

IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(CRIMINAL APPELLATE JURISDICTION)

Present

**Mr. Justice Ashish Ranjan Das**

**And**

**Mr. Justice Md. Riaz Uddin Khan**

**Criminal Appeal No. 4872 of 2022**

In the matter of:

A petition of appeal under section 410 of the  
Code of Criminal Procedure

**In the matter of:**

Malin Chandra Borman @ Uzzal

...Convict- Appellant

Versus

The State

... Respondent

Mr. Khondaker Md. Khurshid Alam, Advocate

...For the Convict-Appellant

Mr. S.M. Asraful Hoque, D.A.G with

Ms. Fatema Rashid, A.A.G

Mr. Md. Shafiquzzaman, A.A.G. and

Mr. Md. Akber Hossain, A.A.G

...For the State

**Heard on: 20.05.2024 and**

**Judgment on: 06.06.2024**

**Md. Riaz Uddin Khan, J:**

This appeal is directed against the judgment and order of conviction passed against the appellant in Sessions Case No. 65 of 1998 arising out Fatullah Police Station Case No. 12 dated 06.05.1997 corresponding to G.R. Case No. 178 of 1997 convicting the appellant under Section 302 of the Penal Code and sentencing him to suffer rigorous

imprisonment for life and to pay a fine of Tk-50,000/ in default to suffer rigorous imprisonment for 06(six) months more.

The sole appellant stood trial upon charge of murder under section 302 of the Penal Code.

The prosecution in total examined 10(ten) witnesses while the defence examined none.

Succinct facts for disposal of this appeal is that one S.I. Khokon Chandra Sarker of Fatullah Police Station being informant lodged a First Information Report (FIR) on 06.05.97 alleging *inter alia* that one Mohar Ali member and Md. Mostafa came to Fatullah Police Station and gave information on 06.05.97 at about 21:05 hours that a young man has been killed and the killer has been caught by the local people. Getting that information the informant along with some other companion police forces went to the spot and saw a dead body of unknown young man inside a cottage having a knife stabbed on the neck and also got the appellant on a tied up condition with a bamboo pole beside the cottage; they found a baby taxi having registration number Dhaka Metro Tha-11-8003 near there; on asking Mohar Ali, Mohiuddin, Mostafa and others present there informed

that at about 8:30 pm hearing outcry from the children they went to the place of occurrence and caught the appellant inside the cottage who was trying to flee and saw the dead body of a boy; on query the appellant told that he and one Robin in order to extortion of the baby taxi in a pre-plan way upon threat showing knife brought the deceased to the place of occurrence from Muktarpur and by fastening his hands and legs killed him by the knife; then the informant arrested the appellant, made inquest report of the dead body and sent the dead body to Morgue for autopsy, seized the baby taxi and went to Fatullah Police Station and filed F.I.R against the accused appellant and Robin under section 302/34 of the Penal Code.

Police took up the matter for investigation and after investigation the Investigating Officer submitted charge sheet only against the accused appellant under section 302/34 of the Penal Code. The learned Magistrate accepting the charge sheet sent the case record to the court of Sessions Judge, Narayanganj for trial. The learned Sessions Judge framed charge against the accused appellant under section 302 of the Penal Code and transferred the case record to

the court of Additional Sessions Judge, 1<sup>st</sup> Court, Narayanganj for trial. After conclusion of trial the trial court found the appellant guilty under section 302 of the Penal Code and sentenced him as stated in the very outset.

Mr. Khondaker Md. Khurshid Alam, learned advocate appearing for the convict-appellant submits that the appellant was apprehended by unknown people on suspicion and the informant who is a policeman along with other policemen arrested the appellant from the alleged place of occurrence finding him in a tied up condition. In this case there is no eye witness of the occurrence. The deceased was killed by unknown person(s) as nobody has seen who killed the victim. The prosecution has failed to prove the case as no one turned up to say who have seen this accused to commit murder or even no one deposed anything that who have fastened this appellant. The investigating officer failed to cite any witness or named any people who tied the appellant with a bamboo pole inside the hut.

The learned advocate then submits that PW-1, a policeman is the informant who he did not see the occurrence. PW-5 is also a policeman who accompanied the PW-1 having no

first hand knowled of the occurrence. PW-4 is the Doctor who performed autopsy of the deceased. PW-8 is the Magistrate who recorded the confession of the accused. PW-9 is the Investigating Officer (IO). They are all formal witnesses. The rest 5 (five) witnesses were local witnesses but they also did not see the occurrence of killing of the deceased by the accused in their own eyes. The seizure list witness did not support the prosecution case and other local witnesses did not see the occurrence. The IO did a perfunctory investigation as he failed to unearth the identification of the co-accused Robin who allegedly stabbed the deceased. Even the owner of the baby taxi had not been included as witness in the charge sheet and also failed to arrest co-accused Robin or even his whereabouts.

Mr. Alam further submits that the prosecution totally relied upon a so-called judicial confession made by this appellant but this confession is neither true nor voluntary. Sicne the IO could not unearth the truth, he after taking remand for 4 days forcefully compelled the accused to give confessional statement with a cooked up story of killing the deceased by one Robin who has

been able to escape but the appellant couldn't who allegedly help that Robin. The appellant, a very poor person and not mentally fit has fallen prey of conspiracy of some local people who apprehended the appellant but did not turned up to depose that they have seen the appellant to kill the deceased or while the appellant was trying to escape they caught him. The IO of the case also failed to identify the people who caught the appellant.

The learned advocate finally submits that in any view of the matter the impugned judgment and order of conviction and sentence is illegal, unjust and improper and as such the same is liable to be set aside.

On the other hand learned Deputy Attorney General appearing for the state submits that though there is no eye witness of the killing but the appellant was caught red handed by the local people while tried to escape after the occurrence and he made judicial comfessein which is true and voluntary as it appears from the deposition of PW-8, the Magistrate who recorded the confessional statement of the appellant. In such view, the learned Deputy Attorney General prayed for dismissal of the appeal.

We have heard the learned Advocates of both the sides, perused the lower court record including FIR, Charge Sheet, depositions of the witnesses, exhibits, the impugned judgment and other materials on record.

To appreciate the points raised by the parties at the bar let us examine the evidence on record.

PW-1, S.I. Khokon Chandra Sarker, the informant stated in his deposition that he was working at Fatulla Police Station on 06/05/97. On that date at about 21.05 hours, Mohar Ali member and Md. Mostafa from Volile area came to Police Station and reported that, a boy has been killed inside a hut on Volile Madrasa Road and the killer has been detained. He went to the spot with the companion force and saw a dead body of unknown young man inside a hut having a knife stabbed on the neck and also got Malindra detained inside the hut; he found a baby taxi having registration number Dhaka Metro Tha-11-8003 near there; on asking Mohar Ali (PW-3), Mohiuddin (PW-2), Mostafa (PW-6) and others present there informed that at about 8:30 pm hearing screams of the children they went to the place of occurrence and caught

the appellant inside the hut who was trying to flee and saw the dead body of a boy; on query the appellant told that he and one Robin in order to extortion of the baby taxi in a pre-plan way brought the taxi driver to the place of occurrence from Muktarpur area upon threat showing knife and by fastening his hands and legs killed him by the knife; then the informant seized the baby taxi, arrested the accused, made inquest report of the dead body and sent the dead body to Morgue of Narayangonj General Hospital for autopsy, and went to Fatullah Police Station and lodged the FIR. In his cross-examination he stated that he cannot remember who was the duty officer at Fatulla police station on 06/05/97. He prepared the seizure list by his own hand at the spot at 21.05. The hand writing of the seizure list and the FIR are not same. It is not true that he did not mention about the confession of the accused in the FIR. He did not see the occurrence. It is not true that the accused did not kill the deceased or he lodged false case.

PW-2, Md. Mohiuddin alias Mahi stated that he cannot remember the date of occurrence but it was in 1997. On the date of occurrence at about 8/8:30 pm while he was

going to Fatullah, hearing screams from children from the house of Nurul Islam, he went there and found a dead body inside a hut having a knife stabbed on the neck. The people present there said that the detained man killed that man and local people detained the killer. He heard that the man's name was Borman. He identified the accused on the dock. In his cross-examination he stated that at the time of occurrence he was staying in the house of Captain Salim near Deovog Madrasa. The distance from his house to the spot is about 300 yards. The hut belongs to a dyer and the name of the owner is unknown who was a tenant. The original owner of the hut is Nurul Islam Mridha. In that room clothes are dried and workers take rest and dyeing clothes are kept in that room. He did not see the killing. The accused confessed to them where 2 to 4 thousand people were present including Mohar Ali member, Mostafa, Suruj Mia etc. It is not true that the accused did not tell them about killing of that person. It is not true that the accused Borman is not the real killer or the real killers captured the accused and tied him up as a killer to save themselves.

PW-3, Mohar Ali Member stated that he cann't remember the date of occurrence but it was about three years ago at 8/9 pm. That day he was going home from Narayanganj and on the way he heard a scream at the house of Nurul Islam Mridha on Deovog Madrasa Road. He saw a dead body having a knife stabbed on the throat and saw a boy in a tied up condition. Then he informed the police about the incident through people and police arrested the accused. Later he heard that the accused confessed to have committed the murder. In his cross-examination he stated that his house is about 3/4 yards from the spot. Nurul Islam Mridha is the owner of the house of the occurrence. The next day, Daroga Sahib told him that the accused had confessed that he had committed the murder. He went to the occurrence room and saw no other people except the bead body and the accused but saw many people outside. He went to the spot at 7/8 pm and heard that the accused was detained by people about half an hour before he reached the spot. He could not say for sure whether the accused was involved in the murder.

PW-4, Dr. Md. Nurul Haque Sarder stated that on 07/05/97 he conducted the post mortem

of an unknown person and found the following injuries:

- 1) Abrasions on the right clavicle.
- 2) Stab injury to the right anterolateral aspect of the throat measuring  $1\frac{1}{2}$  "X5"X cutting of great vessels, Trachea and esophagus.

On deep dissection: Trachea & esophagus were injured and great vessels of the throat were also injured.

Both chambers of the heart were empty.

Opinion: Death was due to hemorrhagic shock resulting from the above mentioned injury which was Ante mortem and homicidal in nature.

In his cross-examination he stated that there are two injuries in the report. The injuries were found on the neck. No injuries were found on any other part of the body except the neck. No injury marks were found on the body's face, jaw and legs. Falling on a sharp object can also cause such injuries. The report does not say when the man died or he was brought to him how long after he died. It is not true that the opinion given is not correct.

PW-5, A.S.I. Md. Lutfor Rahman stated that he was working in Fatulla PS and went to the house of Nurul Islam on Ali Ahmad Chunka road in Bolile area on 06/05/97 along with SI Khokon Chandra Sarkar and found a man dead with stab wounds and a man identified as killer tied up with a bamboo and also a baby taxi. The tied man namely Malindra Chandra Borman said that he and his companion Robin brought the deceased to the spot from Muktarpur area by threatening him with dagger and tied his hands, feet and face and then killed him by stabbing his throat with a knife. The local people heard the scream and came to the spot and detained the accused Malindra Chandra while trying to run away. Khokon Chandra Sarkar prepared inquest report and sent the dead body to the hospital for post-mortem. He identified the accused present on dock. In his cross-examination he stated that-after getting the news from the spot, they went there. He cannot remember what time they reached the spot but it was at night. The investigating officer interrogated him but cannot remember the date of interrogation. There were electric lights in the occurrence house. Mohar Ali member and a person named Mostafa gave the news to the

police station. He went to the spot and saw about 40/50 people. It is not true that the accused did not kill the victim or the real killer ran away or the people of the area with conspiracy with the real killer detained the accused or he gave false testimony as asked by his superior authority.

PW-6, Mostafa stated that he cannot remember the date of occurrence but it happened 4/5 years ago at 8/8:30 PM. At that time Mohar Ali member called him when he was going home in a rickshaw. The incident was in Volile area. He saw a dead body to the police in that spot and a detained boy and cannot recall if that boy was the same or not present in the court. He didn't see the killing of the man and he doesn't know anything else. In his cross-examination he stated that the police after showing the dead body took his signature on paper. He neither read nor was it read to me. He has not seen any occurrence. He heard from the police that the man was killed. He saw a boy arrested by the police being picked up in the police van.

PW-7, Md. Suruj Mia deposed that he cannot remember the date of the incident but it happened 5/6 years ago about 8.30 at night. Police car and some people were going

and member Mohar Ali called him and took his signature on a paper and wrote down his name and address. He saw a man detained in that police car and identified him on the dock. He didn't hear or see how the man died. However, he heard that there was a murder and he doesn't know anything else. In his cross-examination he stated that he saw the police car with a dead body and saw many people and went there when the car was stopped. He did not see any dead body or the accused after going to Deovogh Madrasa. The IO did not interrogate him later.

PW-8, Partho Protim Deb deposed that he recorded the confessional statement of the accused Malin Chandra Borman while working as First Class Magistrate in Narayanganj District on 11/05/97 as per Section 164 of the Code of Criminal Procedure. In his cross-examination he stated that accused Malin Chandra Borman was given 3 (three) hours time under the supervision of his peon Mohammad Ali before recording the confessional statement. Where the accused was during those 3 (three) hours was not written in the column of the statement. The accused was in police custody and will not be remanded to police custody was not mentioned in that form. It is

not true that the accused was compelled to give confessional statement on the influence of the police.

PW-9, S.I. Md. Enamul Hoque stated that on 06/05/97 on the instruction of the officer-in-charge he took charge of the investigation and visited the place of occurrence. He prepared index map, seized some blood stained soil and sandal of accused Malin Chandra Borman alias Uzzal and arrested him and took him for 7 days police remand. Then he prayed for recording the confessional statement of the accused under section 164 of the Criminal Procedure Code and the accused gave confessional statement. During investigation he recorded the statements of 11 witnesses and finding prima facie case submitted CS against the accused. In his cross he stated that he took charge of the investigation on 07/05/97 at 00.05 hrs and went to the spot at 01.15 hrs. He arrested the accused Malin Chandra Borman alias Uzzal on 06/05/97. He prayed for a 7-day remand on 07/05/97 but got 4 days remand. He sent the accused to the court after 4 days. He found marks of swallowing injuries on the body of the accused. The accused was caught by the people and was slightly injured. It is not

true that the accused was tortured during the remand at police custody and sent to court or that the accused was forced to confess under police torture or that he submitted the charge sheet in this case without proper investigation.

PW-10, Zia Mohammad Sujon stated that on 06/05/97 on his way home from work he saw a dead body beside a hut when the police were there. The police prepared an inquest report of the dead body in front of him and he signed on it. In his cross-examination he stated that he cannot say what was written on the paper which he signed. He doesn't know whose dead body it was or anyone did anything.

The appellant Malin Chandra Borman @ Uzzal made a judicial confession wherein he stated that he, Harun and Robin used to drive together. Harun and Robin had a fight before. On 06/05/97 at 11 am Robin told about their quarrel and asked for help on which he agreed. Robin did not tell him the reason of their quarrel. On 06/05/97 at 7.00 pm Robin went to call Harun from Muktarpur asking him to stand beside the Volile madrasa. When Harun came beside the madrasa, Robin fastened Harun with a rope and he helped him to tie.

Then suddenly Robin took out a dagger from his pocket and stabbed on Harun's neck and as a result Harun died. Later local people caught him but Robin run away. He didn't know about murder.

These are the evidences based on which the trial court convicted the sole appellant and sentenced him as stated in the very outset. It appears from the impugned judgment that the learned judge in his findings opined that on analysis of evidence on record it turns out that at the time of killing no one was present at the place of occurrence except the deceased and the accused and in that view there is no eye witness in the case. With the above findings the trial judge convicted the accused based on his confession holding that the confession of the accused was true and voluntary.

First of all, we would like to reiterate the principles laid down by this Division as well as by the Appellate Division of our Supreme Court governing the evidentiary value of judicial confession against the maker.

A confession in a criminal proceeding cannot be a basis of conviction if the making of such confession appears to the Court to be the result of a threat, coercion or

inducement sufficient to tempt the accused making the confession to believe that by doing so (s)he would avoid an evil. Unless true, voluntary and inculpatory in nature confession without independent corroboration cannot form the basis of conviction. Judicial confession can legally be taken into consideration against the maker, and if the confession is found to be true and voluntary and inculpatory in nature, then there is no need at all to look for further corroboration. In other words, as against the maker himself his confession, whether retracted or not, can in law validly form the sole basis of his conviction if the Court is satisfied and believes that it was true, voluntary and inculpatory in nature and was not obtained by torture or coercion or inducement. The question, however, as to whether in the facts and circumstances of a given case the Court should act upon such a confession alone is an entirely different aspect, which relates to the weigh and evidentiary value of the confession and not to its admissibility in law. In the existing scheme of criminal trial, an accused can be convicted either on his pleading guilty to the charge or on his judicial confession

recorded under section 164 of the Code of Criminal Procedure or even on extra-judicial confession provided it is strongly corroborated by other evidence.

In the case of recording judicial confession, it has to be recorded by the Magistrate in strict compliance of sub-section (3) of section 164 of the Code of Criminal Procedure (hereinafter referred to as the Code). The Magistrate is required to certify that the confession was recorded after giving the accused necessary caution and sufficient time for reflection and he is satisfied that the accused made the statement voluntarily. The act of recording confession is a very solemn act and in discharging his duties, the Magistrate must take care to see that the requirements of sub-sections (2) and (3) of section 164 of the Code are fully satisfied. No element of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confession which the accused wants to make it in fact and in substance voluntary and the Magistrate must give a brief statement of his reason for believing that the confession was voluntarily made. In doing so the Magistrate must put questions to the confessing accused to find

out if the confession is made out of repentance or for any other good reason or whether it is the result of torturing or tutoring by somebody or whether it has been caused by any inducement, threat or promise. The question or questions put to the accused, whatever the form, must be designed to show whether the accused is making the confession voluntarily. The judicial consensus is that the requirements of the mandatory provisions of section 164 of the Code are to be strictly complied with before a confession is admitted into evidence and is used against the accused. The recording Magistrate is to make a real and substantial inquiry to ascertain the voluntariness of the confession. When a confession has been recorded by a Magistrate after complying with the provisions of sections 164 and 364 of the Code the said confession can be admitted into evidence by the Court under section 80 of the Evidence Act even without examining the recording Magistrate. However, if a confession is recorded in disregard to the formalities of the law as required, it need not be ruled out altogether as it may still be saved by the curative provisions of section 533 of the Code and proved, if the error committed in

noncompliance with the provisions of section 164 and 364 of the Code has not injured the accused in his defence. The confession may partly be true and partly false and the accused may be convicted on the basis of the true part of the confession if found justified warranting such conviction and the Court is required to give due weight to both parts of the confession. Once a confession is found to be true and voluntary, a belated retraction will be of no help to the confessing accused. The necessity even of some sort of corroboration in such case is not a requirement of law but it is usually desired as a rule of prudence. A free and voluntary confession deserves highest credit, because it is presumed to flow from highest sense of guilt.

These are the views and principles settled by the apex Court of this subcontinent including our, starting from the case of Nazir Ahmed vs. the King Emperor, reported in AIR 1936 (Privy Council) 253 to Shukur Ali and others vs. the State reported in 74 DLR (AD) 11. Reference also may be made to the cases reported in 1964 PLD (SC) 813; 12 DLR (SC) 156; 16 DLR (SC) 598; 21 DLR (SC) 182; 39 DLR (AD) 117; 39 DLR (AD) 194; 1986

BLD (AD) 1; 1988 BLD (AD) 109 = 40 DLR (AD) 139; 44 DLR (AD) 51; 13 BLC (AD) 84; 7 ADC 427; 48 DLR 305; 1994 BLD 332; 3 MLR 57; 6 MLR 205; 51 DLR 244; 59 DLR 17; 59 DLR 396; 61 DLR 253; 7 BLC 62; 13 BLT 151 and so on.

Keeping in view the above mentioned legal principles, if we go through the facts of the instant case, we find that there is no eye witness.

PW-1, the informant claimed that Mohar Ali member (PW-3) and Md. Mostafa (PW-6) came to the police station and informed that a man has been killed and the killer was detained but none of them claimed that they went to the police station. Two of the local witnesses adduced by the prosecution (PWs-2, and 3) stated that they went to the occurrence hut hearing hullabaloo from the children and saw the dead body and the accused in a fastened condition. Both the PWs claimed that local people detained the accused while trying to escape but no prosecution witness turned up to claim that who has seen the accused to commit murder or who are those local people who detained the accused while trying to escape. Another local witness Md. Mostafa (PW-6) stated that while he was passing the area by Rikshaw, local

member Mohar Ali (PW-3) called him and he saw a dead body to the police and a detained boy and cannot recall if that boy was the same or not present in the court. He didn't see the killing of the man or anything else. So, from the above evidence it is not clear that who have seen the accused trying to escape after the occurrence and who have detained the accused. We have already noticed that the appellant is convicted based on his confession.

We have already avowed by a catena of decisions of our Supreme Court as well as India and Pakistan that it is well settled that confessional statement if found inculpatory in nature and also true and voluntary it can be used against its maker and conviction can be based on it without any further corroborative evidence. In the instant case, let us examine how far the confession made by accused Malin Chandra Borman @ Uzzal was inculpatory in nature and true and voluntary. It is admitted position that the appellant was detained by unknown people and the prosecution witnesses (PWs-2 and 3) who are local people stated that they went to the occurrence house hearing hullabaloo from the children and saw the dead

body and the accused in a fastened condition. Now, the question is who have caught the appellant and tied him up with a bamboo? Prosecution failed to prove it. The Investigating Officer (PW-9) admitted in his cross-examination that he prayed 7 days remand and took the appellant on remand for 4 days and produced him in court. He further admitted that there was swallowing injuries on the body of the appellant and those were caused by the people who detained him. So, when the appellant was produced before the Magistrate after 4 days of police remand he was in injured condition. From the deposition of the Magistrate who recorded the confession (PW-8) it appears that he recorded the same in a mechanical way. He neither asked the appellant about any torture nor examined his physical injuries. The appellant was not cautioned about the consequence of the confession or was not assured that he would not be remanded to police again. When admittedly the accused was detained and tied up and injured by unknown people and was produced before the Magistrate for recording confession from 4 days police remand with visible injuries, the Magistrate should have made a real and substantial inquiry to

ascertain the voluntariness of the confession. Because, the act of recording confession is a very solemn act and in discharging his duties, the Magistrate must take care to see that the requirements of sub-sections (2) and (3) of section 164 of the Code are fully satisfied. No element of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confession which the accused wants to make it in fact and in substance voluntary. The above facts suggest that the confession made by the appellant was not voluntary.

The confession was not true either. Because in the confession it was stated that suddenly Robin stabbed the deceased on the neck with a dagger but the police could not identify that Robin. The dagger was not seized and produced before the court. Neither the owner of the baby taxi nor any relatives of the deceased turned up to support the prosecution case. It cannot be firmly said that the confession was inculpatory in nature as the accused stated that he knew nothing about the murder as Robin suddenly stabbed the deceased with the dagger. The accused did not know the reason of quarrel between Robin and the deceased. In that view of the matter

it cannot be said that the confessional statement made by the appellant was the true version of the fact and as such, the impugned judgment passed by the trial court based solely on confession convicting the appellant having found him guilty for the offence committed under section 302 of the Penal Code cannot be sustained.

Considering the facts and circumstance of the case and the position of law as discussed above we find substance in the appeal and the impugned judgment and order of conviction and sentence passed against the appellant in Sessions Case No. 65 of 1998 arising out Fatullah Police Station Case No. 12 dated 06.05.1997 corresponding to G.R. Case No. 178 of 1997 is hereby set-aside.

In the result the appel is **allowed**.

Send down the lower court's record along with a copy of this judgment at once.

**Ashish Ranjan Das, J:**

I agree.