He further submits that on the basis of the confessional statement of some of the accused the non-confessing co-accused cannot be convicted without any substantive evidence.

He relying upon the decision of the case of State Vs. *Abdul kader @ Mobile kader and others reported in 67 DLR (AD)-6.*

Mr. Khan, further submits that no evidence against the appellant Arshad and he was convicted only on the basis of confessional statement of the co-accused without any substantive evidence.

He further submits that prosecution did not examine the vital witnesses specially the boatman and the wife of P.W-3 without any plausible explanation and in such a case an adverse presumption under Section 114(g) of the evidence Act should be drawn against the prosecution. He finally argued that the conviction of the appellant is nothing but a moral conviction and the same should not be sustained. He prayed for rejection of the death reference and allowing the appeal.

Mr. S.M. Shafiqul Islam, the learned state defence lawyer adopted the submission of the learned Advocate Mr. A.K.M Fazlul Haque Khan (Farid) and in addition he submits that the prosecution failed to prove the case by adducing sufficient evidence. He submits that admittedly the case is without any evidence except the confessional statement of the condemned-

convicts but which were not true and voluntary. He submits that the prosecution failed to prove that the condemned-convicts had any involvement to commit the offence by any reliable evidence. He submits that though in the instant case the condemned-convicts were absconding but on facts and circumstances of the case it cannot be said that they were fugitive since at the last stage two accused persons filed application for adjournment but which was not considered and after 342 examination and before the pronouncement of the judgment only two fixed date they were not present in the Court. In such circumstance of the facts it should not be considered that they were fugitive or absconding. In support he cited the decision of the case of *Alamgir Hossain Vs. The State* 22 BLC (AD)-155.

He submits that not a single iota of evidence in the instant case even the circumstantial evidence also not enough to implicate the condemned-convicts.

He further submits that the prosecution did not take step for DNA test to identify the dead body and thus some shorts of doubt in the instant case regarding the identification of the

dead body of deceased Ayub and since the identity of the dead body has not been proved by sufficient evidence in such a case the conviction cannot be sustained.

He further submits that the prosecution did not produce the Mobile tracking list regarding the calling out of the deceased from the house of his father as evidence which creates doubt about the calling out of the victim by the accused Sujon.

He submits that the prosecution failed to produce the vital witness the boatman in which and whose boat the accused persons and the victim were boarded and killing the victim by the accused is not proved even in the remote area all the boatmen are identified and they knew each other but none of the boatman was examined in the instant case.

He further submits that the confessional statements of the condemned-convicts were not true and voluntary specially the statements of Sujan, Saddam and Sohag since they went brought before the magistrate from Police remand and in retraction they narrating the situation that why they made the confessional statement in such a case the said confessional statements cannot be said true and voluntary and as such the

conviction based only relying upon the 164 statement cannot be sustained. He prayed for rejection of the death reference.

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

P.W-1 Md. Abdul Hakim Sarkar the informant and the father of the deceased Ayub deposed that on 29.08.2008 from 05:P.M his son deceased Md. Ayub was missing. He went out from his house at 05:00 P.M and subsequently he came to know that a beheaded dead body was found in the River Meghna nearby the house of Joynal of Damer vowla village. He further deposed that before four months of the occurrence his son appointed as a worker of the Ice Mill of Kabir Ahmed P.W-2 and before his joining Sujan was an employee for this reason Sujan made a plot to kill his son and also maintained a good relationship with him and they often travelled on the Meghna River by boat. He deposed that on 29.08.2008 about 3:00 P.M accused Sujan called the victim on his Mobile Sim number 01923775234 and on his asking he disclosed that Sunaj called him to go to somewhere and accordingly he went out from the house at about 05:00 P.M but did not return back within 10:00

P.M and thereafter he found the mobile was switched off and then searching in several places but in vain. He deposed that subsequently on 01.09.2008 at about 12:00 P.M he came know that a beheaded dead body was floating in the River Meghna and accordingly he went there and saw the beheaded dead body with ill smelling and could identify the dead body seeing the black spot on the middle finger which was caused by the pressure of the machine and also a Ring present in the left ring finger of the deceased Ayub. He suspected the accused Sujan @ Bagha Sujan @ Tiger and Sohag @ Sohag Chandra Das and 4/5 other accused that maybe they killed his son. Then he informed the matter to the Police and Police came to the place of occurrence, prepared the inquest report and sent the dead body to the morgue for autopsy. He proved the inquest report and his signature as exhibit-1 and 1/1. He deposed that he went to thana at night and lodged the written ejaher. He proved the said FIR and his signatures as exhibit Nos.2, 2/1 and 2/2. He further deposed that on 04.03.2010 at about 11:00 A.M the 1st investigating officer produced the said ring to the CID Police officer who prepared the seizure-list. He identified the said Ring.

He proved the seizure-list as exhibit-3 and his signature as exhibit 3/1.

In cross-examination of all accused he stated that he did not lodge the ejahar mentioning the name of the accused but suspected some of the accused and he did not see the murder of his son. He denied the suggestion that his son was not appointed as worker substituting the accused Sujjan in the said ICE Mill and lodged the false ejahar. He denied the suggestion that on his instigation the investigating officer collected the 164 statement of the convicts on pressure and intimidation.

P.W-2 Kabir Ahmed the owner of the Ice Mill deposed that on 1st September at about 12:00 P.M. he received information that a dead body was floating in the Meghna River near the Damer village. He deposed that both the deceased Ayub and accused Taiger were the employees in his Ice Mill and on the alleged date he invited both of them to join the celebration of his son but they did not join in the said celebration and he phoned to the accused Taiger but which was found switched off. Subsequently when he went to the market on reply to his question accused Taiger told that since Ayub did

not join to the celebration as such he also did not join the said programme and on the next day the father of Ayub came to his shop and disclosed that Ayub did not return back to the house on the previous night. He deposed that the accused Taiger was staying in the said Ice Mill on the said night and on 01.09.2008 while he went to the market then Sohag and Taiger went along with him and then Alamgir phoned to him and disclosed that a dead body was found then he along with other went to the said place of occurrence and saw the dead body and the informant reached there before his arrival and he could identify the dead body. The Police sent the dead body to the morgue for post-mortem and after two or three days of the occurrence the accused were arrested and he came to know that subsequently they made confessional statement and the father and brother of deceased suspected the accused-persons.

In cross-examination of accused Sujan and Sohag this witness admitted that both the accused Sujan and victim were the employees in his Ice Mill and Tiger was staying in the Ice Mill at night. In cross-examination he further stated that he asked accused Tiger that why he did not join in the celebration then he

replying that since Ayub and Alamgir went to the village so they could not join in the said programme and after the incident accused Tiger was always along with him and no conflict between Ayub and Tiger and they did not raise any objection against each other and they often used to go boating in Meghna River. He denied the suggestion that they did not suspect the accused Tiger and wrongly suspected the accused Sujon since younger brother of victim was work in his Mills and deposed falsely.

P.W-3 Md. Alamgir Hossain, the brother of the deceased Ayub deposed that he used to live in a separate house and on the next day morning his father and mother told him that Ayub did not return back to the house and they searched for him in various places but could not find and on 01.09.2008 they came to know that a dead body was floating in the River Meghna near the Damer Bawa village and they went there and could identify the dead body to see the block spot in the finger of deceased Ayub which was caused by the pressure of the machine of the Ice Mill and accused Tiger working together with his brother. He deposed that on his asking accused Tiger replied that he did not

know nothing and he also gave them Tk.50 to take meal and when he asked them whether they took lunch than their appearance to the effect: দুপুর বেলা ভাত খাওয়ার কথা জিজ্ঞাসা করলে তখন তারা অবাক হ-য় আমার মু-খর দি-ক তাকি-য় থা-ক । He also deposed that “তারা সারা দিন মদ খে-য় প-ড় থাকত। অস্বাভাবিক আচার আচার-ন আসামী-দর প্রতি আমার স-ন্দহ হয়” । He deposed that the inquest report was prepared in his presence and he proved his signature present in the inquest report as exhibit-1/2.

In cross-examination of the defence this witness stated that he along with his brother were working in the Ice Mill but subsequently he did not work in the said Mill and his brother was replaced of him. When his father lodged the ejahar his friend Kokil was also present there and he wrote the ejahar. He stated that accused Tiger used to live in the said Ice Mill till the case was started and denied the suggestion that the accused did not kill his brother and he deposed falsely.

P.W-4 Md. Zahangir Alam, another brother of deceased Ayub deposed in the same manner as his brother P.W-3 stated and deposed that on 29.08.2008 the accused Sujon repeatedly phoned the victim to go to the house of their employer for

griming the celebration (-ছ-লর মুসলমানির দাওয়াত) of his son and then he went out from house but did not return back. Since Ayub did not come back they suspected the accused Tiger. He put his signature in the inquest report and proved his signature present in the inquest report as exhibit-1/3.

In cross-examination of the defence this witness stated that he was not present when the victim received phone call but his wife was present and she informed to him the said facts. He was not present when his father lodged the ejahar.

P.W-5 Mohammad Anwar Shadat, the Metropolitan Magistrate Dhaka deposed that on 13.10.2008 while he was functioning as judicial Magistrate, Narsingdi the accused Sujon @ Tiger brought before him for recording his confessional statement and he after observing all the formalities of law recorded his confessional statement. He proved the said confessional statement as exhibit-4 and his 10 signatures as exhibit-4 (1)-4(10) series.

He further deposed that on 14.10.2008 the investigating officer again brought the accused Sohag before him and he recorded his confessional statement after fulfillment of the

proceed under Section 164 of the Code of Criminal Procedure. He proved the said 164 statement as exhibit-5 and his 10 signatures marked as exhibit Nos.5 (1)-5(10) series.

He further deposed that on 26.10.2008 another accused Saddam was brought before him for recording his confessional statement and after fulfillment of all the formalities of Section 164 he recorded his confessional statement. He proved the said confessional statement marked as exhibit-6 and his 10 signatures marked as exhibit-6 (1)-6 (10) series.

In cross-examination of the defence he denied the suggestion that without complying the procedure of Section 164 and 364 of the Code of Criminal Procedure he recorded the confessional statement of three accused.

P.W-6 Meharunnesa, Chief Judicial Magistrate, Manikgonj deposed that on 20.05.2009 while she was the Senior Judicial Magistrate, Narsingdi at about 11:00 A.M S.I Imam Hossain brought the accused Samir Chandra Das to her chamber. She after fulfillment of all the procedure of law recorded the confessional statement of the said accused. She deposed that the accused was brought at about on 11:00 A.M and she

recorded his statement at 2:00 P.M and he was given three hours time for reflection and then the accused voluntarily made confession. She deposed that after observing all the formalities of the procedure of law she recorded the confessional statement of accused and the accused appeared healthy and of sound mind. She proved the said confessional statement as exhibit-7 and her nine signatures as exhibit-7 (1)-7 (9) series.

In cross-examination of the defence this witness denied the suggestion that she did not record the confessional statement of the accused following the provision of Section 164 and 364 of the Code of Criminal Procedure.

P.W-7 Md. Abdul Baset, Sub-Inspector of Police of Islampur Police Station deposed that on 01.09.2008 he was attached with the Narsingdi model Police Station and was entrusted to investigate the case due to transfer of the investigation officer S.I Faruq and he investigated the case only for a few days and thereafter handed over the case docket to the next investigation officer Rafiqul Islam.

P.W-8 Dr. Hasan Imam Chowdhury (retired) deposed that on 01.09.2008 while he was attached at Narsingdi Sadar

Hospital and on the identification of Constable No.730 Abdul Aased he held the autopsy of deceased Ayub Ali (18) and found the following injuries.

“Body is highly decomposed. Head is separated from the trunk. (2) Cut throat injury in front of the trcea causing separation of the head (3) Abrasion over the Lt knee.

On dissection: All the great Vessels of the neck is injured and Head is separated from the trunk.”

and made the following opinion: “death was due to shock and haemorrhage as a result of the above mentioned injury which was antemortem and homicidal in nature”.

He proved the post-mortem report marked as exhibit-8 and his signature marked as exhibit-8/1.

In cross-examination of all the accused he admitted that no head with the dead body and he did not conduct any DNA test. They conducted the post-mortem of the deceased Ayub on identified by constable. He denied the suggestion that without any D.N.A test it could not be identified the dead body of

deceased Ayub and he did not conduct the post-mortem properly following the procedure.

P.W-9 Sub-inspector Md. Imam Hossain of CID Brahmanbaria deposed that on 29.03.2009 he was entrusted to investigate the case and visited the place of occurrence and found the investigation made by the earlier investigation officer regarding sketch map and place of occurrence were similar thus he did not again prepare the same. He tried to seize the alamats. But could not possible to seize alamats. He deposed that on 04.03.2010 at about 11:00 A.M on his request the earlier investigation officer S.I Farque Ahmed brought a silver colour Ring of the left Ring finger which was found at the time of holding inquest of the deceased Ayub and accordingly in presence of the informant and the witnesses he seized the same for preparing the seizure-list. He examined the informant and some witnesses and recoded their statements under Section 161 of the Code of Criminal Procedure. Subsequently he succeed to arrest the absconding accused Samir @ Samir Chandra Das (27) and brought him before the magistrate for recording his confessional statement. He further deposed that

he tried to collect the CDR of Mobile phone of the victim. He took remand the arrested accused Sujjan, Sohan, Arshad, Saddam 2nd time and on interrogation they admitted that they killed the victim.

He after completing all the formalities of investigation found *prima-facie* case against the accused persons and submitted the charge-sheet being No.351 under Section 302/201/34 of the Penal Code. He proved the said charge-sheet marked as exhibit-9 and his signature marked as exhibit-9/1. He also proved the charge sheet No.32 under Section 302/201/34 prepared by the previous investigation officer S.I Faruque Ahmed. He knew his signature. He proved the sketch map and index prepared by said I.O marked as exhibit-10 and 11 the signature as exhibit-10/1 and exhibit-11/1 the inquest report and the signature of S.I Faraque marked as exhibit-1 and 1/4, the challan form as exhibit-12 and his signature marked as exhibit-12/1. He also proved the seizure-list made by him marked as exhibit-3 and his signature as exhibit-3/2.

In cross-examination of the defence this witnesses admitted that the earlier Investigation officer S.I Faraque

Ahmed inadvertently did not prepare the seizure list of the Ring which was recovered from the dead body and also admitted that this type of Ring is available in the local market. He denied the defence suggestion that the seized alampatti was not the finger Ring of the deceased Ayub and if the same was found then previous I.O would have seized the same and he purposely seized the said fake material. This witness admitted that he did not send any material for D.N.A test and he went to the place of occurrence only one day and none from the surrounding area of the place of occurrence was examined. He denied the suggestion that he did not go to the place of occurrence. He stated that he tried to identify the boatman but. He denied the defence suggestion that the incident was not happened in the Boat and as such the boatman could not be identified. He denied the suggestion that on his instigation the informant filed naraji petition and then he himself took the case for further investigation. He denied that after purchasing a Ring from the local market he tried to show the same as the Ring of the victim and the recovered dead body was not the dead body

of victim Ayub and thus on trying to prove the case he collected the alleged Ring after two years of the occurrence.

He denied the suggestion that on being tortured by him the accused persons constrained to make confessional statement. He denied the suggestion that he did not investigate the case properly and falsely submitted the supplementary charge-sheet being showing an abandoned dead body claiming the dead body of the victim Ayub and implicating the accused persons in this case on instigation of the informant.

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

We have heard the learned Deputy Attorney General and the learned Advocate of the appellants and the state defence lawyer, perused the impugned judgment, the FIR, the charge-sheet, the inquest report, the post-mortem report, the seizure-list, the deposition of the witnesses, the confessional statements and the papers and documents as available on the record.

The prosecution case as made out by P.W-1 that his son deceased Ayub age about 18 went out from his house on 29.08.2008 at about 05:00 P.M on receiving a phone call from accused Sujjan @ Tiger but did not return back home and accordingly they searching him in several places but in vain. On 01.09.2008 the informant got information that a dead body was floating in the River Meghna near the house of one Joynal Mollah of Damer Bawa village. They went there and a beheaded dead body was recovered from River and the informant and his son P.W-3 could identify the dead body of the deceased Ayub looking the Ring that was worn on the left finger of the deceased Ayub.

It appears that the said Ring though recorded but the earlier I.O did not prepare the seizure-list. It appears that subsequently after two years of the occurrence the said Ring was seized by the next I.O mentioning that the same was in the custody of thana and which was produced by the 1st I.O in presence of the informant and the witnesses and thus the subsequent I.O prepared the seizure-list of the said Ring.

The further case is that the P.W-1 and the P.W-3 could identify the beheaded dead body looking a block spot present in the middle finger and which was caused on pressure of the machine of the Ice Mill when the victim was working in the Ice Mill of P.W-2. Regarding the identification of the beheaded dead body only the above evidence in the record nothing more.

It also appears that none of the witness deposed that they saw the deceased Ayub along with the condemned-prisoners in the Ice Mill area or in the River ghat from where they boarded in a boat.

It also appears that though as per prosecution case the deceased was killed in a Boat while they were travelling in the River Meghna. But the said boat was not seized even the said Boatman also could not be identified.

Furthermore, the incriminating materials such as the wearing cloths, chapatti and other materials which were used for committing the murder also could not be recovered. The prosecution case is that the accused threw the incriminating materials which were used for killing the victim into the River Meghna thats why the same could not be found or recovered.

In the instant case, only the confessional statements of some of the condemned-convicts are the evidence for basing the conviction.

As per prosecution version the motive of killing was that accused Ayub got job in the Ice Mill of Kabir Ahmed (the P.W-2) in place of the condemned-prisoner Sujon and for that reason he killed the victim with the help of other accused.

P.W-1 the informant disclosed the aforesaid facts but owner of the said Mill the P.W-2 did not support the said facts even the P.W-3 the brother of the victim also stated that the victim and Sujon both were working together in the said Mill.

It is settled principle that when the prosecution made out a case of motive then the said case should be proved by the prosecution. This principle supported by the decision of the case of *The State Vs. Sarowaruddin reported in 5 BLC(HCD)-451*. Wherein their lordships held:

“We are aware that the prosecution is not obliged to prove the motive of killing in every case. But if

any motive is suggested, it is the duty of the prosecution to prove the same."

Considering the evidence on record and the facts and circumstances of the case it is our view that the motive as made out by the prosecution has not been proved by adducing sufficient evidence.

Admittedly in the instant case no witness to see the occurrence in such a case the prosecution case only should be based considering the circumstantial evidence. The informant stated that the victim was called by the accused Sujan who repeatedly phoned to the victim through Mobile and the informant specifically mentioned the sim number of accused Sujan but the Police did not submit the Mobile tracking list for evidence that the accused Sujan phoned to the victim when he went out from his house.

Furthermore, none of the witness deposed that they saw the accused were in the Ice Mill or nearby the said Mill along with victim before the occurrence or gathering in the River ghat and rented a boat for travelling in the Meghna River. It is found that the Boatman by whose boat they were travelling in the

river could not be identified even none from the said ghat was deposed that they saw accused persons rented a Boat for travelling in the River Meghna from the said ghat and no such incriminating materials placed as evidence in this case.

However, it is found that from the very initial stag the father of the victim Ayub the informant suspected the accused Sujan and Sohag that they can kill his son. But in support of the said suspicion the prosecution also could not able to produce any single evidence and mere suspicion is not enough to find the guilty of the accused.

Furthermore, it has already been considered that the facts that the victim was replaced in the Mill as work in place of accused Sujon as stated by the informed has not been supported by the owner of the Mill, the P.W-2 even the brother of the victim also did not support the said case.

Considering the above discussions it is clear that the prosecution failed to produce any evidence of involvement of the condemned-convicts for the killing of the deceased Ayub.

However, it appears that the accused Sujan, Sohag, Saddam and Samir Chandra made confessional statement under Section 164 of the Code of Criminal Procedure. From where, it is found that they have described the details about the killing of victim Ayub and also implicating themselves in the commission of offence. From their confession it is found that they also implicated another two none confessing accused namely, Bimol and Arshed.

Now we have considered the confessional statements of the condemned-convicts and also have examined whether the same were true and voluntary.

It appears that condemned-prisoner Sujan and Sohag were arrested immediately after the occurrence and they made confessional statement and from their confession the cause of murder had come to light.

Condemned-prisoner Sujan alias Tiger Sujon made confessional statement on 13.10.2008 but in the form the date of arrest was not mentioned. It is mentioned in the form that he was taken remand on 12.10.2008 and was brought before the magistrate on 13.10.2008. The magistrate P.W-5 proved the

said confessional statement of accused Sujan. We have perused the confessional statement and found that the magistrate the P.W-5, after observing the provision of law recorded his confessional statement and it is found that he disclosed his age as 15 years. The said accused retracted his confession and stated that he was arrested on 02.09.2008 and was in Police custody and after three days of his arrest the Police produce him to the Court and took him remand on 07.09.2008 and thereafter the Police again took him remand and he was taken into the D.B. office and the Police seriously tortured him and forcefully obtained the confession and brought him before the Magistrate on 13.10.2008. The said retraction application was forwarded to the Court by the jail authority on 29.10.2010.

The confessional statement of Sujan as under: "আমি সোহাগ এবং আইয়ুব বোয়াকুড় পাড়ার পাশে কবির সাহেবের বরফ কলে কাজ করতাম। আমি ও সোহাগ প্রতিদিন পাড়া থেকে পলি ব্যাগে ১০/১৫ পোটলা মদ এনে রাত্রে লাভ করে ১০০ টাকা করে বিক্রি করতাম। শূক্রবার পাড়া বন্ধ থাকে বলে আগের দিন ১০০ পোটলা মদ নিয়ে রাখতাম এবং শূক্রবার সেগুলো বিক্রি করতাম। আইয়ুব প্রত্যেকদিন এই মদ হইতে অনেকগুলো পোটলা চুরি করে নিয়ে নিজে খাইত এবং বিক্রি করত। তাকে অনেক নিষেধ করার পরও শূনে নাই, এ নিয়ে তার সাথে প্রায়ই ঝগড়া হত। পরে আমি, সোহাগ, বিমল,

সমীর, এরশাদ এবং সাদ্দাম মিলে ঠিক করি আইয়ুবকে ঝেরে ফেলব। আমরা সকলেই বৌয়াকুড় থাকি পরিকল্পনা অনুযায়ী ২৯/০৮/২০০৮ তারিখ শুক্রবার সন্ধ্যার আগে আইয়ুব-ক বৌয়াকুড় ব-স মদ খাওয়াই। সোহাগ নৌকা ভাড়া ক-র নি-য় আ-স। সন্ধ্যার পর আমরা বৌয়াকুড় ঘাট থে-ক নৌকায় উ-ঠ মেঘনা নদী দি-য় মরিচার দি-ক যাই। যাওয়ার প-থ আইয়ুব-ক আরও মদ ও গাঁজা খাওয়াই। এ-ত আইয়ুব মাতাল হ-য় যায়। তখন আমরা সবাই মি-ল আইয়ুব-বর গলায় রশি দি-য় পঁচ মারিয়া রশি টানিয়া এবং গলা চিপিয়া মে-র ফেলি। প-র সোহাগ ও এরশাদ চাপাতি দি-য় আইয়ুব-বর গলায় কোপাইয়া দেহ হ-ত মাথা আলাদা করিয়া ফে-ল। অতপর দেহ ও মাথা এবং রশি ও চাপাতি মরিচা মাঝ নদী-ত ফে-ল দেই। তখন রাত অনুমান ০৮.০০ টা বা-জ। রাত অনুমান ১০.০০ টার দি-ক আমরা ফি-র এ-স বৌয়াকুড় ঘ-ট নামি। আমি মাঝি-ক ৮০০ টাকা ভাড়া দেই। ঘটনার ৪/৫ দিন পর পুলিশ আমাকে বরফ কল হতে গ্রেফতার করে এরপর থেকে জেল হাজতে আছি। এই আমার জবানবন্দি।"

From where it is found that he stated the reasons that why he killed the victim and also stated the manner of killing of the victim. This confessional statement was subsequently retracted and on perusal of the form of confession and the retraction application some anomaly in the confession is found.

The retraction of accused Sujon as under:

“সবিনয়ে বিনীত নিবেদন এই, আমি সুজন মিয়া পিতা মোঃ জালাল উদ্দিন সাং-
 রামনাথপুর থানা-গৌরীপুর, জেলা-ময়মনসিংহ বর্তমান ঠিকানা বৌয়াকুড় হেলাল মিয়ার
 বাড়ীতে ভাড়াটিয়া হিসাবে আমার পিতা বসবাস করেন। আমার বয়স ১৭ হইবে। আমি
 বাংলাদেশ বরফ কল মোঃ কবির মিয়া, নরসিংদীতে চাকরী করিয়া দরিদ্র পিতার সংসারের
 জীবিকা নির্বাহ করিয়া থাকি। এই মর্মে প্রার্থনা করিতেছি যে, গত ২/৯/০৮ ইং তারিখে উক্ত
 বরফ কল কর্মস্থলে কর্মরত থাকাবস্থায় আমাকে পুলিশ গ্রেপ্তার করে এবং আমার সংবেল করে
 এবং আমার সংগে একই কাজে থাকা মোহাগকে একই সংগে গ্রেপ্তার করিয়া থানায় নিয়া
 মামলার খুনের ঘটনা জিজ্ঞাসা করতে থাকেন। এই এই সময়ে আমি অস্বীকার করায় দারোগা
 ফারুক সাহেব আমাকে মারপিট করে এবং পরদিন হুজুরাদালতে হাজির করিয়া রিমাল্ডে নেয়।
 ইহার পর ৩ দিন থানা হেফাজতে রাখিয়া অমানুষিক নির্যাতনের মাধ্যমে ব্যাপক
 জিজ্ঞাসাবাদ করিয়া ৭/৯/০৮ ইং তারিখে হুজুরাদালতে হাজির করিলে, সূত্রে বর্ণিত
 হাজতে আটক থাকি ।

উক্ত অবস্থার প্রেক্ষিতে বিগত ১৪/১০/০৮ ইং তারিখে ডি,বি পুলিশ কর্তৃক
 রিমাল্ডে নিয়া দারোগা রফিক সাহেব (ছেঁড়া) নির্যাতন করে এবং মামলার ঘটনা
 স্বীকার করার জন্য চাপ দিতে থাকেন। আমি অস্বীকার করায় কারেন্ট দিয়া সট
 দিতে থাকিলে অসহনীয় যন্ত্রনায় বাধ্য হইয়া তাহার কথায় রাজী হই। তখন তিনি যে
 কথাগুলি শিখাইয়া আমাকে মুখস্ত করান এবং আমি তাহার শিখানো কথাগুলি
 ভালভাবে মুখস্ত করা হইলে, তিনি হুজুরাদালতে হাজির করিলে, আমি জীবনের ভয়ে
 বাধ্য হইয়া তাহার শিখানো কথাগুলি স্বীকার করিয়া জবানবন্দী প্রদান করিয়াছি
 মূলতঃ আমি এই মামলার ঘটনায় কিছুই জানিনা এবং কোন ভাবেই জড়িত ও
 অবহিত নহি। আমি সম্পূর্ণ ভাবে ষড়যন্ত্রের শিকার হইয়া প্রদত্ত স্বীকারোক্তিমূলক

জবানবন্দী করায় তাহা দূততার সহিত অস্বীকার করি এবং একই সংগে তা প্রত্যাহারের নিমিত্তে হুজুরাদালতে প্রার্থনা করিতেছি।

অবস্থাস্থানে প্রার্থনা, হুজুরাদালত দয়া করিয়া বর্নিত কারনে প্রদত্ত স্বীকারোক্তি মূলক জবানবন্দী প্রত্যাহারের বিহীত ব্যবস্থা নিতে আজ্ঞা হয়।”

But on perusal of the confessional statement and the retraction and the deposition of the P.W-1,2, 3 and 5 it is our view that though the accused brought some allegation against the investigation officer and some anomaly is found in the form of statement, however the said confessional statement presumed to be true and voluntary. It is also found that the said confession was inculpatory in nature.

The confessional statement of Shoag as under: "আমি টাইগার এবং আইয়ুব বোয়াকুড় পাড়ার পাশে কবির ভাইয়ের বরফ কলে কাজ করতাম। টাইগার এবং আমি পাড়া থেকে মদ এনে বেশী দামে বিক্রি করতাম। শূক্রবার পাড়া বন্ধ থাকে বলে আগের দিন বেশী করে মদের পোটলা এনে রেখে দিতাম। আইয়ুব প্রত্যেকদিন এই মদ হতে অনেক গুলো পোটলা চুরি করে নিজে খাইত এবং বিক্রি করত। অনেক নিষেধ করার পরও সে শূনে নাই। এ নিয়ে মাঝে মধ্যেই আইয়ুবের সাথে ঝগড়া হত। টাইগার আমাদেরকে নিয়ে পরামর্শ করে যে আইয়ুবকে গেরে ফেলতে হবে। আমাদের সাথে বিমল, সমীর, এরশাদ এবং সাদাম ছিল। পরিকল্পনা অনুযায়ী ২৯/০৮/০৮ তারিখ শূক্রবার বোয়াকুড়ে বসে আইয়ুবকে প্রথমে মদ খাওয়ানো হয়। টাইগারের কথা মত আমি নৌকা ভাড়া করে নিয়ে আসি। সন্ধ্যার

পর আমরা বোয়াকুড় ঘাট থেকে লোকায় উঠে মেঘনা নদী দিয়ে মরিচার দিকে যাই। লোকায় মধ্যে আইয়ুবকে আরও মদ ও গাঁজা খাওয়ানো হয়। আইয়ুব মাতাল হয়ে গেলে আমরা সবাই মিলে তার গলায় রশি দিয়ে প্যাঁচ মেরে রশি টেনে এবং গলা চিপে মেরে ফেলি। পরে এরশাদ চাপাতি দিয়ে আইয়ুবের গলায় কোপাইয়া মাথা ও দেহ আলাদা করে নদীতে ফেলে দেয়। তখন রাত অনুমান ০৮.০০ টা বাজে। রাত ১০.০০টায় আমরা বোয়াকুড় ঘাটে ফিরে আসি। ঘটনার ৪/৫দিন পর পুলিশ বরফ কল হতে আমাকে এবং টাইগারকে গ্রেফতার করে। গ্রেফতার হওয়ার পর থেকে অদ্যাবধি জেল হাজতে আছি। এই আমার জবানবন্দী।"

From the confessional statement it is found that the date of arrested of accused Sohag was not mentioned in the statement. It appears that he was taken on Police remand on 12.10.2008 and produced before the magistrate on 14.10.2008. In his statement he also disclosed the facts that why they killed the victim and narrated the details about the murder and stated that: he was arrested after 4/5 day of the occurrence and since then he was in Police custody.

The said accused also retracted his confession and stated that he was arrested on 02.09.2008 from his work place along with accused Sujon and he was taken remand on 03.09.2008 and he was sent to jail hajat on 07.09.2007. He further stated that the Police again taken him on remand and narrated that due to

torture of the Police officer he was constrained to make the confessional statement to save his life.

The said retraction of Sohag as under:

“বিনীত নিবেদন এই, আমি শ্রী মোহাগ পিতা শীতল চন্দ্র দাস সাং-বোয়াকুড়, থানা+জেলা নরসিংদী । আমি বাংলাদেশ বরফ কল প্রাঃ কবির মিয়া নরসিংদীতে চাকরী করিয়া জীবিকা নির্বাহ করি। আমার বয়স ১৮ বৎসর হইবে। এই মর্মে প্রার্থনা করিতেছি যে, গত ২/৯/০৮ ইং তারিখ কর্মস্থলে কাজ করা অবস্থায় দুপুর অনুমান ১২.০০ টায় পুলিশ কর্তৃক গ্রেপ্তার হই এবং একই কাজে চাকুরীতে থাকা আমার সংগে সূজনকেও আমার সহিত গ্রেপ্তার করিয়া একই সংগে থানায় নিয়া ঐ দিন রাত অনুমান ১০.০০ টায় দারোগা ফারুক সাহেব আমাকে উক্ত মামলার খুনের ঘটনা জিজ্ঞাসা করে। আমি অস্বীকার করায় মারপিট করে এবং পর দিন গত ৩/৯/০৮ ইং তারিখ বিজ্ঞ আদালতে হাজির করিয়া ৩ দিনের রিমান্ড নেয় ইহার পর ঐ দিন রাত অনুমান ৮.০০ টায় আমার ২ হাত ও চোখ বাঁধিয়া উপর দিকে ঝুলায় এবং পায়ের তলায়, হাটুতে কোমড়ে কাঠের লাঠি দিয়া বেদম প্রহার শুরু করেন এবং বলেন, খুনের ঘটনা স্বীকার করিতে । এই সময় আমি অস্বীকার করায় ক্ষিপ্ত হইয়া নির্দয় ও নিষ্ঠুরভাবে মারপিট করে আহত অবস্থায় থানা হেফাজতে রাখেন। এমনিভাবে প্রতিদিন নির্যাতন করিয়া ব্যাপক জিজ্ঞাসা করিত । অতঃপর গত ৭/৯/০৮ ইং তারিখ বিজ্ঞ আদালতে হাজির করিলে, আমাকে জেল হাজতে প্রেরন করায় হাজতে আটক আছি ।

বর্ণিত অবস্থায় বিগত ১৪/১০/০৮ ইং তারিখ পুনরায় ডি,বি পুলিশ কর্তৃক রিমান্ডে নিয়া তাহাদের কার্যালয়ে চোখ বাঁধিয়া ২ হাত রশি দিয়া গ্রীলে বাঁধিয়া ঝুলাইয়া ফেলে এবং ঐ অবস্থায় দারোগা রফিক সাহেব মামলার ঘটনা জিজ্ঞাসা করিতে থাকেন। আমি অস্বীকার

করা মাত্রই তিনি হাতে থাকা কাঠের লাঠি দিয়া ঝুলন্ত অবস্থায় পায়ের গিরালীতে, হাটুতে নির্ভুর ভাবে বাইরাইতে থাকেন এবং বলতে থাকেন যে, তো-ক স্বীকার করতেই হবে। এই কথা বলিয়া অমানুষিকভাবে নির্যাতন করিতে থাকিলে, এক পর্যায়ে আর কিছুই বলিতে পারি নাই। ইহার পর রাত অনুমান ২.০০ টায় আমার জ্ঞান ফিরিয়া আসে। অতঃপর দিন সকালে উক্ত দারোগা সাহেব আমাকে কারেন্ট দিয়া সট দিতে থাকিলে, অসহ্য যন্ত্রনায় মনে হইত যে, এখনই আমার মরন হইতেছে। বর্নিত অবস্থায় একের পর এক সট দিতে থাকিলে যন্ত্রনা সহিত না পারিয়া এক সময় **চিৎকার** দিয়া বলিতে থাকি, সব কিছুই বলিব। আমাকে বাঁচান। অতঃপর নির্যাতন বন্ধ করিয়া জিজ্ঞাসা করিলে, ‘আমি বলি SIR, আমি কিছুই জানিনা, কি বলিব এরপর তিনি আমাকে বলেন, আমার কথায় রাজী হইলে, যে কথা গুলি আমি শিখাইয়া দিব। এই কথাগুলি কোটে গিয়া স্বীকার করিলেই হইবে। আমার কথা রাখলে আমি তুকে বাঁচাইয়া দিব। তখন প্রানের ভয়ে তাহার কথায় রাজী হইলে, তিনি যে কথাগুলি মুখস্থ করাইয়া আমাকে গত ১৬/১০/০৮ ইং তারিখে বিজ্ঞ আদালতে হাজির করেন এবং উক্ত শিখানো কথা গুলিই স্বীকার করিয়া জবানবন্দী প্রদান করি। মূলতঃ মামলার ঘটনায় আমি কিছুই জানিনা এবং কোন ভাবেই জড়িত নহি। আমি সম্পূর্ণভাবে ষড়যন্ত্রের শিকার হইয়া বাধ্যতামূলক শিখানো বক্তব্য প্রদানে অত্র স্বীকারোক্তিমূলক জবানবন্দী প্রদান করিয়াছি বিধায় তাহার দৃঢ়তার সহিত অস্বীকার করি এবং পাশাপাশি প্রত্যাহারের দাবীতে হুজুরাদালতে আকুল প্রার্থনা করিতেছি।

অবস্থাধীনে প্রার্থনা, হুজুরাদালত দয়া করিয়া অত্র দরখাস্ত গ্রহন করতঃ বর্নিত কারণে প্রদত্ত স্বীকারোক্তিমূলক জবানবন্দী প্রত্যাহারের বিহীত ব্যবস্থা নিতে আন্তা হয়।”

The P.W-5 the recording magistrate proved the confessional statement. On perusal of the record it is also found that the magistrate after observing all the procedure of law recorded the confessional statement. It is also found that which was inculpatory in nature and he also implicated the other co-accused in the alleged offence. Since the confession was found true and voluntary thus it is our view that the above retraction has no manner for taking adverse view.

The condemned-prisoner Samir Chandra also made confessional statement which as under: "আমি মাছের ব্যবসা করি। ঘটনা ২০০৮ সালের। টাইগার, সোহাগ, বিমল এই ৩ জন মদ বিক্রি করত। আমরা মাঝে মাঝে মদ খেতে যেতাম। টাকা কিছু কম দিতে গেলে ওরা আমার সাথে ঝগড়া করত। নিহত আইয়ুব-টাইগার ও সোহাগের লাইসেন্সের মদ চুরি করত প্রায়ই। একদিন আমরা সবাই মিলে ঠিক করি যে, আইয়ুবের হাত পা ভেঙ্গে তাকে বাড়িতে ফেলে রাখবো। আমি নিষেধ করি এবং বলি যে, গার্ডিয়ানের কাছে বিচার দিতে বলি। ওরা রাজী হয়নি। সবাই মিলে আইয়ুবকে হাত পা ভেঙ্গে মেরে ফেলার চিন্তা করে। ঘটনার দিন কবির এম পির ছেলের মুসলমানি ছিল। সেখানে টাইগার ও সোহাগ ও আইয়ুব এর দাওয়াত ছিল। ওরা সবাই বরফকলে চাকরি করে সে কারনে মুসলমানির দাওয়াত করে। ঘটনার দিন টাইগার ও বিমল নৌকা ঠিক করতে যায় বেলা ৩.৩০ টায়। তখন আমি মাছ বাজারে মাছ বেচছিলাম। কিছুক্ষণ পরে টাইগার, বিমল, সোহাগ আমাকে সামনে আসতে বলে। বিকাল ৫টায় নিহত

আইয়ুবকে ফোন করে আনে টাইগার। এমপির বরফ কলের সামনে। সেখানে তখন আমি, বিমল, টাইগার, সোহাগ ছিলাম। এরশাদ ও সাদ্দাম পরে আসে। বরফ কলের সামনে সবাই মিলে মদ খাই। তখন নিহত আইয়ুবকে টাইগার বলে যে, আমরা সবাই সন্ধ্যা ৭টায় নৌকায় করে ঘুরে আসবো। এরপর নৌকা করে মরিচা গাংগের দিকে যাচ্ছিলাম। নৌকায় সবাই মদ, গাঁজা আবার খাই। আইয়ুবকে টাইগার ও সোহাগ মদ ও গাঁজা বেশী খাওয়ায়। টাইগার কোমর থেকে প্লাষ্টিকের দড়ি বের করে আইয়ুবের গলায় প্যাঁচ দেয়। আমি, বিমল, সোহাগ, এরশাদ, সাদ্দাম হাত পা চেপে ধরি। তখন আইয়ুব প্রায় আধা মরা হয়ে যায়। সোহাগ তখন চাপাতি বের করে আইয়ুবের গলায় কোপ দিলে মাথা আলাদা করে ফেলে, এরশাদ তখন পা ধরে রাখে। সোহাগ মাথাটা শরীর থেকে আলাদা করে নদীতে ফেলে দেয়। এরপর সোহাগ চাপাতি দিয়ে শার্ট, প্যান্ট ছিড়ে ফেলে এবং খুলে নিয়ে ঐ শার্ট-প্যান্ট, চাপাতি ও প্লাষ্টিকের রশি নদীতে ফেলে দেয়। মাঝ নদী আসার পর এরশাদ ও সোহাগ লাশটা ফেলে দেয়। সব কাজ সেরে মাঝিপাড়া ঘাটে আমরা সবাই আসি। সোহাগ ও এরশাদ ঘাটে নেমে গোসল করে। তখন টাইগার নৌকা ভাড়া দেয় মাঝিকে ৮০০/- টাকা নৌকা বিদায় করে আমরা সবাই টাইগার, সোহাগ, এরশাদ, বিমল, সাদ্দাম ও আমি তাপসের বাড়িতে যাই ভাত খাওয়ার জন্য। তাপস মাংস, পোলাও রান্না করে। সবাই খেয়েছে, কিন্তু আমি খাইনি। পরে আমরা সবাই যে যার যার বাড়িতে চলে যাই।"

It appears that accused Samir Chandra arrested on 29.05.2009 and brought before the magistrate on 30.05.2009 and he was not in the Police remand and made confessional statement on the next day of his arrest. The P.W-6

Meherunneesa the recording magistrate proved the said confessional statement. On perusal of the confession it appears that the magistrate after observing all the procedure of law recorded the confession. It also appears that he narrated the facts of murder and implicated him with the murder along with other co-accused and his statement was inculpatory in nature and was true and voluntary.

On perusal of the record it is found that the accused Arshed though taken on remand by the Police but he did not make any confession. But it appears that he has been absconding since his bail.

It also appears that accused Bimol is all along absconding.

We have considered the material facts of the case and found that four accused persons made confessional statements implicating themselves along with two non confessing co-accused Arshad and Bimol and they were also the members of killing party.

Now it is well settled principle that on the basis of the confessional statement of other co-accused none confessing

accused should not be convicted without any corroboration and substantive evidence which reliance upon the decisions of the case of State and another Vs. Abdul Kader @ Mobile Kader and others reported in 67 DLR (AD)-6 and the case of Abdus Salam Mollah Vs. State reported in 13 BLC (AD)-17. Even in subsequent decision of the case of Saley Akram alias Polash Vs. State reported in 73 DLR (AD)-264 wherein our Apex Court held that relying upon the confessional statement of co-accused conviction can be based on the non confessing accused on the facts and circumstance of the case with some substantive evidence.

Their Lordships further held that: it is the established Rule of evidence as well as the Rule of prudence that confessional statement of a co-accused shall not be used as the sole basis of conviction in the absence of independent corroborative evidence.

We have already considered that none of the witnesses even the father or two brothers did not disclose that the two co-accused Arshed and Bimol had any involvement in murder or they were present at the time when the accused persons

gathered in the Ice Mill area along with victim Ayub. None of the witnesses disclosed that they saw that they boarded in the boat for travelling in the Meghna River in such circumstance of the case it is our view that the prosecution failed to prove the case against the condemned-convicts Arshad and Bimol.

We have considered the confessional statement of Saddam which as under: “আমি সদর সাবরেজিষ্ট্রি অফিসে ফরমায়েস খাটতাম। ঘটনার দিন বিকালে আমি, টাইগার, সোহাগ, বিমল, সমীর, এরশাদ এবং আইয়ুব বোয়াকুড় পাড়ার সামনে একত্রিত হই। ঐখানে বসে সন্ধ্যা পর্যন্ত মদ খাই। পরে সন্ধ্যায় আমরা সবাই বোয়াকুড় মাঝপাড়া ঘাট থেকে নৌকায় উঠি। নৌকা আগে থেকেই প্রস্তুত ছিল। নৌকায় উঠে আমরা বড় গাংগের দিকেরওয়ান হই এবং মদ খাওয়া চলতে থাকে। আইয়ুবকে বেশী করে মদ খাওয়ানো হয়। আইয়ুব মাতাল হয়ে গেলে তার গলায় রশি লাগানো হয়। অতঃপর আমরা রশি টানাটানি করে আইয়ুবকে নিশ্বেজ করে ফেলি। পরে আইয়ুবের দেহ নৌকার সামনের দিকে এক পাশে আনা হয়। পরে সোহাগ চাপাতি দিয়া কোপাইয়া মাথা ও দেহ আলাদা করিয়া ফেলে এবং নদীতে ফেলাইয়া দেয়। মাঝ নদীতে এই ঘটনা ঘটে। তখন অনুমান রাত ৮টা বাজে। রাত অনুমান ১০.০০ টায় আমরা বোয়াকুড় ঘাটে ফিরে আসি। টাইগার মাঝীকে ৮০০/- টাকা ভাড়া দেয়। এই আমার জবানবন্দী।”

It is found that he was taken to the police remand on 23.10.2008 and he was brought before the magistrate on 26.10.2008. This accused retracted his confessional statement

on 14.02.2011 long after $2\frac{1}{2}$ years of his confession. Though the date of arrest has not been mentioned but in his retraction application it has been mentioned that he was arrested on 20.09.2008. The same has also been proved by the recording Magistrate, P.W-5. In his statement he implicated himself and also disclosed the name of the other condemned-convicts and stated that why they killed the victim and also narrated the nature of killing. On perusal of the same it is found that magistrate after observing all the formalities of law recording the confession and which is inculpatory in nature.

On perusal of the confessional statement of accused Saddam it appears that which cannot be said exculpatory in nature but he implicating himself regarding the killing and took part for committing the murder. But on perusal of the record it is found that he was arrested long before and the Police took him remand from the jail custody and after four days of his remand he was brought to the magistrate for recording his confessional statement in such a case there were some shorts of corroboration is required and in absence of any corroboration of his confession he may get benefit of doubt. In the case of

Sikha Rakshit Vs. Paritosh Rakshit and others reported in 70 DLR (AD)-1 wherein our Apex Court held that "One of the essential elements of any confessional statement is that it must be voluntary. In order to gauge that the statement is voluntary, the Magistrate must ensure that the confessing accused is free from any fear and that he is making his statement without any inducement or duress. It is, therefore, important that the Magistrate ensures that there is no police presence, which must act as a threat or perceived threat to the confessing accused."

Their lordship further held:

"Furthermore, from the form on which the confessional statement was recorded, it appears that accuses Bhola and Jahangir were kept in the custody of Police personnel before recording their statements and he was threat from the Police remand so their statements cannot be said voluntary though can be treated as true".

Considering the aforesaid facts and circumstance of the case and the above cited decisions it is our view that since no substantive evidence against him and he was produced before the Magistrate from four days Police remand in such a case it is

our view that the conviction of accused Saddam should not be sustained.

Now we consider the case of accused Samir Chandra Das. It appears that he also made confessional statement and he was arrested on 29.05.2009 and brought before the Magistrate on 30.05.2009. Though he did not specifically mentioned that he was involved and took part of murder but he stated that he pressed the leg and hands of the accused. It is found that he was not brought before the magistrate from remand and brought before the magistrate on the next day of his arrest and no retraction made by him.

Considering the aforesaid facts it is our view that though in some cases it has been decided that if no substantive evidence against the accused with the involvement of murder the conviction should not be based only on the confession. But in some cases it has been decided that no bar to convict the accused on the basis of confession to its maker. On perusal of the record it is found that accused Samir was arrested on 29.05.2009 and brought before the Magistrate on 30.05.2009 and no allegation of torture and no retraction and in such a case

it is our view that considering his confessional statement the conviction should be sustained.

We have already considered that accused Sujan @ Bagha Sujan @ tiger and sohag @ Sohag Chandra Das suspected by the informant from very initial stage and their name were mentioned in the FIR and also P.W-2 in his deposition suspected this two accused and the P.W-3, and P.W-4 also deposed accordingly, furthermore, they made confessional statement implicating themselves with the murder.

It appears that they brought before the Magistrate from Police remand and also immediately after their confession they retracted the same and sent the application through the jail authority alleging of torture but it is our considered view that since some shorts of corroboration of their involvement in the murder is found thus we are refrained ourselves to make any further inquiry about the matter. In view of above their conviction should be upheld.

But it appears that they are minor and tendered age and in death cell for more than five years. In the decisions of the case of *Sikha Rakshit Vs. Paritosh Rakshit and others reported in*

70 DLR (AD)-1 our Apex Court considering the mitigating circumstances imposed lesser sentence and since all the accused are tendered age and their previous record is clean and they are not the menace of the society in such a case it is our view that the Justice will be best served if their sentence be reduced to imprisonment for life.

In the result, the death reference No.161 of 2016 is rejected. The impugned judgment and order of conviction so far as relates to the condemned-prisoner Sujan @ Bagha Sujan @ Tiger (absconding), son of Jalal Uddin Mollah, Sohag @ Sohag Chandra Das (absconding), son of Shree Shital Chandra Das and Samir @ Samir Chandra Das, son of Sudhir Chandra Das is hereby upheld with modification of sentence. They are sentenced to imprisonment for life instead of death and also to fine of Tk.10,000/- (ten thousand) in default, to suffer rigorous imprisonment for 06 (six) months more.

The Criminal Appeal No.4869 of 2022 preferred by the accused Arshad is allowed. He is not found guilty of the charge leveled against him and be acquitted therefrom and he be set at

liberty forthwith if not wanted in connection with any other cases.

The accused Saddam (absconding), son of A. Razzak and Bimol (absconding), son of Shree Kalachan are also not found guilty of the charge leveled against them and they be acquitted therefrom.

The concerned authority including the Deputy Commissioner, Narsingdi and the Superintendent of Police, Narsingdi is directed to secure the arrest of the condemned-convict (1) Sujan @ Bagha Sujan @ Tiger (absconding), son of Jalal Uddin Mollah, (2) Sohag @ Sohag Chandra Das (absconding), son of Shree Shital Chandra Das and (3) Samir @ Samir Chandra Das, (absconding) son of Sudhir Chandra Das.

Communicate the judgment along with the lower Court records at once.

K M Zahid Sarwar, J:

I agree.