In the Supreme Court of Bangladesh
High Court Division

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Biswajit Debnath

Death Reference No.75 of 2017
The State
Vs.
Md. Lavlu
...Condemned-Prisoner.
With
Criminal Appeal No. 6509 of 2017
Md. Lavlu @ Lavlu
.. Convict-Appellant.
Vs.
The State ..Respondent.
Mr. M.A. Muntakim with
Mr. Chowdhury Shamsul Arifin, Advocates
…For the convict-appellant.
With
Jail Appeal No. 264 of 2017
Md. Lavlu Gazi
.. Appellant.
Vs.
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 Shafayet Zamil, A.A.G. with
Mr. Mohammad Humayun Kabir, A.A.G.
…..For the State.
Heard on 14.02.2023, 19.02.2023 and 26.02.2023.
Judgment on 27.02.2023 and 28.02.2023.

SHEIKH HASSAN ARIF, J:

1. This death reference has been sent to us by the Nari-O-Shishu Nirjatan Daman Tribunal, Jessore in view of the provisions under Section 29 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 read with Section 374 of the Code of Criminal Procedure for confirmation of death sentence imposed by it vide judgment and order dated 30.05.2017 passed in Nari-O-Shishu Mamla No. 231 of 2014, the Tribunal sentenced the convict-Md. Lavlu to death after convicting him under Section 9 (3) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (hereinafter called "the said Ain"). The said convict having, in the meantime, preferred Jail Appeal No. 264 of 2017 and Criminal Appeal No. 6509 of 2017, the same have also been sent to us for disposal along with the said death reference. Therefore, the said

death reference, criminal appeal and jail appeal are to be disposed of by this common judgment.

2. **Background Facts:**

2.1 Prosecution case started with the lodging of the FIR by P.W. 1(Md. Billal Hossain), father of the deceased (Sabina Khatun), with the Kotwali Model Police Station, Jessore alleging, inter-alia, that her daughter, Sabina Khatun (8), was a student of class three and the accuseds, Anwar Hossain and Lavlu, were their neighbours. That the accuseds used to visit his house and accused No. 1 used to call the victim 'বন্ধু' (friend) as he was related to her as grandfather. That in the evening at 7:30 on 23.03.2014, while his said daughter was studying at the veranda of his house, the accuseds came and sought to eat betel leaf (পান) from his mother (P.W. 2), which his mother could not give as there was no betel Nut. That

while his mother went to a nearby house, the accuseds took away the victim on the pretext of giving her sweets and wrapped her mouth with hand. The accuseds then took the victim to the potol field (পটল ক্ষেত) of accused Anwar towards the south-west side of informant's house. The accuseds then raped and killed the victim after tying-up her hands, mouth and legs, and left her in the paddy field with earth in her mouth. That the informant then returned from bazar and found no one at home except his mother. He started searching for her daughter and found the deceased-victim at 09:15 at night at Anwar's paddy land with her hands, legs and mouth tied up. The body was then taken to the General Hospital, Jessore by one Saju and Rafiqul, wherein the victim was declared dead. That police came after knowing about the incident. The informant then, after knowing everything

from his mother (P.W. 2) and neighbour Saleha (P.W. 5), lodged the FIR on the next day.

2.2 Accordingly, the said FIR was registered as Kotwali Model Police Case No. 92 dated 24.03.2014 under Section 9 (3) of the said Ain and the charge of investigation was given to P.W. 7, an SI of the said police station. However, in the meantime, on the strength of a GD entry, one SI of the said police station visited the hospital morgue at night on 23.03.2014, prepared inquest report and sent the body for post mortem. During his investigation, P.W.7 seized some materials by way of seizure list, prepared sketch map & index, examined the post mortem report and arrested accused-Lavlu, who then made confessional statement before a Magistrate. The investigating officer also recorded statements of witnesses, and upon finding the allegations to

be established prima-facie against both the accuseds, he submitted charge sheet, being Charge Sheet No. 663 dated 23/07/2014, under Section 9 (3) of the said Ain against them.

2.3 Thereafter, the case, being ready for trial, was sent to the Nari-O-Shishu Nirjatan Daman Tribunal, Jessore for trial. Subsequently, one of the accuseds, namely, Anower Hossain, having died, the Tribunal framed charge against accused Lavlu only vide order dated 20.04.2015 under Section 9 (3) of the said Ain. The said charge was then read over to him, but he pleaded not guilty and demanded trial. During trial, prosecution produced nine (09) witnesses (P.W. 1 to P.W. 9) including some documents and materials which were, accordingly, marked as exhibits and material exhibits respectively. After completion of recording of the evidences, the Tribunal examined the accused under

Section 342 of the Code of Criminal Procedure, whereupon the accused again pleaded not guilty and refused to give any evidence in defence. The Tribunal then, after hearing the parties, delivered the impugned judgment and order dated 30.05.2017, thereby, convicting the accused-appellant under Section 9 (3) of the said Ain and, accordingly, sentenced him to death with a fine of Taka one lakh. The Tribunal then sent the case records to the High Court Division of the Supreme Court of Bangladesh in view of the provisions under Section 29 of the said Ain read with Section 374 of the Code of Criminal Procedure for confirmation of the said death sentence. As stated above, the convict-appellant has in the meantime preferred the aforesaid jail appeal and regular criminal appeal. Thereupon, after necessary formalities, the said appeals have also been sent to us,

along with the said death reference, for disposal.

3. **Depositions of the witnesses:**

3.1 Before scrutiny of the evidences on record as against the submissions of the learned advocates, let us first describe, in short, as to what the prosecution witnesses deposed before the Tribunal.

P.W. 1 (Md. Billal Hossain) was the informant and father of the deceased. Accordingly, he deposed before the Tribunal that the occurrence took place in between 7:30 and 9:00 at night on 23.03.2014. That in the evening on that day, when he came out of the house for bazar, accused-Lavlu entered his house. That other accused-Anower was also in his house at that time. That when he went to bazar, her daughter Sabina, aged 8, was doing study at the veranda of the house and the accuseds were watching

television. That after 30/40 minutes, he received a phone call from his sister Dolly, who made query about the whereabouts of Sabina. He then replied that he saw accuseds-Anwar and Lavlu watching TV at home and asked his sister to ask them about it. His sister then informed him that the said two people were also not at home. That people of the house then started searching for the victim, and, after 10 minutes, his brother-in-law, Mirajul, informed him that the victim was found at the potol field of Anwar. He then rushed to the spot and saw the victim being taken to the hospital on a motor cycle by one Raju and Mukul. He then tried to go to the hospital, but was asked by the people not to go there as, according to them, his daughter had already died. That doctor at the hospital declared his daughter dead. That inquest and post mortem were done thereafter. According to him, the victim was raped and killed by accuseds Lavlu and Anower. He then

lodged FIR with the Kotwali police station on the next day. Accordingly, he proved the said FIR as Exhibit-1 and his signature thereon as Exhibit-1/1. He also identified the accused-Lavlu standing on the dock. According to him, the other accused had died.

In cross-examination, he deposed that the body of the victim was brought to his house by the village member and people on the next day and, thereafter, the body was buried. That he filed the case at about 7/8 after Maghreb on 24.03.2014 and that he himself did not write the FIR, but it was written as per what he told about the incident. He further deposed in cross-examination that police was informed about the incident at about 12:00 at night on 23.03.2014 and police immediately rushed to the house. That Ismail member and Alim also informed police after he informed it. He denied that he did not write in the FIR as regards his visit to the bazar and Lablu's visit

to his house or that Lavlu and Anwar were watching TV or that his daughter was doing study at the veranda or that he received a phone call while he was at bazar or that he did not ask his sister to make query from Anwar and Lavlu who were watching TV or that his sister told him that the accuseds were also not at home or that after 10 minutes, his brother-in-law informed him that the dead body was recovered or that local people asked him not to go the hospital. He, however, admitted in cross-examination that he did not see the occurrence and that he saw the dead body after the rape and killing of his daughter. He further admitted that the Upazila election was taking place on the day of the occurrence. He also admitted that he had a wife named Asia, but she was not at home at the time of occurrence. He admitted that Mahfuza Begum (P.W. 2) was his mother and Fazlul Hoq Bepari was his father and that Dolly was his sister, who was married

away to Chandra village which was about 8-10 km away from the place of occurrence. However, he expressed his ignorance as to whether the house of Lavlu was massacred by the village people or whether Lavlu's livestocks were looted away. He also admitted in cross-examination that Lavlu was arrested by RAB. He further deposed that Lavlu fled away immediately after the occurrence, and, after 5/6 months, he was detained by RAB and that RAB detained him after Lavlu's poster was circulated at different places. He further denied the defence suggestion that he was engaged in phensedyl business and that the people of Durgapur village filed case against him in respect of such phensedyl. He further denied the defence suggestion that Lavlu's house was massacred because of village grouping or that Lavlu was chased away from the village or that he was implicated falsely in the case because of that.

P.W. 2 (Mahafuza Begum) is the mother of the informant (P.W.1). She deposed that the occurrence took place in between 07 and 09 o'clock at night in the evening on 23.03.2014. According to her, on that day, Anwar visited her house in the evening and sought to eat betel leaf and Anwar was sitting on a chowky (bed) at the veranda. That other accused Lavlu was standing while holding the roof of that veranda of the house. That upon a call from her sister's house nearby, she went there and, while she was going, she saw victim Sabina, aged 8, studying and sitting on the bed towards eastern side of the veranda. That when she returned from her sister's house, she found the books open on the bed and found her grandchild missing along with the accuseds. She then started to search for her grandchild and, at one point of such searching, found the victim lying upside down with blood stained cloths at the potol field of accused-Anwar.

She then rushed to the spot immediately along with Saleha (P.W. 5), Moti Kaka (P.W. 3) and other local people. She found the torn-up cloths on the dead body and saw blood thereon. She also found earth in the mouth of the victim and some burn injuries from cigarette on victim's hand and abdomen. That people present there said that the victim was alive and, accordingly, they tried to make the victim breath upon removing the earth from her mouth. That Mukul and Saju then took the victim on a motor cycle and they went away quickly towards the Jessore 250-bed hospital—where the doctor declared that the victim had died long ago. That upon arrival of the dead body and inquest report, the body was buried. She, accordingly, identified accused-Lavlu standing on the dock.

In cross-examination, she deposed that the potol field of Anwar was 1/2 km away from her house and

the house of accused-Lavlu was also half km away from her house. She also deposed that police came to her house at about 10/10:30 at night, but she could not say as to who gave information to the police. She also deposed that she visited her sister Rokeya's house to see the birth of a cow-calf and she stayed there for 20 minutes. She further confirmed that the house of Rokeya and her house were adjacent to each other. She, however, deposed that she did not see the incident and that she did not go to the hospital when the victim was taken there. That after the death of her granddaughter, she became shocked and, accordingly, she didn't know when her son went to file the case. She also admitted that their original house was in Chowgacha and that they belonged to Dhopadi clan (ধোপাদি বংশ) and the witnesses belonged to Bepari clan. She also deposed in cross-examination that Lavlu was detained by police from

Hashimpur Bazar after about 26/27 days of the occurrence and she, along with her son, visited the police station on that day after arrest of Lavlu. However, she expressed her ignorance as to whether Lavlu was beaten by police on that day. She further denied the defence suggestion that they had asked police to extort confession from Lavlu by beating. She also expressed ignorance as to whether local people had massacred Lavlu's house after the occurrence or that Lavlu's livestocks were looted away. She deposed that she gave statement to police on the day of the occurrence. She also denied the defence suggestion that she did not disclose to police about the cigarette burn on the body of the victim.

P.W.3 (Md. Motiur Rahman) was the neighbour of the informant. Accordingly, he deposed that the informant and accused were known to him. He also

deposed that on 23.03.2014, he saw Anwar and Lavlu talking to each other at the Maghrib time in front of his house. That at about 08:00 o'clock at night, he visited informant's house after hearing hue and cry and upon hearing that the victim had gone missing. He then, along with other people, started searching for the victim and, at one stage, found the victim lying on the potol field of Anwar. That the victim was lying upside down and that her clothes were stained by mud and blood. That he saw Fazlu recovering the victim and taking the victim quickly to the house. That the earth from the mouth of the victim was taken out after taking the victim to the house and she was taken to the hospital quickly by Mukul and someone else on a motor cycle, wherein doctor declared her dead. That the case was filed and police visited the place of occurrence. Accordingly, police seized the piece of victim's payjama and blood stained earth by a seizure list

and took his thumb impression thereon. Accordingly, he proved the said seizure list as Exhibit-6 and identified his signature thereon. He also identified accused-Lavlu standing on the dock.

In cross-examination, he admitted that he could not be able to read as to what was written on the said paper with his thumb impression. He could not remember as to when he gave such thumb impression. He deposed that he did not go to the hospital. He also deposed that the distance of Anwar's potol field from his house was about 300 yards and that the distance of Sabina's house from his house was about 250 yards. He also deposed in cross-examination that they had searched for the victim with the torch lights and there were about 10/12 torch lights. However, they did not deposit torch light to the police. He confirmed that P.W. 2 also visited the potol field of Anwar. He admitted that

the grandfather of victim was his friend. He, however, denied that he did not tell police that he saw Lavlu and Anwar talking to each other standing on the road. He also denied that he did not tell police that he had heard screaming from the house of Billal (P.W. 1). He also denied that he did not tell police that Sabina was taken to the house by her grandfather and that the earth from her mouth was taken away on that he did not tell police that Mukul and someone else took Sabina to the hospital. He, however, expressed ignorance as to whether the house of accused was massacred. He also denied the defence suggestion that he was involved in such massacre and looting. He, however, admitted that he did not see the rape at the potol field. He denied the defence suggestion that he gave evidence in order to justify his looting.

P.W. 4 (Md. Rafiqul Islam) is another neighbour of the informant. He also confirmed the date and time of the occurrence in his deposition and confirmed that the occurrence took place at the potol field of Anwar Hossain at Erenda village. He confirmed that there was Upazila election on the day of the occurrence and he was at the bazar. He deposed that the informant was searching for his daughter, and, being a neighbour, he also joined the searching. That during such search, they came to know that accuseds Anwar and Lavlu were at informant's house and that Sabina's sandal and accused-Lavlu's watch were found on the bank of a pond. They then started searching for Sabina and found her body lying upside down and senseless in the potol field of Anwar Hossain. That Sabina's grandmother Mafuza (P.W. 2) and neighbour Saleha (P.W. 5) took Sabina to house with muds on the mouth and nose of Sabina. He then took Sabina to

the hospital, with the motor cycle of Saju where the doctor declared her dead. He also took the dead body to Sabina's house after post mortem. According to him, police prepared inquest report on 24.03.2014 and he was present at that time. Accordingly, he proved the said inquest report as Exhibit-2 and his signature thereon as Exhibit-2/1.

In cross-examination, he deposed that police came at about 11 in the morning on 24.03.2014. He further deposed that it was written on the inquest report that he had signed the same on 23.03.2014 at 23:50 at night. He deposed that he was at Erenda bazar on the day of occurrence and the distance of Erenda bazar from Sabina's house was near ½ km and there are 25/30 houses in between. That he came to know from Sabina's aunt (ফুফু) that Sabina had gone missing and the said aunt's name was Dolly and that he received such information at about 7/7:30 in the

evening. That he was along with 7/8 people at that time and all of them started searching when it was dark at night. He deposed that the potol field of Anwar was about 30/40 ft. away from Sabina's house and Anwar's house was about 60/70 ft. away from the said potol field. He confirmed that Sabina and Lavlu were from same locality (পাড়া). He deposed that he saw Sabina lying on the ail and he did not see as to what happened before that. He also confirmed that he started with the motor cycle from Sabina's house at about 8:30/8:45 at night and Sabina was naked at that time and that a cloth was put on her. That Sabina was bleeding at that time and some blood saddled on his body as well. He also confirmed that he found Sabina in the torch light and that there were torch lights and charger lights in the hands of people, but the torch lights, charger lights and his blood stained cloths were not given to police. He could not say as to wherefrom Sabina's

sandal and Lavlu's watch were recovered and as to who recovered them or who deposited them to police. He deposed that he had received dead body on the next day at about 11-12 o'clock and he was present at the time of lodging the FIR. He admitted that Lavlu was arrested by RAB from Hashimpur of Jessore. He denied that Lavlu was arrested from Keshobpur on that accuseds-Lavlu and Anwar were not at the house of Sabina's father. He, however, admitted that he did not see Lavlu and Anwar at Sabina's father's house.

P.W. 5 (Saleha Begum) was another neighbour of the informant. She, accordingly, confirmed the time and date of occurrence. She confirmed that she was watching TV at that time, but she could not remember as to at whose house she was watching TV, but she confirmed that Lavlu and Anwar were standing at that house. She then heard that Sabina

went missing and she started searching for Sabina. That after about half an hour, Sabina was recovered naked from the potol field of Anwar. That there were muds on Sabina's mouth and eyes. That 10/12 people took Sabina to her house, muds were washed away, a pant was put on her and she was sent to hospital. She deposed that Sabina had died.

In cross-examination, she deposed that Billal was his brother through village relation and that there were two houses in between her house and Billal's (P.W.1) house. She, however, deposed that she was watching TV serial at Billal's house and the said TV serial was CID. She denied the defence suggestion that there was no such TV serial named CID or that 7:00 o'clock at night was not the time for CID serial. She also deposed in cross-examination that she was at Shariful's house for half an hour and she could not remember as to when she returned

home. After returning home, she came to know at 07:30 that Sabina had gone missing. That she searched for Sabina for 1 to 1½ hours and found her. At that time, there were 10/12 people. She expressed her ignorance as to whether Lavlu's house was vandalized on the night of the occurrence and whether Lavlu's livestocks were looted away. However, she confirmed that her house and Lavlu's house were adjacent to each other. She, however, deposed that she had heard later on that Lavlu's house was looted. She also heard that Lavlu was arrested by RAB and then he was beaten by RAB. She again deposed that Lavlu was standing and Anwar was eating betel leafs. She, however, denied the defence suggestion that Lavlu was not standing or that local people implicated Lavlu falsely in the case or that she deposed falsely on the dictation of the local people.

P.W.6 (Anisur Rahman) was another neighbour of the informant. He, accordingly, confirmed the time and date of occurrence. He also confirmed that Anowar's potol field was near victim-Sabina's house. He, however, deposed that he heard from local people that accuseds-Anwar and Lavlu killed the victim after raping her forcefully. He saw the dead body. In cross-examination, he deposed that he had heard about the incident at about 7:45 or 8:00 o'clock at night on 23.03.2014 and, at that time, he was at this house. That his house was about 400/500 yards away from the place of occurrence and there were 7/8 houses in between his house and the place of occurrence and those houses belonged to Ayub Ali, Faruk Hossian, Azibor, Aftaf Hossain, Abul Kashem and Motiar. That he visited the place of occurrence at about 8:00 o'clock at night, but he did not see the incident of rape. He confirmed that he deposed on the basis of his

hearsay. He also could not remember as to whether he had signed any paper. He, however, admitted that Lavlu was arrested by RAB and he deposed that Lavlu was in RAB custody for one month. He, however, denied the defence suggestion that Lavlu was not involved in the incident or that he did not hear anything. However, he could not remember as to whether he was asked by police anything during investigation. He also denied the defence suggestion that the confession of Lavlu was extorted through torture by RAB. He also denied the defence suggestion that Lavlu was not present at the place of occurrence on 23.03.2014. He denied that he gave false deposition.

P.W. 7 (Md. Rafiqul Isalm) was the investigating officer of the case. He deposed that on 24.03.2014, he was Inspector (investigation) of the Kotwali police under Jessore District. That on that day, at about

21:15, at night, duty officer S.I Sowmen Das recorded the FIR lodged by P.W. 1 and the officer-in-charge of the police station handed over the investigation charge on him. He, accordingly, visited the place of occurrence, prepared sketch map & index on different papers, seized some materials and recorded the statements of witnesses under Section 161 of the Code of Criminal Procedure. He also detained absconding accused-Lavlu with the help of RAB and public during investigation and that Lavlu voluntarily gave confessional statement before Magistrate admitting his guilt. That upon examination of post mortem report and circumstances, he found the allegations under Section 9 (3) of the said Ain being established against accused-Md. Anwar Hossain @ Anar and accused-Md. Lavlu and, accordingly, he submitted charge-sheet under the said Section, being Kotwali Model Police Charge-Sheet No. 663 dated

23.07.2014, under Section 9 (3) of the said Ain. He deposed that after completion of investigation and during continuation of the case, accused-Anwar had died. Accordingly, he identified accused-Lavlu standing on the dock. He also identified the signature of FIR-recording officer Sowmen Das and his three signatures on the FIR as Exhibits-3, 3/1, 3/2. He also identified the recording officer's signature on the margin of the FIR as Exhibit-1/2. He, accordingly, proved the sketch map as Exhibit-4 and his signature thereon as Exhibit-4/1. He also proved the index of the said map as Exhibit-5 and his signature thereon as Exhibit-5/1. He, accordingly, deposed that the surathal report of the victim was prepared by his associate, S.I. Md. Sayful Alam Kabir, and he was acquainted with his signature. Accordingly, he proved his signature as Exhibit-2/2. He deposed that he seized pieces of victim's yellow cloth and blood stained earth at the

police station in presence of witnesses vide seizure list-Exhibit-6. Accordingly, he proved his signature on the said seizure list as Exhibit-6/1. He also proved the seized pieces of cloth and blood stained earth as material Exhibits-I and II.

In cross-examination, he could not say as to who had written the FIR. He deposed that he did not examine the writer of the FIR, but confirmed that the FIR was lodged on 24.03.2014 at 21:15 hour. He also confirmed that police visited the place of occurrence on 23.03.2014, but could not say the exact time. According to him police visited the place of occurrence on 23.03.2014 on the strength of GD, but he could not say the GD number and confirmed that he did not seize the said GD. He also confirmed that accused-Lavlu was arrested on 18.05.2014 with the assistance from RAB and police, but he could not say as to wherefrom Lavlu was arrested.

However, he deposed that Lavlu was arrested with the assistance from public, police and RAB, but he did not make anyone of them as witness. He also confirmed the name of the deceased as Sabina Khatun, but confirmed that he did not mention the house of Sabina Khatun in the index. He, however, confirmed that P.W. 3 did not tell him in 161 statement that Lavlu and Anwar were talking to each other standing on the street. The said witness also did not tell him that he had heard screaming from the house of P.W.1. That the said witness also did not tell him that Sabina's grandfather took Sabina on his lap. He, however, deposed that the deceased was taken to the hospital from the place of occurrence by police. He confirmed that he saw the post mortem report, but he did not take statement from doctor under Section 161 of the Code. He also confirmed that he did not make separate sketch map for the house of the informant, but he mentioned

about that house in the index. He denied the defence suggestion that Lavlu was not detained by RAB and public or that Lavlu was arrested from Keshobpur or that Lavlu's confessional statement was extorted by torturing at the police station or that he gave such confession against his will or that no prima-facie case was made out or that he gave false deposition.

P.W. 8 (Dr.Kajol Mollick) was a formal witness as he was the doctor who conducted post mortem on the dead body. According to his deposition, he was working as an emergency medical officer of the 250-bed medical hospital on 24.03.2014 when the dead body of Sabina, aged 8 years, daughter of Billal Hossain, village-Erenda, P.S.-Kotwali, Jashore, was brought to him by one constable Md. Ruhul Amin Gazi, Constable No. 922. He, accordingly,

conducted post mortem on her dead body and found the following injuries:

> *Abrasion both Fore-arm extensor surface.*
>
> *Abrasion in both inguinal area which is congested in dissection.*
>
> *Vaginal injuries:-Abrasions in anterior and posterior fornix with clotted blood.*
>
> *Anus:-Abrasion in anal Mucosa which is congested in dissection.*
>
> *Neck and Throat:-Skin healthy, Trachea-Congested".*

He further deposed that according to his opinion:-

> *"Death was due to asphyxia followed by suffocation and sexual assault which is antemortem and homicidal in nature".*

Accordingly, he proved the said post mortem report as Exhibit-7 and his signature thereon as Exhibit-7/1. He also identified the signature of the Civil Surgeon concerned on the said post mortem as Exhibit-7/2. In cross-examination, he deposed that he had examined the inquest report and examined

the dead body by moving the same with the help of one Kollwany Das, wife of the Dom Gobinda Das, but he did not mention in the report the age of such injuries. He, however, denied the defence suggestion that he did not examine the dead body or that he prepared the post mortem report negligently or that he gave false deposition.

P.W. 9 (Md. Amirul Islam) was also a formal witness as he was the Judicial Magistrate who recorded the confessional statement of accused-Lavlu. He deposed that, on 18.05.2014, he was working as Senior Judicial Magistrate of the Jashore Chief Judicial Magistracy when the investigating officer of the case brought accused-Md. Lavlu Gazi to him for recording his confessional statement under Section 164 of the Code. That the said accused was presented to him at 12 o'clock (noon), and, before recording such confessional statement,

he gave the accused sufficient time and started recording the statement at 03 o'clock. He also read over the said statement to the accused and took three signatures from the accuseds on the same. This witness gave seven signatures on the same and, accordingly, proved the said confessional statement as Exhibit-8 and his said seven signatures thereon as Exhibits-8/1 to 8/7. He also proved the signatures of the accused on the said statement as Exhibits-8/8, 8/9 and 8/10.

In cross-examination, he deposed that the accused was arrested at 01:30 AM and not at 01:30 PM. He also deposed that he had recorded the confession of the accused in his khash kamra, but he did not tell the accused in writing that he was not police or that he was Magistrate or that if the accused did not confess, he would not be sent to the police custody. However, he deposed that "if you admit guilt that

would be used as evidence against you”—this statement was made to the accused orally, but not in writing. However, he deposed that he was not aware whether the accused understood English. He confirmed that he wrote the memo under the confessional statement in English. He, however, denied the defence suggestion that he had recorded the said confessional statement without complying with the provisions under Sections 364 and 164 of the Code of Criminal Procedure as he was influenced by the prosecution.

4. **Submissions**:

4.1 Before scrutiny of the evidences produced by the prosecution, let us first refer to the submissions made by the learned advocates before this Court. It may be noted that at the out-set of the hearing, entire paper book, lower Court records as well as other materials were placed before this Court one after another by the learned Deputy Attorney

General. Thereafter, he made oral submissions in support of confirmation of the conviction and death sentence of the accused-appellant. However, for the sake of our convenience, we will refer to the submissions of the learned advocate of the accused-appellant first followed by the submissions of the learned Deputy Attorney General.

4.2 Mr. Chowdhury Shamsul Arifin, learned advocate appearing for the accused-appellant, has made the following submissions:

(i) That the first place of occurrence, namely, the place of abduction, was not mentioned in the map and no witness deposed as regards such abduction of the victim from her house. Therefore, the prosecution has totally failed to prove the allegation of abduction.

(ii) By referring to a medical slip lying with the lower Court record, he submits that the accused was given treatment at the outdoor of a hospital, which suggests that he was seriously beaten up either by public or police. Therefore, the confessional statement of the accused cannot be accepted as legal confessional statement and as such the same cannot be the basis of any conviction as the same was not given voluntarily.

(iii) That more than one prosecution witnesses categorically deposed that accused-Lavlu was arrested by RAB as against which investigating officer could not disclose as to wherefrom the accused was arrested, which, according to him, creates a serious doubt as regards illegal detention of the accused before extortion of his confessional statement.

(iv) By referring to the deposition of P.W. 6, he submits that this witness has categorically deposed before the Court below that the accused was in the custody of RAB for about one month. Therefore, according to him, under no circumstances, the confessional statement of the accused can be accepted by this Court as voluntary confessional statement.

(v) By referring to the inquest report and the advice of the officer who prepared such inquest report for examination of victim's cloths, sexual organs, semens and blood, he submits that such examinations were not admittedly done and the DNA was also not examined. This being so, according to him, the prosecution has failed to prove the connection of this accused with the alleged crime of rape and/or killing. Accordingly, he

submits that the accused will get the benefit of such non-examination of material evidence by the prosecution in view of the provisions under Section 114 (g) of the Evidence Act.

(vi) Alternatively, as regards sentence, he submits that the accused-appellant is married and he has two children and that the accused was 28 years of age at the time of occurrence. Therefore, according to him, considering his long incarceration in jail and condemned cell, his sentence should be commuted to life imprisonment in case of affirming conviction against him under Section 9 (3) of the said Ain.

(vii) By referring to the confessional statement of the accused-appellant, he submits that if the confessional statement is to be taken as the basis of conviction, the whole statements should be considered by this Court.

Therefore, he submits that the confessional statement itself says that the accused-appellant was not involved in the alleged killing of the victim. Therefore, under no circumstances, his death sentence should be accepted by this Court.

4.3 As against above submissions, Mr. Harunur Rashid, learned Deputy Attorney General, has made the following submissions:

(a) That the confessional statement of the accused-Lavlu has no apparent illegality and it is evident from the same that the same was voluntary and true, particularly when the substance of the same corroborates the substantive evidences as regards manner of occurrence as found in the inquest report and postmortem-report which were proved by the relevant witnesses. Therefore, according to him, there is no scope to treat the said

confessional statement (Exhibit-8) as being not true and not voluntarily.

(b) As regards manner of arrest of the accused, he submits that the investigating officer has clearly recorded such manner of arrest in the case diary and this Court may examine the same to see if such arrest was not lawful or whether the accused was detained illegally.

(c) By referring to the deposition of P.W. 1, he submits that it is clear that Lavlu fled away immediately after the occurrence and, accordingly, this conduct of the accused is relevant in view of the provisions under Section 114 of the Evidence Act.

(d) By referring to different orders of the Tribunal as well as materials lying on record, learned DAG submits that the accused, at no point of time, retracted his confessional statement, and even in Section 342 examination, he did

not allege any sort of torture on him or illegal detention by RAB or any other authority. Therefore, according to him, this submission as regards illegal detention or arrest is an afterthought submission.

(e) By referring to the depositions of P.Ws. 2 and P.W. 5, he submits that these two witnesses have categorically deposed that they saw the accuseds immediately before the occurrence took place at the house of the victim-Sabina. Therefore, the doctrine of 'last seen theory' will be applicable in this case, particularly when accused-Lavlu has categorically stated in his confessional statement as regards his presence at the house of victim-Sabina at the relevant time.

(f) By referring to Section 32 of the Penal Code, learned DAG submits that even though accused-Lavlu stated in confessional

statement that he did not overtly take part in the killing, but his omission to prevent accused-Anwar from committing further rape and killing would also come within the mischief of rape and killing.

(g) By referring to Section 9 (3) of the Nari-o-Shishu Nirjatan Daman Ain, 2000, learned DAG submits that in case of death of the victim, only option open to this Court is to impose or confirm death sentence and, according to him, the life imprisonment mentioned therein can only be imposed when the victim survives gang rape. Accordingly, he submits that the death sentence imposed by Tribunal should be accepted by this Court.

5. **Scrutiny of Evidences**:

5.1 Admittedly, the charge against the appellant is of gang rape coupled with murder punishable

under Section 9 (3) of the said Ain. The prosecution case is that the appellant and accused-Anwar (died after cognizance and before charge framing) abducted victim-Sabina, aged 8 years, from her house, took her to nearby potol field of Anwar and repeatedly raped her, which resulted in her death. Therefore, let us see whether the prosecution has proved, beyond reasonable doubt, that gang rape was committed on the victim and, as a result of which, she died.

5.2 It appears from materials on record that the prosecution successfully proved the inquest report, as prepared by one S.I. of the police station concerned at the earliest opportunity, by P.W. 4 as Exhibit-2 and his signature thereon as Exhibit-2/1. P.W. 7 (Investigating Officer) also identified the signature of the author of the said inquest report as Exhibit-2/2. On the other hand, the post-mortem report, as prepared by the

doctor concerned, namely, P.W. 8, has also been proved by the said doctor as Exhibit-7. It appears from the said evidences, in particular the post-mortem report (Exhibit-7), that P.W. 8 found the following injuries on the victim:

> *"Abrasion both Fore-arm extensor surface. Abrasion in both inguinal area which is congested in dissection.*
>
> *Vaginal Injury:- Abrasions in anterior and posterior fornix with clotted blood.*
>
> *Anus:- Abrasion in anal Mucosa which is congested in dissection".*

After such examination, the doctors (P.W.8) in their opinion held: "*death was* d*ue to asphyxia followed by suffocation and sexual assault which is antemortem and homicidal in nature"*.

5.3. P.W. 8 proved the said post-mortem by his clear deposition before the Tribunal. It appears from the said post-mortem report that the injuries

found therein, in particular the vaginal and anal injuries, are consistent with gang rape. It also suggests some perversion on the part of the perpetrator(s) of such offence, given the age and nature of injuries of the victim. In addition to that, the seizure list prepared by P.W. 7, namely Exhibit-6, has also been proved by P.W. 3 and P.W. 7 himself before the Tribunal. The materials seized by the investigating officer, namely, pieces of wearing cloths of the victim and the blood stained earth, were also produced before the Tribunal as material Exhibits-I and II by P.W. 7. If we examine these materials on record, it will be evidently clear that this is a case of gang rape, or multiple rape, on a female victim aged 8 years. Therefore, we have no option but to conclude that the prosecution has successfully proved, beyond reasonable doubt, that the victim-Sabina in this case has been a

victim of gang rape, or multiple rape, which resulted in her death.

5.4 Now, the question is who committed such rape. Admittedly, there is no eye witness to the occurrence, namely, the gang rape and the killing. There is no eye witness to the alleged abduction as well. However, there are two witnesses, namely P.Ws. 2 and 5, who have categorically deposed before the Tribunal that immediately before the occurrence, they saw accused-Anwar and appellant-Lavlu with the victim in the same house, namely the house of informant (P.W. 1). P.W. 2-Mahfuza Begum was the grandmother of the victim and she was in the house of informant (P.W. 1) when victim Sabina was doing study on a bed at the veranda of the house. Accordingly, she (P.W. 2) deposed that accused-Anwar came to her house immediately after the evening and

wanted to eat betel leaf and he sat on a bed at the veranda. At that time, accused-Lavlu was standing holding the roof of the veranda. She also deposed that while she was leaving for her sister's house, victim-Sabina was doing study on a bed at the veranda. But when she returned from her sister's house, she found the books of the victim open on the bed and found the victim missing along with the accuseds. The said witness and others then started searching for the victim and, subsequently, found the victim upside down lying on the potol field of Anwar. She also found some earth in the mouth of the victim and saw some burn injuries on the hand and abdomen of the victim apparently given by burning cigarette. They tried to make the victim breathe and save her, but the victim ultimately died.

5.5 This presence of the accuseds immediately before the occurrence at the house of P.W. 1 has also been supported by P.W. 5, who also saw the accuseds being present at the said house at the relevant time. She (P.W. 5) deposed that at the relevant time of occurrence, she was watching TV in the house of P.W. 1, and accuseds-Lavlu and Anwar were standing there. She also supported the deposition of P.W. 2 in respect of recovery of the dead body of the victim and the manner in which she was recovered and subsequent death of the victim. Therefore, at least these two witnesses have categorically proved before the Tribunal that they saw two accuseds, including the appellant, at the house of P.W. 1 immediately before the death of the victim. These depositions of the P.Ws. 2 and 5 may be connected with the confessional statement of accused-Lavlu, if it is found that

such confessional statement of Lavlu is voluntary and true.

5.6 As stated above, the confessional statement of Lavlu was proved by the recording Magistrate (P.W.9) before the Tribunal as Exhibit-8. For the sake of clarity and convenience, we are reproducing the said confessional statement of Lavlu herein below:

> "এখন থেকে আনুমানিক দুই মাস আগের ঘটনা, আমি ভিকটিম সাবিনাদের বাসায় টেলিভিশন দেখতে যাই। তখন এই বাসায় খায়েরের বউ আর সাবিনার দাদী ছিল। কিছুক্ষন পর খায়েরের বউ চলে যায়। এরপর আনার সাবিনাদের বাড়ি আসে। সাবিনা তখন বারান্দায় পড়ছিল। আমরা ঘরে টি,ভি দিখছিলাম। আনোয়ার @ আনার আসাতে উঠানে বেরিয়ে আসি, দেখি আনার সাবিনার সাথে কথা বলছে। সুন্দর করে কথা বলছে। বলছে আজ তোকে আমি বিয়ে করব। আমার সাথে চল। পকেটে টাকা দেখিয়ে লোভ দেখায় সাবিনাকে। এরপর দাদীর কথামত সাবিনা রান্নাঘর থেকে বড় ঘরে ভাত দিয়ে আসে। এরপর আনারের সাথে সাবিনা বেরিয়ে যায়। আমি বাড়ির পথে পা বাড়াই। কিছুক্ষন পর আমি বাড়ির কাছাকাছি যেতে আনার আমাকে তার পটলক্ষেতে সাবিনাদের বাড়ির কাছে ডেকে নিয়ে যায়। ওখানে গিয়ে দেখি আনার সাবিনার মুখের ভিতর কিছু একটা দিয়ে ধর্ষণ

করছে। আনার এরপর নেমে আমাকে ধর্ষণ করতে বলে। তখন আমি সাবিনাকে ধর্ষণ করি। এরপর আনার আরো দুইবার ধর্ষণ করে। আনার ভারত থেকে কী যেন সেক্স এর ঔষধ নিয়ে এসেছে। সে ঐ ঔষধ খেয়ে ধর্ষণ করে। ফলে সে এক নাগারে অনেকক্ষণ ধর্ষণ করে। সাবিনা বাচ্চা মেয়ে, ৮/১০ বছর বয়স। এই দীর্ঘ সময় ধর্ষণ এর যন্ত্রণা তার সহ্য করতে পারার কথা না। এরপর তার গালের ভিতর মাটি পুরে দিয়েছিল আনার যাতে সে শব্দ করতে না পারে ফলে শারীরিক চাপে তার দম বন্ধ হয়ে যাওয়ার এক পর্যায়ে সাবিনা মারা যায়। কিছুক্ষন পর সাবিনার উপর থেকে আনার নেমে আসে। সাবিনা আর কোন ভাবে উঠছে না দেখে আমরা মেসের আগুন জ্বালিয়ে চেক করি। দেখি সে মরে গেছে। তখন আমরা লাশ রেখে যার যার মত বাড়ি চলে যাই। আনার যাওয়ার সময় মৃত মেয়ের খালা তাকে দেখে ফেলে। আনারের গায়ে কাঁদা মাখা অবস্থায় সে দেখতে পায়। পরে র‍্যাব আমাদের গ্রামে গেলে আমি ভয়ে অস্থির। নিজের মনের ভয়ে পালানোর চেষ্টা করলে লোকজন বুঝতে পেরে আমাকে ধরে ফেলে পুলিশে দেয়। এটা গতকালের ঘটনা।”

5.7 It appears from the recording such confessional statement that the appellant was arrested at 1:30 am on 18.05.2014 and he was taken to the police station at 11:30 am on the same day and was produced before the said Judicial Magistrate at 12:00 pm on the same day

and the Magistrate started recording his confessional statement at 3:00 pm. It further appears from the said form that columns-5 and 6 of the same have been fully complied with and the same have been signed by the Magistrate concerned and the accused. As against this, if we examine the deposition of P.W. 9, namely the recording Magistrate, in particular his reply in cross-examination, it appears that in reply to a question from the accused, he deposed that he did not tell the accused that he was not police, rather he was a Magistrate.

5.8 However, it appears from Clause-1 of Column-5 of the Form (Exhibit-8) that he signed Column-5 endorsing that he carefully explained afresh to the accused that he was not an officer of police but a Magistrate. Therefore, we do not find any reason as to why the said Magistrate deposed that he did not say the same to the accused. It

further appears from question-1 under Column-6 of the said Form that the Magistrate told the accused that he would not be sent to the police custody, but he did not tell the accused that he would not be sent to the police custody if he did not make confessional statement and he admitted this position in his cross-examination. However, he specifically told the accused that if he made confession, it would be used against him as evidence and this position has been confirmed by the Magistrate by Clause-3 under Column-5 of the form. The Magistrate also admitted the same in the cross-examination that he orally told the accused that the confessional statement could be used against him as evidence. Therefore, apart from some minor ignorable irregularities, we do not find any major incongruity in recording the said confessional statement by the said Magistrate (P.W. 9).

5.9 Learned advocates for the accused also could not shake his such position in extensive cross-examination. On the other hand, it appears from the contents of the said confessional statement that the manner of occurrence, in particular the rape and killing as stated by this appellant in his confessional statement, is clearly supported by substantive evidences, namely the findings of the inquest report (Exhibit-7) and the materials seized by the seizure list (Exhibit-6). Post-mortem report clearly suggests that multiple rape took place on the victim. The said rape was committed in a perverse way, namely that the accused-Anwar was using some sort of medicine from India to increase his stamina, which resulted in the suffocation of the victim. Even the appellant has observed in his confessional statement that the victim was not supposed to endure such long time rape given her age about

8/10 years. This appellant, in the confessional statement, has also stated that Anwar put earth into the mouth of the victim so that she could not make any sound. P.W. 2 categorically deposed that the victim was recovered with the muds into her mouth. Some other witnesses also supported the said claim. The seizure list prepared by P.W. 7, as proved by P.Ws. 3 and 7 as Exhibit-6, and materials (Material Exhibits-I and II) also proved such manner of committing rape. This being so, we have no option but to hold that the confessional statement, as given by this appellant, is not only voluntary one, but the contents of the same are true. This being so, we also have no option but to hold that the statement of this appellant in his confessional statement is categorically supported by substantive evidences, namely, the post-mortem report (Exhibit-7), seizure list (Exhibit-6) and

material exhibits (Exhibits-I and II). Therefore, although there was no eye witness to the occurrence of rape and killing in this case, the last seen aspect of the accuseds with the victim and other circumstantial evidences were so strong that the chain of such circumstantial evidences could not be broken at all by the extensive cross-examination on behalf of the accused.

5.10 Although a point has been raised by the learned advocate appearing for the appellant as regards alleged mystery surrounding the arrest of the accused, particularly when one of the witnesses (namely P.W. 6) deposed that the accused-appellant was arrested by RAB and that he was kept in custody for one month, we have not found anything on record as to how that witness (P.W.6) made such statement before the Tribunal, particularly when he did not mention

anything as regards the source of his such knowledge or whether he saw the accused under the custody of RAB anywhere. Learned advocates for the accuseds before the Tribunal also could not extort any such information from the said witness. Therefore, we are of the view that the said deposition of P.W. 6 before the Tribunal was a mere sweeping remark which does not have any footing to stand, and the accused, accordingly, will not get any benefit from such statement. The other reason for discrediting such deposition of P.W. 6 is the very statement of accused himself in his confessional statement, wherein he concluded the same by saying that পরে র‍্যাব আমাদের গ্রামে গেলে আমি ভয়ে অস্থির। নিজের মনের ভয়ে পালানোর চেষ্টা করলে লোকজন বুঝতে পেরে আমাকে ধরে ফেলে পুলিশে দেয়। এটা গতকালের ঘটনা ।

5.11 Therefore, according to him, he was detained by public and was handed over to police the day

before he made the confessional statement. On the other hand, in the Section 342 examination of this accused-appellant, he did not mention a single word about any sort of torture or illegal detention in respect of him. He also did not file any application for retraction of his confessional statement during the entire course of the trial. Therefore, we are of the view that this submission of the learned advocate representing the appellant as regards illegal detention of the appellant or torture of the appellant for extorting confessional statement is an afterthought argument mainly based on the said sweeping remark of the P.W. 6. The deposition of P.W. 5 as to the beating of the appellant by RAB is also a mere hearsay without any reference as to from whom she heard it. Therefore, such deposition also cannot be taken into considerate. This being so, such submission of learned advocate

for the appellant does not have any substance at all, particularly when the investigating officer of the case was not confronted with any such question during cross-examination.

5.12 In this regard, we have also examined the case diary of the investigating officer, wherein we have not found any such irregularity or indication of illegal detention or torture of the appellant. This being the position, we have no option but to hold that the prosecution has successfully proved, beyond reasonable doubt, that this appellant, along with accused-Anwar (already expired), committed gang rape resulting into the death of the victim and, accordingly, the charge against this appellant under Section 9 (3) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 has been proved beyond reasonable doubt.

Sentencing:

5.13 Sentencing by a judge has now become a much talked-about issue in our sub-continent. The Appellate Division of our Supreme Court has already expressed frustration in **Ataur Mridha vs. State, 73 DLR (AD) (2021)-298** as regards absence of any specific guidelines for the judges to give appropriate and proportionate sentence. The majority judgment, as delivered by his Lordship Mr. Justice Hasan Foez Siddique (as his Lordship then was), expressed such frustration in the following way:

> *"137. There is no guidance to the Judge in regard to selecting the most appropriate sentence of the cases. The absence of sentencing guidelines is resulting in wide discretion which ultimately leads to uncertainly in awarding sentences. A statutory guideline is required for the sentencing policy.*

Similarly, a properly crafted, legal framework is needed to meet the challenging task of appropriate sentencing. The judiciary has enunciated certain principles such as deterrence, proportionality, and rehabilitation which are needed to be taken account while sentencing. The proportionality principle includes factors such as mitigating and aggravating circumstances. The imposition of these principles depends on the fact and circumstances of each case. The guiding considerations would be that the punishment must be proportionate. The unguided sentencing discretion led to an unwarranted and huge disparity in sentences awarded by the courts of law. The procedure prescribed by law, which deprives a person of life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided. While deciding on quantum of

sentence as accused getting away with lesser punishment would have adverse impact on society and justice system. Sentencing for crimes has to be analysed on the touchstone of three test viz. crime test, criminal test and comparative proportionality test."

5.14 Further, in doing the balancing act between aggravating and mitigating circumstances, his Lordship observed as follows:

"On balancing the aggravating and mitigating circumstances as disclosed in each case, the Judge has to judiciously decide what would be the appropriate sentence. In Judging an adequate sentence, the nature of the offence, the circumstances of its commission, the age and character of the offender, the injury to the individuals or to the society, whether the offender is a habitual, casual or a professional offender, affect of punishment on the offender, delay in the trial and the mental agony suffered by the offender during the prolonged trial, an eye to correction and reformation of the offender are some amongst many factors that have to be taken into consideration by the

Courts. In addition to those factors, the consequences of the crime on the victim while fixing the quantum of punishment because one of the objects of the punishments is doing justice to the victim. A rational and consistent sentencing polices requires the removal of several deficiencies in the present system. An excessive sentence defects its own objective and tends to undermine the respect for law. On the other hand, an unconscionably lenient sentence would lead to a miscarriage of justice and undermine the people's confidence in the efficacy of the administration of criminal justice." (See para 138)

5.15 The minority view in **Ataur Mridha case,** as expressed by his Lordship Mr. Justice Muhammad Imman Ali, also supports this anxiety of the majority view (see paragraphs 82 and 83 of the reported case), wherein his Lordship proposed to have a separate sentencing hearing for determining such aggravating and mitigating circumstances. It

may be noted that there is no specific provision in our law, in particular the Code of Criminal Procedure, for separate sentencing hearing. However, there is no bar in holding such hearing. Rather, we have found the intention of the Legislator in favour of holding such sentencing hearing either separately or along with the hearing on the point of conviction. This provision is enunciated under sub-section (5) of Section 367 of the Code of Criminal Procedure, which is reproduced below:

> *"Section 367 (5)- If the accused is convicted of an offence punishable with death or, in the alternative, with transportation for life or imprisonment for a term of years, the Court shall in its judgment state the reasons for the sentence awarded".*
>
> (Emphasis given)

5.16 Therefore, it appears that the Legislature has made it mandatory for the Court to state

reasons for imposition of particular sentence when such sentences are death sentence or “transportation for life”—meaning ‘life imprisonment’ (see Section 53A of the Penal Code) or imprisonment for a term of years.

5.17 Taking away the life of an individual is a highly serious act and the Courts of law are always reluctant to pass any such order unless it is bound to do so by the Act of the Legislature. Some countries in modern world have already abolished death sentence basically on the ground that the parties to a criminal proceeding are human being and they are bound to do mistakes and such mistakes should not be allowed to take away the life of an individual. There are judicial pronouncements in our sub-continent which suggest that when a case is proved merely on circumstantial evidences, imposition of death sentence should be avoided.

Indian Supreme Court in **Bachan Singh vs. State of Punjab (1980) 2 SCC-684,** which is widely known as **Bachan Singh case,** has already given some strict guidelines to be followed and has categorically declared that death sentence may only be given in 'rarest of rare cases'. Different benches of the Indian Supreme Court have also expressed their view to hold separate sentencing hearing on the ground that it would be fairer to the parties concerned, in particular the accuseds, and such hearing is necessary for balancing between aggravating and mitigating circumstances.

5.18 Now, the question arises, how the Court will exactly know such circumstances when accused is not given any hearing, particularly when unlike England, Bangladesh does not have any such Sentencing Council or Board which may assist the Court in reaching such

decision by providing sufficient information about the mitigating and aggravating circumstances surrounding the accused concerned. Unlike the Children Act, 2013, there is no provision in our Code of Criminal Procedure seeking any report (সামাজিক প্রতিবেদন) in respect of the accused from the probation officer of the area concerned. Therefore, the Judges fall into a dilemma when they are required to impose a particular sentence.

5.19 It has been reported by different newspapers that the rate of death sentences in Bangladesh, as imposed by the district judiciary, have been increasing rapidly. It may be noted that once a death sentence is imposed, the convict is immediately transferred to the condemned cell in view of the provisions under Section 30 of the Prisons Act, 1894. Although the Indian Supreme Court (see **Sunil Batra vs. Delhi**

Administration and others, AIR 1980 SC-1579), has already declared that such prisoner has to be under ‘executable death sentence’ and such stage comes only after the mercy petition of the prisoner is rejected by the President in exercise of his Constitutional power, the jails in our country strictly follow the existing practice of transferring the prisoner immediately to the isolated condemned cell once death sentence is imposed by the trial Court or Tribunal.

5.20 Different newspaper reports suggest that more than one thousand prisoners under death sentence are now confined in such condemned cells in different jails of Bangladesh. On the other hand, it is admitted position that the High Court Division is lagging behind about six years in its disposal of death reference cases. Therefore, once an accused is imposed with

death sentence, he is bound to stay in such isolated condemned cell for a minimum period of six years. This being so, the Judges in our country should be very cautious in imposing death sentences.

5.21 As against our above observation, we have examined the impugned judgment wherein the reason for imposition of death sentence on the accused-appellant has been stated in the following terms:

> "এই মামলায় একটি আট বৎসর বয়স্কা শিশুকে আসামি আনোয়ার ওরফে আনার (বর্তমানে মৃত) এর সহিত আসামি লাভলু পালাক্রমে ধর্ষণ করিয়া এবং ধর্ষণের ঘটনায় সাক্ষী না রাখিবার অসৎ উদ্দেশ্যে পূর্ব পরিকল্পিতভাবে অত্যন্ত পৈশাচিক এবং নৃশংসভাবে ভিকটিমের মুখের ভিতর কাদা মাটি দিয়া শ্বাসরোধের মাধ্যমে উক্ত শিশু ভিকটিম সাবিনাকে হত্যা করিয়াছিল বিধায় এই আসামির প্রতি কোন প্রকার অনুকম্পা প্রদর্শনের সুযোগ নাই এবং উক্ত ঘটনাটিকে হালকাভাবে দেখারও সুযোগ নাই। কাজেই আসামি মোঃ লাভলুকে নারী ও শিশু নির্যাতন দমন আইন, ২০০০ এর ৯ (৩) ধারাধীনে দোষী

সাব্যস্তক্রমে সর্বোচ্চ শাস্তি মৃত্যুদন্ড তৎসহ ১,০০,০০০/- (এক লক্ষ) টাকা অর্থ দন্ডে দন্ডিত করিবার সিদ্ধান্ত গৃহীত হইল।"

5.22 It appears from above reasoning of the Tribunal that the Tribunal did not at all give any hearing to the accused, or the learned advocates of the accused to make submissions in favour of any mitigating circumstances available in his favour or to determine the extent of gravity of the criminal act perpetrated by the accused-appellant. It cannot be denied that the prosecution has mostly relied on the confessional statement of this accused-appellant to convict him. Without this confessional statement, the prosecution would have been in serious struggle in proving the charge against this appellant beyond reasonable doubt, and, in that case, its only piece of circumstantial evidence was a 'last seen scenario'. Therefore, when the appellant's

confessional statement was relied upon for convicting him, the mitigating circumstances, if any, in such confessional statement should have also been considered by the Tribunal.

5.23 As stated above, in view of the provisions under sub-section (5) of Section 367 of the Code, since the Legislature has mandated that the Court must give specific reasons for sentencing death or life or any terms of years, such reasons cannot be stated by the Judges unless a separate sentence-hearing is given to the parties before the delivery of the judgment. Therefore, when final argument of the parties is concluded and the trial judge has made up his mind to convict the accused for the offences punishable with death or life imprisonment or imprisonment for a term of years, the judge concerned should express his such mind to the parties in open Court or Tribunal and then

should fix a date, within shortest possible time, for separate hearing on sentencing so that the intention of the Legislature as provided by sub-section (5) of Section 367 of the Code is reflected. Our Appellate Division, in the above referred **Ataur Mridha case,** has also indicated such methodology, although not specifically stated in the majority judgment. But such proposal of separate hearing has been given in minority view and the same view has not been disagreed with by the majority judges. Therefore, we are of the view that in each case where an accused is to be convicted of an offence punishable with death or of life imprisonment or imprisonment for a term of years, the trial judges shall give a separate hearing, before pronouncement/delivery of the judgment, in respect of appropriate sentences to be imposed on the said accused, and, in

which hearing, the accused should be entitled to provide materials available in his possession including his social background, crime record, age, financial and family status etc. as indicated by our Appellate Division in the majority view quoted above, namely:

> *"138. .....On balancing the aggravating and mitigating circumstances as disclosed in each case, the Judge has to judiciously decide what would be the appropriate sentence. In Judging an adequate sentence, the nature of the offence, the circumstances of its commission, the age and character of the offender, the injury to the individuals or to the society, whether the offender is a habitual, casual or a professional offender, affect of punishment on the offender, delay in the trial and the mental agony suffered by the offender during the prolonged trial, an eye to correction and reformation of the offender are some amongst many factors that have to be taken into consideration by the Courts. In addition to those factors, the consequences of*

the crime on the victim while fixing the quantum of punishment because one of the objects of the punishments is doing justice to the victim. A rational and consistent sentencing polices requires the removal of several deficiencies in the present system. An excessive sentence defects its own objective and tends to undermine the respect for law. On the other hand, an unconscionably lenient sentence would lead to a miscarriage of justice and undermine the people's confidence in the efficacy of the administration of criminal justice."

5.24 In such hearing, the trial judge shall balance between aggravating and mitigating circumstances with an eye on the particular issues like the nature of sentence, circumstances of its commission, the age and character of the offender, the injury to the individuals or to the society, whether the offender is a habitual, casual or a professional offender, effect of punishment on the offender,

delay in the trial and mental agony suffered by the offender during the prolonged trial and even eye to correction and reformation of the offender etc., and, only after that, the trial judge shall deliver/pronounce the judgment and order of conviction along with sentence.

5.25 In the present case in hand, since the trial judge concerned has not given such opportunity to the accused, we have heard the learned advocate for the appellant and the learned DAG on the mitigating and aggravating circumstances. In such hearing, learned advocate appearing for the appellant has submitted that at the time of occurrence, the accused was about 28 years of age and that he had two children and a wife. On the other hand, he has submitted that the confessional statement categorically indicates that this accused has only committed rape once and he

did not have any perverse mentality except that he committed rape on a minor girl. On the other hand, the most aggravating acts of rape have been committed by accused-Anwar, who has died in the meantime. He further submits that immediately after arrest, this accused made confessional statement, which in fact helped the prosecution to close the case. Therefore, according to him, the sentence on this accused should be commuted to life sentence.

5.26 We have scrutinized the aggravating and mitigating circumstances available in this case carefully. Since the prosecution case is mostly based on the confessional statement of this appellant, the whole statements in his confessional statement should be taken into consideration while balancing such aggravating and mitigating circumstances. In the said

confessional statement, this accused has categorically stated that the most perverse act of rape with brutality was committed by accused-Anwar. This accused has admitted that he also committed rape once and he did it on the instigation of the accused-Anwar, who called him to the place of occurrence. There are evidences on record that the house of this appellant was massacred by the village people. In the absence of separate hearing on sentencing by the Tribunal, we are not in a position to know as to what happened thereafter to the wife and the children of this accused. In a country like ours, the female members as well as children of a family are mostly dependent on the male member. On the other hand, the admitted position is that the appellant has in the meantime served in jail for nine years including more than five years in

condemned cell. During this more than five years of time in condemned cell, he was under the apprehension every day that he would be hanged any time. Therefore, according to the observation of our Appellate Division in **Ataur Mridha case,** he died every day. This being so, we are of the view that the sentence of death of this appellant should be commuted to the sentence of life imprisonment and he should get benefit of Section 35A of the Code of Criminal Procedure and ratio of our Appellate Division in the aforementioned **Ataur Mridha case** in respect of total tenure of such life imprisonment. Accordingly, we should reject this death reference. However, his Criminal Appeal No. 6509 of 2007 should be dismissed and the impugned judgment and order should be affirmed in so far as the conviction is concerned.

ORDERS OF THE COURT:

5.27 In view of above discussions of law and facts, the orders of the Court are as follows:

1) This Death Reference No. 75 of 2017 is rejected.
2) The Criminal Appeal No. 6509 of 2017, as preferred by the convict, **Md. Lavlu @ Lavlu,** is dismissed. Accordingly, the impugned judgment and order dated 30.05.2017 passed by the Nari-O-Shishu Nirjatan Daman Tribunal, Jessore in Nari-O-Shishu Case No. 231 of 2014 convicting the appellant under Section 9(3) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 are, hereby, affirmed. However, the sentence of death, as imposed by the Tribunal upon the appellant, is commuted to the sentence of life imprisonment and the convict shall get the benefit of Section 35A of the Code of Criminal Procedure for the period he has been in custody in the meantime. The jail

appeal, being Jail Appeal No. 264 of 2017, as preferred by him, is disposed of accordingly.

3) The authorities concerned, including the Jail Authority, are directed to withdraw the convict, **Md. Lavlu**, son of Md. Intaj Ali of Village-Erenda Battola Para, Police Station-Kotwali, District-Jashore, from the condemned cell immediately and shift him to the general prison.

4) The trial Courts and the Tribunals in Bangladesh are directed to hold a separate hearing on sentencing of the accused before delivery/pronouncement of the judgment in the following manners:

(a) When the final argument of the parties is concluded and the judge has made up his mind to convict the accused for the offences punishable with death or life imprisonment or imprisonment for a term of years, the judge shall express his/her

such mind to the parties in open Court or Tribunal and then shall fix a date, within shortest possible time, for separate hearing on sentencing of the accused in order to determine the appropriate sentences to be imposed.

(b) In such hearing, the parties shall be entitled to produce the aggravating and mitigating materials available in their possession including the social background, crime record, age, financial status etc. of the accused as indicated by our Appellate Division in its majority judgment in **Ataur Mridha vs. State, 73 DLR (AD) (2021)-298** at paragraphs 137 and 138 of the reported case keeping in mind the intention of the Legislature as inherent in sub-section (5) of Section 367 of the Code of Criminal Procedure, 1898.

(c) In such hearing, the trial judge shall balance between aggravating and mitigating circumstances with an eye on the particular issues like the nature of sentence, circumstances of its commission, the age and character of the offender, the injury to the individuals or to the society, whether the offender is a habitual, casual or a professional offender, effect of punishment on the offender, delay in the trial and mental agony suffered by the offender during the prolonged trial and even eye to correction and reformation of the offender etc., and, only after that, the trial judge shall deliver/pronounce the judgment and order of conviction along with sentence.

5) The Registrar General of the Supreme Court of Bangladesh is directed to send a copy of this

judgment containing above directions or to issue a circular in this regard directing the Courts and the Tribunals concerned in Bangladesh to comply with the above directions about sentencing.

6) Let a copy of this judgment be also sent to the Hon'ble Secretary, Ministry of Law, Justice and Parliamentary Affairs, for necessary actions in this regard.

Let an advance order be issued communicating the above result in respect of the convict-appellant.

Send down the lower Court records immediately.

…….....
(Sheikh Hassan Arif, J)

I agree.

……..……..
(Biswajit Debnath, J)