

**In the Supreme Court of Bangladesh
High Court Division**

[Criminal Appellate Jurisdiction]

Present:

Mr. Justice S. M. Emdadul Hoque

And

Mr. Justice Md. Bashir Ullah

Death Reference No. 127 of 2017

The State

---Petitioner.

-Vs-

Abdul Malek

--- Condemned-prisoner.

with

Criminal Appeal No. 10366 of 2017

(arising out of Jail Appeal No. 406 of 2017)

Abdul Malek

--- Appellant.

-Vs-

The State

--- Respondent

Mr. Md. Giasuddin Ahammed,

Deputy Attorney General

with

Mr. Zahid Ahammad (Hero),

Assistant Attorney General,

Mr. Abu Naser (Swapon),

Assistant Attorney General and

Mr. Mirza Mohammaed Soyeb Muhit,

Assistant Attorney General

... for the petitioner

(In Death Reference No. 127 of 2017)

Mr. S. M. Mahbubul Islam, Advocate

... for the appellant

(In Criminal Appeal No. 10366 of 2017)

Heard on 04.09.2023, 05.09.2023 and 11.09.2023
Judgment on 13.09.2023

Md. Bashir Ullah, J.

The Additional Sessions Judge, Chapainawabganj has made this reference under section 374 of the Code of Criminal Procedure (“The Code”) for confirmation of the death sentence awarded upon condemned prisoner Abdul Malek on 25.09.2017 in Sessions Case No. 90 of 2010 arising out of Shibgonj police station Case No. 19 dated 10.10.2009 corresponding to GR No. 414 of 2009 convicting the condemned-prisoner Abdul Malek under section 302 of the Penal Code and sentencing him thereunder to death and to pay a fine of Taka 10,000/- and also convicting him under section 201 of the Penal Code and sentencing him thereunder to suffer rigorous imprisonment for 7(seven) years and to pay a fine of Taka 5,000/-, in default, to suffer simple imprisonment for 03(three) months more.

Against the aforesaid judgment and order the condemned prisoner filed Jail Appeal No. 406 of 2017 which was subsequently converted to Criminal Appeal No. 10366 of 2017. Since the reference and appeals have arisen out of

the same judgment and order of conviction and sentence, there have been heard together disposed of by this judgment.

The prosecution case, in brief, is that PW1 Tobzul Islam lodged First Information Report (FIR) with Chapainawabgonj police station at 18.15 hours on 10.10.2009, alleging, *inter alia*, that deceased Rubel, son of informant returned from abroad for few months ago. His friend Malek took loan of Taka 18,000/- from him. When, Rubel demanded the amount from Malek. But instead of payment he planned to kill Rubel. Accused Malek went to the informant's house on 04.09.2009 and took Rubel with him to Chouhan's beel saying to show him a garden but thereafter he did not return home. The informant then asked accused Malek about Rubel but in reply he spoke in a different language. The informant tried to get the trace of his son for more than a month searching in all possible places but failed. He then went to the house of accused Malek at about 09.00 am on 10.10.2009 and asked him to go to a Kobiraj (astrologer) with him. But accused Malek without stating anything to the informant told his father and uncle to stop mouth of the Kobiraj paying him Taka 10,000/- only.

On interrogation of his father the accused admitted that he killed Rubel on 04.09.2009 in Khaleque's sugarcane field at Chouhan's beel. The father of the accused informed the chairman and member of the locality about the matter. Getting information, the chairman through local chowkidar (security guard) detained Abdul Malek and brought him to the union parishad office where in presence of the local people he admitted that he killed Rubel on 04.09.2009 inflicting injury with Hashuya (sickle). Accused Malek also confessed that one month and two days after the occurrence he went to the place of occurrence and finding bones of various organs of Rubel took those inside a bag and threw into the water of the canal situated beside Chouhan bridge. The chairman then informed the matter to the police station. Police came to the office of the union parishad. Then, they went to the place of occurrence and recovered the skeleton and the clothes of Rubel as pointed by the accused. The informant identified the skeleton of Rubel looking his shirt. Police recovered Hashuya which was used in the killing and a gunny bag (sack) from the house of accused Malek. The case was lodged under section 302/201 of the Penal Code.

A Sub-Inspector (SI) of Shibgonj police station Md. Shorab Hossain, investigated the case. He visited the place of occurrence, made an inquiry prepared a report and sent the dead body to the morgue for holding post-mortem examination. He also prepared sketch map, recorded statements of witnesses under section 161 of the Code and finally submitted charge sheet against the sole accused under sections 302 and 201 of the Penal Code.

Eventually, the case was transferred to the Court of Additional Sessions Judge, Chapainawabgonj who framed charge against the accused under sections 302/201 of the Penal Code on 09.06.2010. The charge so framed was read over to him, to which he pleaded not guilty and claimed to be tried.

In the trial, the prosecution examined 13(thirteen) witnesses among 24(twenty four) cited in the charge-sheet and the defence duly cross-examined them but the defence examined none.

After conclusion of examination of the prosecution witnesses, the learned Judge examined the accused under

section 342 of the Code where he claimed his innocence again.

The defence case, as could be gathered from the trend of cross-examination of the prosecution witnesses and the examination under Section 342 of the Code, is total denial of the prosecution case and claimed that the accused was not at all involved with the alleged killing and he has falsely been implicated in the instant case out of grudge and enmity with the chairman of local union parishad and he became a victim of circumstances by his enemies. The alleged extra judicial and judicial confession is not true and voluntary rather the same was obtained by coercion and torture. The recovered bones did not belong to Rubel. The prosecution implicated accused Malek showing another person's bones.

The trial Court, on consideration of the evidence on record, found the accused guilty of the charge leveled against him under section 302 of the Penal Code and sentenced him thereunder to death and to pay a fine of Taka 10,000/- and under section 201 of the Penal Code and he was sentenced to suffer rigorous imprisonment for 07(seven) years and to pay a fine of Taka 5,000/-, in default, to suffer simple

imprisonment for 03(three) months more, by its judgment and order dated 25.09.2017 and sent this reference under section 374 of the Code to confirm the death sentence.

Mr. Zahid Ahammad (Hero), learned Assistant Attorney General takes us through the judgment and order of conviction and sentence and other materials on record. Mr. Md. Giasuddin Ahammed, learned Deputy Attorney General then submits that the condemned prisoner confessed his guilt which has been recorded by PW9 Mainuddin, a Senior Judicial Magistrate under section 164 of the Code of complying with the provisions of law. His confession is found true, voluntary and inculpatory in nature. He further submits that the prosecution has proved the charge leveled against the condemned prisoner beyond all reasonable doubt. The date, time, place and manner of occurrence has been proved by corroborative evidence of witnesses. He then submits that the bones of the deceased and the sickle were recovered on pointing out of the accused and hence, he has rightly been found guilty by the trial Court. He prayed for acceptance of the death reference and dismissal of the appeal

by upholding the judgment and order of conviction and sentence of the condemned prisoner.

Mr. S. M. Mahbubul Islam, learned Advocate appearing on behalf of the condemned prisoner submits that Rubel was missing for more than a month but the family members of the deceased filed no GD Entry to that effect the FIR was lodged after one month and six days without any explanation for the delay which creates serious doubt about the prosecution case. The vital witness such as Mobin chairman and ward member Fazlul Haque were not examined.

He nextly submits that the statement recorded under section 164 of the Code is not true and voluntary. The accused was produced before the Magistrate after 24 hours of his arrest. The Magistrate PW9 failed to follow the mandatory provisions of law of section 364 of the Code and did not properly ask the question of Column 5 to the accused.

Learned counsel contends that the prosecution tried to prove the case by producing the bones and skeleton of an unknown deceased. The prosecution could have done DNA test of the bodies to confirm that those were of the deceased.

Moreover, PW11, Dr. Khairul Kabir, failed to pass any definite opinion regarding the cause of death of the man whose bones were recovered.

He further submits that digging a hole to hide a dead body with a Hashuya is entirely unbelievable. It is surprising that convict went to see the body of Rubel after one month and two days of the occurrence and saw the skeleton but nobody saw it and got any lousy smell of rotten dead body. The bag from which the skeleton was recovered was not seized under any seizure which raises a serving doubt about the prosecution case.

He nextly submits that there was enmity between Malek and Rubel due to monetary transactions and it cannot be believed that at the time of visiting the garden Malek was carrying an 18 inch Hashuya but Rubel did not see it and did not raise any objections.

Mr. Islam further contends that the trial court did not mention the name of the deceased, the recovery of the bones of the deceased from the canal namely Chouhan beel and the confessional statement in the charge and therefore, the charge being not specific is defective. Passing of conviction and

sentence of the appellant upon such a defective charge cannot be sustained. The poor tender aged young man has been languishing in Jail since 10.10.2009 i.e. more than 14 years, specially in condemned cell from 25.09.2017. He finally prayed for rejection of the death reference and allowing the appeal by setting aside the judgment and order of conviction and sentence passed by the trial Court.

To consider the merit of the case and analyze the facts, let us visit the evidence of prosecution witnesses.

PW1, Tobzul Islam, is the informant and father of the deceased. He stated that deceased Rubel went to Dubai and stayed there for one year. Then he returned with some money. Accused Malek was Rubel's friend who took Taka 18,000/- from him as a loan. When Rubel asked him to return the money he wanted to repay it by selling the cow. Malek came to the house of Rubel at 9:00 a.m. on 04.09.2009 and proposed him to show a garden at Chouhan beel (canal). Rubel went with him to see the garden but did not return. He further stated that when he asked Malek, whereabouts of Rubel he kept saying different things at different times. He (informant) tried to find out Rubel but failed. When, he asked

Malek and his father that he would go to Kabiraj (astrologer). Then Malek's father stated that he would kept the astrologer mum by paying Taka 10,000/-. At the query of his father Malek disclosed that he killed Rubel. Malek's father informed the matter to the member and chairman. The chairman and member brought Malek to Mobarakpur union parishad by sending chowkidar (security guard). In the union parishad Malek disclosed that he stabbed Rubel in the throat with a Hashuya from behind at 11:30 am at Khaleque's sugarcane field receiving which he fell on the ground and died. He dug a hole at the land of Khaleque and kept the dead body into it covering with leaves of sugarcane. He visited Khaleque's land after one month and two days and saw the skull and bones of hand and legs come out, then he put those in a bag and kept under the bridge of Chouhan beel. Upon hearing from Malek about the incident, the chairman and member of union parishad informed police about the matter. Police came and Malek told the incident to them. At pointing out by Malek police recovered the bones with bag kept under water. Police prepared an inquest report. The informant identified the bones as his son, seeing his shirt and T-shirt

vest (genji). Police took his signature in the inquest report. He proved the inquest report and identified his signature as exhibit-1 and 1/1, respectively. Police went to Malek's residence after recovery of the dead body and recovered a Hashuya and a bag, as shown by him. Malek used it in the killing. He stated that the delay occurred due to searching of his son for one month. Police produced Malek to the Court and he made a confessional statement to the Magistrate. The police sent the bones for post mortem examination. He proved the FIR and identified his signature as exhibits-2 and 2/1, respectively. He also proved Hashuya, check shirt and T-shirts as material exhibits-'Ka' and 'Kha'. He identified the accused on the dock.

In cross-examination, he stated that Afsar member was in charge due to the absence of the chairman. He had a good relation with Afsar. He went to the chairman when he brought Malek through chowkider. Malek was brought by Imam chowkidar, dafadar and Fazlu member. He was at the bazar when Malek was apprehended and brought to the Union Council office. Afsar called him. After reaching, he found Malek guarded by chowkidar and dafadar. He saw

Malek and former chairman Mobin talking. He stated that Mobin resigned and Afsar was in charge. He denied the suggestion that Malek had enmity with Afsar chariman, and for that reason, he tortured Malek, bringing him through chowkidar and dafadar to implicate him in the case. He denied the suggestion that the chairman influenced the police, and Malek was compelled to make false confessional statements under coercion. He admitted that there is Hashuya in everyone's house. He denied the suggestion that the recovered bones were not of Rubel and they brought bones of another man and identified it as Rubul's. He denied the suggestion that Malek did not kill his son and he gave false testimony to implicate Malek.

PW2, Md. Rafique is the brother of informant and uncle of the deceased Rubel. He stated that he knew accused Malek and victim Rubel. The incident occurred three and a half years ago at 11:30 a.m. in the land of Khaleque. The dead body was recovered from Chouhan beel. There was friendship between the accused and Rubel. Malek came to Tobzul's (PW1) house on the date of occurrence and invited Rubel to visit a garden. Rubel went to see a garden with the

accused Malek. At that time, he was at Tobzul's house. When Rubel did not come back, he and his brother visited Malek's house within 3:30 to 4:00 pm. They failed to meet Malek that day, so they visited the following day. Malek was unable to answer Rubel's whereabouts correctly. After a few days, Malek admitted the facts to his father and uncle. Then Malek's father informed the matter to the chairman Afsar of Mobarakpur union. Afsar chairman brought Malek to the Union Council through chowkidar. Then he, informant and others were present. Malek was apprehended and brought by chowkidar after one month and six days after the incident. In reply to the question made by the chairman, Malek admitted that he called Rubel to show the garden at Khaleque's sugarcane field and then hit him with a Hashuya from the back and killed him. After that, he kept the dead body by digging a hole in the land of Khaleque, covering it with leaves of sugarcane. After a few days, when the skeleton came out, he put it in a bag and kept under Chouhan beel's water. The chairman called the police. The accused confessed the guilt in front of police. Police recovered Rubel's body from Chouhan's beel as pointed out by Malek.

Sirajul brought the bag from water. The bag contained Rubel's bones, skull, parts of a check shirt and vest. Tobzul identified the dead body seeing his shirt. Police recovered Hashuya from Malek's house at his showing. In reply to cross-examination, he stated that the chowkidar apprehended Malek upon the order of Afsar chairman. He denied the suggestion that there was a conflict between Afsar and Malek. He further denied that chairman Afsar brought Malek by Chowkidar to implicate him. He denied that Malek was beaten and detained at the council office.

PW3, Md. Sirajul Islam, a neighbour of the informant, stated that he knew informant Tobzul, accused Malek and deceased Rubel. The occurrence took place at 11:30 am on 04.09.2009 in Khaleque's sugarcane field. Rubel invited and called Malek on 04.09.2009 at 9:00 am to see the garden. Tobzul tried to find him out but Rubel did not return. Then, he asked Malek the whereabouts of Rubel. He wanted to know from Malek where his son was; otherwise, he would have gone to Kabiraj. After hearing that Malek confessed to his father Mahatab and uncle Rafique that he killed Rubel. Then Mahatab informed the chairman of union parishad that

his son Malek killed Rubel. The chairman brought Malek by chowkidar. The chairman interrogated, Malek and he said that he took Rubel to see the garden and when they reached Khaleque's sugarcane field, he stabbed in the throat with a Hashuya from behind. Rubel fell down and died and he was buried in a hole in the ground of sugarcane field covered with sugarcane leaves. Malek also told that subsequently he went there and saw the bones, skull and shirt coming out of the hole. He then put those in a bag and hid them in a bit of water under the bridge of Chouhan beel. The chairman then called police, police arrived and took Malek to Chouhan beel. Accused Malek pointed the place where he put Rubel. He (PW3) and Malek went down into the water and took the bones out of the pit. Police had opened the bag through Malek and bones of the head, hand, limbs and torn vest and shirt came out. Rubel's father saw the torn shirt and identified the shirt and bone of Rubel. Police prepared the inquest report and took his signature. He proved the inquest report exhibit-1 and identified his signature exhibit-1/2. Police seized the torn shirt and vest and prepared a seizure list. Then police went to the union parishad and seized the

Hashuya from Malek. He stated that Rubel and Malek had a friendship. Rubel returned from abroad and lent Taka 18,000/- to Malek to purchase cow. When he demanded the lent money then Malek killed Rubel. He identified Malek in the dock.

In cross-examination, he testified that Malek had disclosed the incident at the union parishad office. At that time, Amirul, Rejjak, Bairul, Moazzem, Kamal, Chutu and former chairman Mobin were present. Malek was surrounded by chowkidar and dafadar. Denying the suggestion, he stated that it is not true that accused Malek was brought to the Union Parishad and beaten by chowkidar and forced to tell that he killed Rubel. He denied that Afsar had enmity with Malek and hence Afsar Chairman blamed Malek for Rubel's murder. He denied that no bones of Rubel was recovered from Chouhan beel and Afsar chairman filed a case against accused Malek with bone and skeleton of an unknown man.

PW4 Abdur Rajjak is a neighbour of the deceased. He stated that he knew Tobzul, deceased Rubel and accused Malek. The occurrence took place four and half years ago at around 11:00 am to 11:30 am at Khaleque's sugarcane field.

Rubel went to Dubai and brought some money after staying there for one year. He was a friend of Malek. Rubel borrowed Taka 18,000/- to Malek. When Rubel requested Malek to refund his money, Malek refused to pay showing various causes. One day, Malek came and took Rubel with him to show a mango orchard. After this, Rubel did not return. When Rubel did not come back, Rubel's father asked Malek about Rubel. Malek refused to tell about Rubel and then Tobzul said that he would go to 'Kabiraj'. Thereafter, one day Malek told his father and uncle that he had killed Rubel. Malek's father then told it to the chairman. The chairman called Malek to the council office by the chowkidar and dafadar. When the chairman interrogated Malek then he informed that he had taken Rubel to the mango garden and had killed him. After killing, he buried the dead body and covered it with sugarcane leaves. Later on, he went to see the dead body again and found bones skull and torn clothes. Then he put the bones and torn clothes in the mud in Chouhan's beel, carrying by a sack. The chairman called police and took Malek to Chouhan's beel bridge. Malek showed the place where the sack was dropped. He further

deposed that Malek and Serajul went into the water and found the sack. In the sack, there were bones of the head, hands, legs and torn clothes. Seeing the clothes, Tobzul identified them as of his son's. The constable prepared inquest report and took his signature. He proved his signature marked as exhibit-1/3. He identified the accused, Malek in the dock.

In cross-examination, he stated that the chowkidar brought Malek to the union parishad office. He denied the suggestion that there was enmity between Afsar chairman and Malek and hence, Afsar brought him and imposed the responsibility of murder upon him. He also denied the suggestion that Malek was tortured.

PW5 Md. Ibrahim is a cousin of the informant. He stated that the incident took place in Malek's sugarcane field at 11:30 am about four and a half years ago. Malek went to Tobzul's house at 09:00 am and called Rubel away to show a garden. After this, Rubel never came back. Tobzul searched for Rubel but could not find him out and then asked Malek about Rubel's whereabouts. Malek answered that he did not know about Rubel. Tobzul then threatened that he would go

to Kabiraj. In order to stop the mouth of Kabiraj Malek wanted to pay Taka 10,000/- (ten thousand). Malek then told his father and uncle about the incident, then Malek's father informed it to the chairman. The chairman brought Malek by the chowkidar to the council office. The chairman asked Malek about the incident then, he admitted that he took Rubel to the sugarcane field of Khaleque and killed with a "Hashuya. Thereafter, he dug some places and covered the body with sugarcane leaves. A few days later, when Rubel's bone and skull came out, then he kept those under the little water of Chouhan's beel with a sack. The chairman called police and informed them about the incident. Malek and Sirajul went into the water and brought the sack. He further stated that the bag was opened and bones of leg and hand, skull and parts of shirt were found. Tobzul identified by looking at the part of the shirt. On query, Malek admitted that he killed Rubel with a Hashuya.

In cross-examination, he stated that he did not see when Rubel was called on and taken away. He searched for Rubel and asked Malek for several times. He was not present at the council office when Malek disclosed the incident. He

denied the suggestion that no bone was recovered from the Chouhan's beel.

PW6 Md. Tajul Islam, guard of 4 No. Mobarakpur union of Shibganj stated that the incident took place on 04.09.2009. He was working in office at 11:00 am on 10.10.2009. The acting chairman called him along with security guard Jafar Ali and Imam Ali and directed them to go to the house of Mahatab and to bring Mahatab's son Malek. On the instruction they went to the Mahatab's house and brought accused Malek to the union parishad office. The chairman interrogated Malek and he admitted that he kept dead body of Rubel in a sugarcane field and later on put the body in the water of Chouhan's beel. Then the chairman reported it to the Shibgonj police station. The police came and officer-in-charge interrogated Malek and then the accused again confessed the guilt. Malek showed the place where he kept the body of Rubel. Two or three persons went down into the water and recovered bones of the deceased. Police also recovered Hashuya with a bag from the house of Malek. Police made a seizure and prepared a list. He proved the seizure and identified his signature exhibits-3 and 3/1,

respectively. He also identified Hashuya and gunny bag as material exhibits-‘Ka’ and Ka(1).

In cross-examination, he stated that at that time the chairman was in charge. He denied the suggestion that they tortured the accused on the instruction of the chairman and compelled him to make confession. He did not know the names of two to three persons who went to the water. The bones were kept open underwater. Police brought the bones wrapped in a cloth. He denied the suggestion that there was enmity between Afsar chairman and the family of the accused and for that reason the chairman called accused Malek and brought the allegation of murder of Rubel.

PW7 Md. Jafar Ali was a staff of Union Parishad. He stated that the chairman directed him to bring Malek. He, Taijul and Imam went to the house of Malek and brought him to union parishad. The chairman asked Malek about Rubel then he admitted that he killed Rubel in the sugarcane field of Khaleque and kept the bones under water in Chouhan beel. The chairman informed the officer-in-charge of Shibgonj Police Station. The OC came and Malek disclosed the incident in front him. Bones were collected from

Chouhan beel, as shown by Malek. On query, Malek admitted that he killed Rubel with a Hashuya. Malek took out the Hashuya from a sack. Police prepared a seizure list in the union parishad office. He proved the seizure list exhibit-3 and identified his signature thereon exhibit-3/2.

In cross-examination, he stated that he did not know the names of two to three persons who went to the water to collect the bones. The bones were kept open and not in a sack. He stated that Hashuya as seized is available in every house and used for household purposes. He denied the suggestion that Afsar chairman conspired to implicate Malek in the case.

PW8 Md. Imam is a village Police who is a witness to the seizure. He worked at the union parishad office. The chairman directed Tajul, Jafar and him to bring Malek. Then, they brought him before the chairman. On interrogation by the chairman, Malek disclosed that he killed Rubel and buried him in Khaleque's sugarcane field. Later he threw the bones into the water of Chouhan's beel and that bones were recovered there from. On query, Malek said that he killed Rubel by Hashuya and it was kept in his house. Malek

brought out the Hashuya from a sack. He proved the Hashuya and sack as material exhibits-‘Ka’ and ‘Ka/1’. He proved the seizure list as exhibit-3 and identified his signature thereon as exhibit-3/6.

In cross-examination, he denied the suggestion that he tortured Malek as per the instruction of chairman and implicated him in the murder. He further denied the suggestion that he implicated Malek in the case, showing the bones of another man.

PW9 Md. Mainuddin, Senior Judicial Magistrate, recorded the confessional statement of the accused under section 164 of the Code. He stated that he followed the provisions of the law at the time of recording the accused’s statement. He stated that SI Shohrab brought Abdul Malek at 03:00 pm on 11.10.2009 for recording his confession. He was kept in the custody of MLSS Md. Ismail. The accused was given 03(three) hours time for reflection. He further stated that the recorded statement was read over to the accused and he put his thumb impression in his presence. The confessional statement was proved as exhibit-4.

In cross-examination, he stated that he did not state in the form of the confessions the time of starting and ending the recording. He also denied the suggestion that the accused made confession out of fear as tutored by police.

PW10 Afsar Ali is the acting chairman of Mobarakpur union and a witness to the inquest. He stated that Mobin chairman informed him through phone call that accused Malek had killed Rubel and police along with the security guard would go to the residence of Malek. Then he sent Jafar, Imam and Tajul there. They informed him through call of mobile phone that Malek was staying in his house and then he asked to bring Malek to the union parishad. They brought Malek accordingly and the OC came. He interrogated Malek who admitted of killing Rubel by sickle and keeping the body in the sugarcane field. He stated that he went to the sugarcane field with Malek and police but the dead body was not found there. On interrogation, Malek informed that he threw the bones into Chouhan's beel. They went there and the bones were collected from water. Police held inquest and prepared a report and took his signature. He

proved the report and identified his signature thereon as exhibits-1 and 1/4.

In cross-examination, he denied the suggestion that there was enmity with Malek when he was acting chairman. He brought Malek through chowkidar and dafadar when Mobin chairman informed him. The OC came within two minutes of apprehending Malek. and interrogated him. He did not know whether police ill treated Malek. He further denied the suggestion that out of conspiracy, he forced Malek to make the confession.

PW11 Dr. Md. Khairul Kabir held post-mortem examination of the bones and skeleton. He deposed that a board consisting of 03(three) member's conducted the post-mortem examination of deceased Rubel as per the identification of constable Hazrat Ali. They got some bones of the dead body. He further deposed that he could not ascertain the cause of death. He proved the post-mortem report exhibit-5 and his signature thereon exhibit-5/1. The defence declined to cross-examine him.

PW12 Md. Sohrab Hossain an Inspector of Police is the first Investigating Officer. He stated that at 12:05 pm on

10.10.2009 he received information through a phone call that a dead body was found at Monohorpur Union. He rushed there and saw accused Malek in the custody of the chairman of union parishad. He interrogated the accused who answered that he had killed Rubel and buried the body in a sugarcane field and thereafter kept the body under water. He with his force seized Rubel's torn shirt, parts of the T-shirt, part of the skull and bones of leg and hand as shown by the accused. He proved seizure exhibit-10. He recovered an 18-inch length Hashuya and a sack from the Khaleque's sugarcane field as shown by the accused Malek. He made a seizure and prepared a list exhibit-3. He further proved the inquest report exhibit-1.

In cross-examination, he stated that he had seen Malek at the council office. The chairman and victim's father produced the accused. The dead body was unidentifiable. Only bones were seen. Rubel's father identified the shirt and T-shirt of the deceased. He did not send sickle for chemical examination. He did not get any sign of a stab on victim's shirt and T-shirt. People apprehended accused Malek at 10:30 a.m. on 10.10.2009. He brought the accused to the

police station at 05:00 pm and sent him to the Court the next day at 09:30 to 10:00 am and the magistrate received the accused at 11:00 am. He denied the defence suggestion that the accused made the confession on coercion and threat.

PW 13 Md. Jamal Uddin, an SI of police and the second IO who submitted the charge sheet. He stated that he visited the place of occurrence again and found the investigation done by the previous officer correct. After completing investigation he submitted charge sheet No. 30 on 31.01.2010 against sole accused Malek.

In cross-examination, he stated that mother of the deceased filed a case against five persons and Malek was included in that case.

It transpires that with the defence case is that the recovered skeleton and bones are not of Rubel. The bones belong to someone else and collected to implicate Malek in the case of murder of Rubel due to enmity with Afsar chairman and his team. In the application for retraction of the confession which was filed on 03.03.2014, i.e., before examination of prosecution witnesses, it has been stated:

“গ্রাম্য দলাদলির কারণে আসামী আঃ মালেক কে ফাঁসাইবার জন্য তৎকালীন এলাকায় ক্ষমতাসালী চেয়ারম্যান এর দায়িত্ব পালনকারী আফসার আলী ও তাহার দলীয় লোকজন আঃ মালেক কে তাহার লোকজন দিয়া জোরপূর্বক থানায় ধরিয়া আনিয়া অজ্ঞাত কোন লাশের খুলি ও হাড় সংগ্রহ করিয়া তাহাকে রুবলের হত্যাকারী রূপে প্রতিপন্ন করিবার উদ্দেশ্যে পুলিশকে অন্যায়ভাবে প্রভাবান্বিত করিয়া তাহাদের দ্বারা আঃ মালেকের উপর অমানুষিক নির্যাতন করিয়া তাহাদের শেখানো মতে বিজ্ঞ জুডিশিয়াল ম্যাজিষ্ট্রেট সাহেবের সম্মুখে স্বীকারোক্তি মূলক বক্তব্য দিতে বাধ্য করে।”

Unfortunately, the prosecution could not try to prove properly that the recovered bones were of Rubel not of anybody else. The learned Advocate for the condemned-prisoner also contended that the prosecution had tried to prove the case by showing the bones of others and the so called bones were not tested by holding DNA test. The prosecution should have done such modern test but they deliberately ignored it. We find substance in the submission made by the learned defence counsel. The prosecution miserably failed to substantiate that the recovered skeleton is of Rubel. DNA evidence can provide definitive proof. The accuracy and reliability of DNA analysis deserves paramount

importance. DNA evidence has contributed to more rigorous and scientifically informed approach to criminal investigations and prosecutions. DNA evidence has become a formidable tool for uncovering the truth. A fair investigation is necessary for complete justice. Scientific methods and aid in criminal investigation strengthen the pathway of fair justice. DNA provides scientific evidence beyond reasonable doubt in criminal investigations.

PW11 Dr. Khairul Kabir did not provide any definite opinion regarding the cause of death. In his evidence he deposed, “মৃতের কিছু হাড়ি পাই। মৃত্যুর কারণ সম্পর্কে কোন ফাইন্ডিংস দিতে পারি নাই।” In the post-mortem report it is opined: “In our opinion the above bony parts are of adult human skeleton.” It appears in the post-mortem examination report that nothing was mentioned about the bones that those were of male or female. Even the age was also not ascertained. The doctor depended on the guess of the police constable who brought the skeleton, mentioning name and age but he has not done the ossification of bones and taken chemical analysis and other modern methods suggested in the medical jurisprudence for ascertaining the identification, gender and

age of the deceased. Thus the prosecution case becomes absolutely doubtful. The recovery of the bones from water without any proof whose bones they are does not lead us to the irresistible conclusion that the recovered bones were of Rubel's. As discussed above since it is not proved in evidence that the alleged bones actually comported with the bones of victim Rubel, the charge leveled against the accused under Section 201 of the Code does not deserve consideration.

In this regard, we may refer to the decision in the case of *Akhtar Hossain alias Babul Akhtar alias Akhtar Ali and another Vs. the State*, 44 DLR (1992) 83, wherein it has been held:

“The doctor has also failed to perform his duty properly as required under the medical jurisprudence referred to by the learned Advocate for the appellants. Modi's Text Book on Medical Jurisprudence and Toxicology (20th Edition at page 80) sets down certain principles in question and answer forms to be applied for ascertainment whether

it was a corpus of a human being and if so whether it is of a male or female and also for ascertaining the age of the person whose skeleton was produced before the doctor. The doctor depended on the guess work of the constable who escorted the dead body but he has not done the ossification of bones and taken recourse to chemical analysis and other methods suggested in the medical jurisprudence for ascertaining the age of the deceased. ...

...The prosecution case becomes more doubtful. The recovery of the skeleton without any proof as to whose skeleton it was does not lead us to the irresistible conclusion that it was the skeleton of Shahida.”

We also get support from *Mohammad Siddiqur Rahman and others Vs the State*, reported in (1987) 7BLD (AD) 93, wherein it was held by Apex Court:

“It is true that six human skeletons were recovered after $4\frac{1}{2}$ years in pursuance to their

skeletons only is hardly acceptable. The identification by with reference to their skeletons only is hardly acceptable. The identification by reference to the skeletons is itself doubtful in view of late introduction of this story through the mouth of the witnesses for the first time in court...”

Any other evidence or witness did not corroborate it. PW2, Rafique stated in his evidence that he was present there when Malek called away Rubel. Although PW1 stated that he after watching the torn shirt and T-shirt identified the body of his deceased son but it is beyond the common prudence that how a dead body could be identified in such an abstract way after one month and six days when only some of the bones of the deceased are recovered from under water and such way of identification has definitely came out of the blue and does not lead to satisfaction and he failed to answer in cross examination that at that particular time what dress of what colour Rubel put on his body.

We find a contradiction between the evidence led by PWs 2, 3, 5, 6, 7 and 10 regarding the recovery of the bones

of the deceased and the bag from which bones alleged to have been recovered. PW2, Rafique deposed that Siraj collected a bag from the canal and PW3 Siraj said that police opened the bag with the hand of Malek. PW5 also deposed that Sirajul brought the bag from water. On the other hand PW6 Taizul Islam deposed that the bones were kept open under water. PW7 Md. Jafar Ali corroborated the evidence made by PW6 that the bones were kept open and not in a bag. PW10, Afsar Ali stated that the bones were collected from the water.

The evidence referred to above shows that some witnesses said the bones were lying in the water, and some said the bones were kept in a bag. Such inconsistency creates serious doubt which goes in favour of the condemned-prisoner. Moreover, it appears from the seizure lists that no bag was seized and exhibited from which the alleged bones of Rubel were recovered.

It is alleged by the prosecution that Malek killed Rubel with an 18 inch Hashuya and the dead body was buried by digging the land of Khaleque's sugarcane field by the Hashuya. The learned defence lawyer made the argument

that it is not believable that a huge hole was made by digging soil with a Hashuya to hide an adult's dead body. He also argued that the bones were recovered after one month and two days but nobody saw it and no one got any lousy smell, which is surprising. He further argued that there was enmity between Malek and Rubel but when Malek called Rubel to visit a garden he went with him, but it was not seen by Rubel that Malek was carrying an 18 inch Hashuya which creates serious doubt about the fact. We find substance in the submission made by the defence lawyer. We also find that PW1 Tobzul Islam and PW2 Md. Rafique stated in their evidence that there was enmity between Malek and Rubel and they saw Malek offered and called to show Rubel a mango orchard and Rubel went to visit garden with Malek. But PW1 and PW2 did not state that they saw Malek carrying a Hashuya or a bag with him. Malek carried an 18 inch sickle might be seen by Rubel or PW1 and PW2, but there is no satisfactory answer to this unbelievable incident. According to the case of the prosecution that Malek and Rubel maintained a bad relationship and at the same time, it is also the case of prosecution that Rubel responded the

invitation of Malek to visit a mango garden deliberately and such circumstances definitely make the prosecution case doubtful.

PW12, Md. Sohrab Hossain, Inspector of Police, seized the Hashuya and bag and prepared the seizure list marked as exhibit 3. In evidence he stated: “তারপর আসামী মালেকের দেখানো মতে, ৫০০ গজ দূরে আঃ খালেকের আখক্ষেত হতে একটি হাসুয়া ১৮ ইঞ্চি লম্বা, চটের ব্যাগ উদ্ধার করি ও তালিকা মূলে জব্দ করি।” But PWs 1, 2, 6, 7, 8 and 10 deposed that the Hashuya was seized from Malek’s house. PWs 3, 4 and 5 stated in their examination-in-chief that a Hashuya was recovered but they did not mention from where it was seized. Thus it transpires that the sickle seized under exhibit-3 is not proved in evidence through which prosecution wants to believe the Court the commission of offence.

We also find discrepancies in the statements relating to the financial transactions. In his confessional statement Malek stated that he gave a loan of Taka 11, 000/- to Rubel. When Rubel returned from Dubai then he asked to repay and accordingly Rubel paid Taka 18, 000/-. On the other hand it is stated in FIR that Rubel gave loan of Taka 18,000/- to

Malek which apparently contradicts the confessional statement of Malek made under section 164 of the Code with the statement made in the FIR and in such circumstance the case of the prosecution falls through according to the settled principle of law.

Learned defence lawyer contends that deceased Rubel was missing for more than a month but his family members did not file any GD Entry regarding his missing. The FIR was lodged after one month and six days on receipt of instructions from the acting chairman who alleged to have conspired to implicate Malek which creates serious doubt about the prosecution case. Against this backdrop, we have carefully perused the FIR, evidence and other materials on record. In the FIR and in evidence PW1 stated that Malek called away Rubel at 9.00 am on 04.09.2009 and thereafter, he did not return. The informant asked Malek on several occasions about Rubel's whereabouts but Malek replied different things in different times. When Malek was apprehended by chowkidar-dafader and brought to the union parishad office by the acting chairman on 10.10.2009, he disclosed about the incident and the informant lodged FIR at

06.15 pm on 10.10.2009 with Shibgonj police station. In the meantime, one month and six days elapsed but no GD entry or case was filed by him or by any member of his family with regard to missing. Even Rubel's family members should have informed the local chairman-member. This kind of silence and inaction of by Rubel's family is questionable.

Learned defence counsel also contends that the trial court did not mention the name of the deceased, the recovery of the bones of the deceased from the canal namely Chouhan beel as pointed out by the accused and about the confessional statement in the charge and thus the charge was framed in a vague manner at the expense of defence and as such the conviction and sentence passed by the trial Court is not sustainable in law inasmuch as the accused has been seriously prejudiced in his defence as he was not given reasonable opportunity of confronting the charge with full particulars while the witnesses were examined.

The charge form is quoted below to examine the grievances raised by the learned defence lawyer:

ÒGKIU A\|f#hVM

[১৮৯৮ সালের ৫ নং আইন, ৫ নং তফসিল, ২৮ (১) নং]

(ফৌজদারী কার্যবিধির ২২১, ২২২, ২২৩ ধারা)

- (১) ম্যাজিস্ট্রেটের নাম ও অফিস, আমি (১) মোঃ আনোয়ার হোসেন,
ইত্যাদি দায়রা জজ, চাঁপাইনবাবগঞ্জ।
- (২) আসামীর নাম এতদ্বারা আপনি (২) আঃ মালেক
কে নিম্নলিখিতরূপে অভিযুক্ত
করিতেছি যে :-
- (৩) অপরাধ বর্ণনা করুন আপনি ৪/০৯/০৯ তারিখে বা ঐ দিন
আনুমানিক ১১.৩০ ঘটিকার সময়ে
মোবারকপুর চৌহান বিল স্থানে
আমবাগান দেখানোর নাম করে
ভিকটিমকে মোবারকপুরের চৌহান
বিলের আখন্ডেতে নিয়ে যান এবং
পিছন দিকে থেকে ভিকটিমের গলার
সাইড হাসুয়া দিয়ে আঘাত করে হত্যা
করেন এবং মাটি খুড়ে লাশ গোপন
করেন।,,

...

Upon perusal of the above-mentioned charge, we find substance in the submission of the learned defence lawyer. In this regard, reliance may be placed in the case of *Abdur Razzaque @ Geda Vs. State*, reported in 48 DLR (1996) 457, wherein it has been held:

“A charge is an important step in the criminal proceeding...

The whole object of framing a charge is to enable the accused to concentrate his attention

in the case i.e. he has to meet the charge. If particulars of the offence is not brought on charge the accused is deprived of getting an opportunity of meeting the same.”

In the case of *Bashir Kha Vs. State*, reported in 50 DLR (1998) 199, the court observed:

“The failure of the trial court in not mentioning the particular’s which are required to be mentioned under sections 221 and 222 of the Code of Criminal Procedure while framing charge caused prejudice to the accused and because this omission deprived him from taking proper defence and, as such, the error in the charge definitely occasioned failure of justice.”

Similar views were taken in the case of *Moslem Ali Mollah Vs. State*, reported in 48 DLR (1996) 427, the Court held:

“The object of framing charge is to ensure that the accused may have as full particulars as are possible of the accusation brought against him.”

In the case of *Md. Mir Kashem Vs. Abdru Razzak and others* (unreported judgment passed in Criminal Misc Case No. 2163 of 2016) this Court observed that if charge is framed in such a vague manner that the necessary ingredients of the offence with which the accused is convicted are not brought out in the charge, then the charge is defective. A charge should be carefully drawn up in accordance with the offence disclosed. The charge should be precise in its scope and particular in its details.

It is admitted that in this case there is no eyewitness to the occurrence. The prosecution case rests on the confessional statement and some circumstantial evidence including the recovery of the bones of the deceased and Hashuya at the instance of the accused. The accused have been convicted and sentenced solely based on the said confession aided by circumstantial evidence. The defence plea was that the confessional statement of Malek was neither voluntary nor true and the same was extracted by police with the aid of Afsar chairman and his team, torturing him in union parishad office and police custody.

In Jail Appeal No. 406 of 2017, filed by the condemn prisoner, it is also stated that,

“...ইউপি চেয়ারম্যানের সদস্যগণ বার বার আমার বাড়িতে গিয়ে হুমকি প্রদান করিতে থাকে। নিখোঁজ হওয়ার ১ মাস পর জানিতে পারি যে, মামলার বাদী, পুলিশ এবং ইউপি চেয়ারম্যান কোথা থেকে কিসের হাড্ডি উদ্ধার করে নিয়ে আসে এবং ঐ হাড্ডি হাড্ডিগুলো বাদীর হারিয়ে যাওয়া সন্তানের দাবী করিয়া আমার বিরুদ্ধে হত্যা মামলা দায়ের করে। বাদী সম্পূর্ণ মিথ্যার আশ্রয় নিয়ে আমার বিরুদ্ধে স্বাক্ষী দেয় এবং ভারপ্রাপ্ত চেয়ারম্যান, গ্রাম পুলিশ জোর করে আমাকে ধরে নিয়ে বেদম প্রহার করে এবং পুলিশ ডেকে আমাকে পুলিশের হাতে ধরিয়ে দেয়। ভারপ্রাপ্ত চেয়ারম্যান প্রভাবশালী হওয়ায় পুলিশ তার কথামত আমাকে মারধর, নির্যাতন ও প্রাণনাশের হুমকি দিয়ে স্বীকার করিয়ে নেয়।”

Earlier, the condemned prisoner filed an application for retraction of the confession on 03.03.2014, wherein he made an allegation of torture in the similar manner as above which has been quoted earlier.

It is alleged in the FIR that Malek disclosed to his father that he killed Rubel. At that moment, Malek's father informed former chairman Mobin and UP member Fazlul

Haque. Upon receipt of the information, the chairman apprehended and brought Malek to the union parishad office through local chowkidars. Then Malek described the whole incident to the chairman, members and other local people. After that the chairman informed the officer-in charge of Shibgonj police station about the matter and police reached there within a short period. PWs 6, 7 and 8 deposed that the chairman directed them to apprehend Malek and bring him to the union parishad at 11.00 am to 11.30 on 10.10.2009. Accordingly, they apprehended him and brought him to the union parishad office. PW10, Afsar Ali chairman deposed that although initially Malek was denying but when he faced serious snub he admitted that he killed Rubel on 04.09.2009 with a Hashuya. He stated, “মালেক প্রথমে বলিতে ছিলনা পরে ধমক দিলে বলে যে, সে রুবলকে হাসুয়ার কোপ দিয়া ৪/৯ ইং তারিখ মারিয়া ফেলিয়াছে।”

It appears that the father of deceased did not come to the chairman-member or union parishad at first. The chairman informed and called Rubel’s father after Malek confessed his guilt. The chairman without providing information to the local police station, directed Taijul, Jafar

Ali and Md. Imam to bring him to the union parishad office by apprehending him. He and his team extracted a extra judicial confession of accused Malek first. The chairman's activities raised the question as to apprehending of Malek through his men without waiting for police. The chairman admitted in his examination-in-chief that Malek made the confession upon pressure and coercion. So, the extra judicial confession is not free from doubt.

The confessional statement to the Magistrate exhibit-4 shows that the accused was arrested at 11.00 am on 10.10.2009 and he was produced before the recording Magistrate by SI Sohrab at 3.00 pm on 11.10.2009. Police produce the accused before the Magistrate after 24 hours of his arrest and thus violated the mandatory provisions of law of section 61 and 167 of the Code. There is no explanation for such delay in producing the accused Malek before the recording Magistrate within the specified time. In this regard reliance may be placed and referred to the case of *The State Vs. Mofizuddin and others*, reported in 15 BLT (AD)(2007) 105, wherein our apex Court held:

“The High Court Division further opined that it is unsafe to rely on such confessional statement to convict accused Mofizuddin, since same has been recorded after detaining him in police custody beyond the period permitted by law. The High Court Division has rightly held that the confessional statement of accused Mofizuddin is not true and voluntary.”

It appears from the record that the accused was produced before the recording Magistrate at 3.00 pm on 11.10.2009. The Magistrate kept the accused under the custody of MLSS Md. Ismail for 3 hours for reflection. PW9, the recording Magistrate stated that, এস.আই. সোহরাব অভিযুক্ত আব্দুল মালেককে দোষ স্বীকারোক্তি লিপিবদ্ধ করণের জন্য দুপুর ৩.০০ টায় আমার নিকট উপস্থাপন করে। আমি অভিযুক্ত আঃ মালেককে নিজ খাস কামরায় এম.এল.এস.এস মোঃ ইসমাইলের হেফাজতে রাখি। অভিযুক্তকে মুক্তভাবে চিন্তা করার জন্য তিন ঘন্টা সময় দেই। So, it is evidently clear that, the recording Magistrate started recording the confessional statement after 6.00 pm beyond the Court hour. But Rule 79(1) of the Criminal Rules and Orders (Practice and

Procedure of Subordinate Courts) 2009 provides that a confession should always be recorded during the Court hour.

The said Rule runs as follows:

“Confessions are to be recorded during the Court hours in the Magistrate Court or other room in a building ordinarily used as a Court house unless, the Magistrate, for reason to be recorded by him in writing, certifies that compliance with these conditions is impracticable or that he is satisfied that the ends of justice would be liable to be defeated thereby.”

On going through the confession, we do not find that the learned Magistrate assigned any reason for recording the confession beyond the time prescribed by law. In cross-examination, the recording Magistrate Md. Mainuddin (PW9) stated that, ফরমে ইহা আমি উল্লেখ করি নাই যে কয়টার সময় দোষ স্বীকারোক্তিমূলক জবানবন্দি লিপিবদ্ধ শুরু করি এবং কখন শেষ করি।”

This expedition raises the question as to why the learned Magistrate had recorded the confessional statement beyond the Court hour. He could have easily recorded it on

the following day, if the maker really wanted to make it. We get support from the decision passed in the case of *State Vs. Rija Khatun*, reported in the case of 73 DLR 343 wherein the Court observed:

“The confession was also recorded in violation of Rule 79(1) of the Criminal Rules and Orders (Practice and Procedure of Subordinate Courts) 2009. So, we are unable to rely on the confession. ... Accordingly, the death reference is rejected. The conviction and sentence of condemned-convict is set-aside.”

Usually, a father wants to protect his child from any accusation, but it is revealed from FIR that Malek’s father informed the local chairman Mobin and union parishad member Fazlul Haque as soon as he learnt from his son Malek about the murder of Rubel which is unbelievable. Relevant part of the FIR is as follows:

“তখন মালেক এর বাবা মাহাতাব বলে যে, রুবেল কোথায় আছে বলো তখন মালেক বলে আমি রুবেলকে গত ইং ০৪/০৯/০৯ তারিখ শুক্রবার বেলা অনুমান ১১:৩০

ঘটিকার সময় চোঁহান বিলের জনৈক আঃ খালেকের আখ
ক্ষেতের ভিতরে নিয়ে হত্যা করিয়াছি। এই কথা শনার পর
মালেকের বাবা তাৎক্ষনিক ভাবে প্রাক্তন চেয়ারম্যান মবিন
ও ইউপি সদস্য ফজলুল হক এর নিকট জানায়। এই
সংবাদ পাইয়া চেয়ারম্যান সাহেব স্থানীয় চৌকিদারের
মাধ্যমে মাহাতাব এর ছেলে আঃ মালেককে আটক করিয়া
ইউনিয়ন পরিষদে নিয়ে আসে।”

It appears from the evidence of PW10 Afsar Ali, the acting chairman, that Mobin chairman informed him through phone call that Malek had killed Rubel, hence police would come. Mobin chairman also directed Afsar chairman to send chowkidar to Malek's residence. In cross-examination, Afshar stated that when Malek was brought to the union parishad, then Mobin chairman, Fazlu member, Al-Amin member, Afzal member and officer-in-charge of the police station were present. However, Mobin chairman, Fazlu member, Al-Amin member, Afzal member were not examined. The examination of Mobin chairman was very important in the case. The prosecution withheld the examination of the aforesaid witness which creates a serious doubt about the prosecution case. It is undoubtedly the duty

of the prosecution to place before the court all available witnesses irrespective of their evidence being favorable or unfavorable in a case involving capital sentence. Where a necessary witness is mysteriously not cited as a witness, the court may properly draw an adverse inference against the party failing to do so. If a material witness has been deliberately kept, then a serious reflection designing smokescreen is cast on the validity of the conviction.

In order to convict a person charged with murder, there should be unimpeachable evidence of reliable witnesses beyond any reasonable doubt. If any doubt arises in a case then the benefit of doubt should be given to the accused. At this stage, we remember the age-old maxim that it is the cardinal principle of the criminal jurisprudence that thousands of accused may be acquitted but no single innocent person should be convicted.

In the light of the above discussions and observations, we hold that the prosecution has hopelessly failed to prove the charge leveled against the condemned-prisoner but the trial court illegally passed the judgment and order of

conviction and sentence, which is not sustainable in law and warrants interference of this Court.

Accordingly, we find merit in the appeal.

In the result, the death reference No. 127 of 2017 is rejected and Criminal Appeal No. 10366 of 2017 is allowed. The judgment and order dated 25.09.2017 passed by Additional Sessions Judge, Chapainawabgonj in Sessions Case No. 90 of 2010 arising out of Shibgonj Police Station Case No.19 dated 10.10.2009 corresponding to GR No. 414 of 2009 convicting and sentencing the condemned-convict is set aside. The convict-appellant Abdul Malek, son of Mahatab Uddin is acquitted of the charges leveled against him under Sections 302 and 201 of the Penal Code.

The Jail Appeal No. 406 of 2017 is disposed of.

The concerned authority is directed to set him at liberty at once, if not wanted in connection with any other case.

Send down the lower Court records with a copy of this judgment for necessary action.

S. M. Emdadul Hoque, J:

I agree.