

Present:
Mr. Justice S M Kuddus Zaman
And
Mr. Justice Md. Ali Reza

Death Reference No. 20 of 2018

The StatePetitioner

-Versus-

Md. Ashraf AliCondemned-prisoner

With

Jail Appeal No. 71 of 2018

Md. Ashraf AliConvict-Appellant

-Versus-

The StateRespondent

Mr. Noor Us Sadik Chowdhury, Deputy Attorney General with

Ms. Farhana Afroze Runa,

Mr. Md. Abdul Aziz Masud and

Mr. Md. Shamim Khan, Assistant Attorney General

.....for the State

Mr. S.M. Safiqul Islam, State Defense Lawyer

.....for the condemned-prisoner

Ms. Bulbul Rabeya Banu, Advocate

.....for the Convict-

appellant

(in Jail Appeal No. 71 of 2018)

Heard on: 20.03.2024 and 24.04.2024

Judgment on: 09.05.2024.

Md. Ali Reza, J.

This Death Reference 20 of 2018 has been made by the Additional Sessions Judge, Sherpur for confirmation of sentence of death awarded upon condemned-prisoner Md. Ashraf Ali. The condemned-prisoner preferred Jail Appeal 71 of 2018. Since the Death Reference and Jail Appeal have arisen out of the same judgment and order those are taken up together for disposal by this judgment.

Both the reference and appeal have arisen out of the judgment and order dated 14.02.2018 passed by the Court of Additional Sessions Judge, Sherpur in Sessions Case 206 of 2011 convicting accused Ashraf Ali under section 302 of the Penal Code and sentencing him thereunder to death and to pay a fine of Taka 10,000.00 (ten thousand).

The prosecution case, in brief, is that Md. Kashem Ali lodged a First Information Report (FIR) with Nalitabari Police Station on 08.05.2011 against the accused alleging, *inter alia*, that his daughter Hazera Khatun was married to Olil Mia three years ago and she had a boy of 1½ (one and a half) years. Olil was not at home on 07.05.2011 and Hazera after

dinner went to sleep with his child in the tinshed conjugal bed room. Finding the house empty accused Ashraf with an evil intent burgled into the house from the east side and snuggled her to commit rape. She woke up and started scuffling to get away from the accused refusing his indecent proposal. The accused then got excited and dealt blows with knife under the left breast and other parts of the body randomly for 6/7 times. She started screaming for which her parents-in-law living alongside room and surrounding people rushed to the place of occurrence and saw her smeared with blood. Her parents-in-law poured water on her head. Being informed from others her father Kashem went to the house of his son-in-law in Mowakura and saw her daughter in injured condition. The victim regained consciousness at that time. She was asked who committed the offence and she disclosed in presence of Kashem and witnesses that in view to rape her accused Ashraf entered the room to which she expressed her reluctance and for such reason he got frantic and after hitting her in a disorderly manner fled away from the room. After hearing such statement witness Lokman (PW 2) along with other

witnesses started searching the accused and caught him while sitting in a bhotbhoti in front of the house of Mozor Ali. The victim died in the place of occurrence immediately after such disclosure. Hence FIR was lodged against the accused under sections 459 and 302 of the Penal Code on 08.05.2011.

The case was then endorsed to Sub-Inspector (SI) Md. Zahurul Islam for investigation. He visited the place of occurrence and held inquest on the dead body on identification of her mother Malesa Begum. SI Parvez Ahmed Selim was then engaged for investigation. Subsequently SI Mostafizur Rahman (PW-10) was assigned with the task who submitted a charge-sheet on 13.08.2011 against the accused under sections 459/302 of the Penal Code.

The case was ultimately transferred to the Court of Additional Sessions Judge, Sherpur for trial who framed charge against the accused under the aforesaid sections of the Penal Code on 03.02.2014 to which he pleaded not guilty and claimed to be tried.

In the trial, the prosecution examined 10 witnesses who were cross examined by the defence but the defence adduced none.

After conclusion of examination of prosecution witnesses the accused was examined under Section 342 of the Code of Criminal Procedure (the Code) to which he reiterated his innocence.

The defence case as it transpires from the trend of cross examination of the prosecution witnesses is that he is innocent and has been falsely implicated in the case and the confessional statement was extracted by torture.

On consideration of the evidence and other materials on record the learned Additional Sessions Judge passed the judgment and order of conviction and sentence as aforesaid and sent the reference to this Court under Section 374 of the Code.

Ms. Farhana Afroze Runa, learned Assistant Attorney General appearing on behalf of the State takes us through the materials on record as well as the impugned judgment and submits that confessional statement of the accused alone is

sufficient for conviction which the trial Court found as true and voluntary. She submits that prosecution has proved the case beyond any shadow of doubt and the Court has properly passed the judgment on proper consideration of evidence giving good reason and finding. She then submits that all the prosecution witnesses are neutral and competent and there is no falsehood in their evidence on any point thus convicting and sentencing the accused by the Court on the basis of confessional statement supported by evidence stand good and the impugned judgment calls for no interference by this Court.

Mr. S.M. Safiqul Islam, the learned Advocate appointed as a defence lawyer for the condemned-prisoner and Ms. Bulbul Rabeya Banu, learned Advocate for the convict-appellant support the appeal and oppose the reference and their submissions are almost same. Mr. Islam submits that the condemned-prisoner is quite innocent and has been falsely implicated in this case relying on the confessional statement which was procured by torture and coercion. He submits that the trial Court failed to apply judicial mind in analyzing the evidence of the prosecution witnesses. The prosecution

hopelessly failed to prove the charge leveled against the convict under section 302 of the Penal Code beyond any shadow of doubt by adducing independent and disinterested witnesses. The Court below failed to appreciate that the confessional statement is not true and voluntary and appears to be bizarre being opposite to human nature and conduct and the same is apparently inconsistent with the facts and circumstances of the case as well as the evidence adduced by the prosecution. He finally submits that the trial judge evidently committed wrong in convicting and sentencing the condemned-prisoner without proper appreciation of evidence as required by law and the impugned judgment being unjustified and illegal is liable to be set aside outright. Ms. Bulbul Rabeya Banu, learned Advocate adopts the submission made by Mr. S.M. Safiqul Islam and further adds that the appellant has been falsely implicated in the case out of grudge and enmity arising out of dispute with regard to land.

In order to consider the submissions of the contending parties as well as the merit of the case, we are now called on to

scrutinize the material evidence on record in order to come to a proper conclusion in this reference and appeal.

Informant Kashem Ali is PW 1 and father of the victim Hazera. He stated that the incident took place in between 12 AM to 2 AM on 08.05.2011. Hazera was sleeping in the west side tinshed room of her husband Olil Mia. Her husband was not at home on that night. He went to Mymensingh for treatment. Ashraf sneaked into the room by digging hole on the floor while his daughter was sleeping. He wanted to have physical relation with her but when she refused he started scuffling. At one stage he stabbed the victim for six to seven times with a knife under her left breast and on other parts of her body. Hearing her scream her parents-in-law entered the room. After being informed PW 1 came. Neighbours also came forward. PW 1 entered into the room and found his daughter writhing on the bed and bleeding. They poured water on her head and after a while she regained consciousness. Then they asked her who did that to her. She replied that accused Ashraf wanted to rape her but on refusal and resistance he dealt blows on her with a knife and about half an

hour later his daughter died. In the morning PW 1 lodged the FIR with the police station. In the morning police went and recovered the soil cutter pole-axe and the stabbing knife and held inquest and prepared a report and sent the body to the morgue for post mortem examination. He proved the FIR Exhibit-1. In cross examination he stated that in the night he with his wife went there after being informed by PW 5. There were an estimated 20/25 people there and he admitted that it was dark. Victim was senseless and she became conscious after about half an hour of pouring water on her head and she was groaning. His son-in-law Olil was not at home on that night and PW 2 is Olil's maternal cousin. PW 5 was in another room. Other witnesses were in their respective houses. He does not know whether PW 5 has any land dispute with the accused. He denied the suggestion that the accused has been falsely implicated in murder of his daughter due to filing of suit by the accused against PW 2 alleging forged document or failing to evict accused Ashraf from his homestead. He also denied that the accused did not confess to anyone admitting the murder.

PW 2 Lokman is the maternal cousin of victim's husband and lives in Baghber. He stated in his examination-in-chief that the time of incident would be between 2 AM to 2.30 AM. On hearing the scream he moved there with a torchlight and when he went half the way he saw accused Ashraf running towards south. He stopped the accused and asked him where he was going. Accused then told that he was going to Mozor Member's house to bring a bhotbhoti. On asking he (accused) replied that Olil's wife had received knife injury all over the body. He then went to the place of occurrence and saw the victim in the room in a bloody restless state. Her parents-in-law and parents were pouring water on her head. There were other people too. On pouring water victim got her sense back. Victim's mother then asked her who dealt the blows to which she answered that accused Ashraf came to rape her but she refused and for that reason she was hit. After hearing such he went to the house of Mozor Member to catch the accused. He saw him smoking cigarette sitting in a bhotbhoti. He caught him there with the help of others and he told the accused that he has killed victim Hazera. At first he denied. He found soil

and blood on his hand, feet and head. They tied up the accused and then he confessed in front of 50/60 people that he killed her. Everyone got angry and he locked the accused in a room of Mozor Member. In the morning police came and arrested the accused and took him to his own house where he himself took out the pole-axe (khonta) and the knife smeared with blood. Police seized a piece of red blouse, a blue petticoat, a printed sharee and a blood-stained bed sheet and prepared seizure. He proved the seizure Exhibit-2 and his signature thereon Exhibit-2/1. In cross examination he stated that his house is two hundred yards away from the occurrence house and he went there hearing commotion. Victim's parents had arrived there before he reached. Their house is in another village and far away than his house. The victim got sense after 10-15 minutes of pouring water on her head. Local member Mozor Ali informed the police after her regaining consciousness. SI Zahurul himself recorded the FIR on the spot. He also recorded the statements of witnesses under section 161 of the Code. The witnesses are Olil Mia's relatives. He denied the suggestion that accused was falsely implicated

in the case by extracting a false confession for being beaten up by the police because of dispute in respect of land.

PW 3 Olil Mia is the husband of the victim. In his examination-in-chief he stated that he went to Mymensingh for treatment of eye. His wife was alone at home. His parents were in the north side room. Ashraf entered into the house by digging the soil of floor from the east side of his house situated at western side and hugged his sleeping wife and tried to rape her. Victim did not agree for which accused stabbed under her left breast along with in 6/7 places of her body with a knife. He received a phone call after 3/3.30 AM. and started from Mymensingh. He reached home at 10.30 AM. At first he went to Nalitabari police station and saw the accused. He asked the accused why the accused killed his wife. Accused replied that he went there to rape her but she refused and having regard with fear that she might tell people he killed her. Then he went home and saw the hole at the east side of his home and all blankets and pillows got wet with blood. In cross examination he stated that he was not in home at the time of incident. At first he came to learn from his brother-in-law

Farid through phone call. Witnesses are of neighboring villages. PW 2 Lokman is his paternal cousin and witness Shahidul is relative of Lokman. There are many houses flanked by his dwelling house and many people live there. On the east side of the place of occurrence there are houses of Khalil, Mintu, Liton, Jalil, Mozam. On the west side of the place of occurrence there are houses of Heki, Aziz, Mozid, Kazim, Chan. On the north side there are houses of Khaleq, Mozid, Siraj, chan, Abdul Hye, Tofazzel, Mosharof and on the south there are houses of Nur Mohammad, Soforuddin, Motin, Kofil, Nurnobi, Samad and they are witnesses to the case. PW 3 was in Mymensingh and he at first went to Nalitabari Police Station and saw the dead body. He also admitted that witnesses found the victim unconscious. He denied the suggestion that the accused did not confess to him about the incident.

PW 4 Malesa Khatun is the wife of PW 1 and mother of victim. She mainly stated in examination-in-chief that after hearing scream she reached out to the spot and saw her daughter was squeezing on the bed and victim's parents-in-law

were pouring water on the head. Victim got back her consciousness after 10/15 minutes and on query she replied that accused Ashraf beat her because of her refusal to his bad proposal who thereafter hit under the left breast along with other parts of the body. In the house of Mozor Member PW 2 caught the accused. In cross examination she admitted that at the time of pouring water there were 15/20 persons in the room and it was dark. She denied the suggestion that the victim did not say anything after watering her head or there was a clash in respect of land between PW 2 and accused for which PW 2 embellished the case.

PW 5 A. Jabbar, father-in-law of the victim and father of PW 3 stated in his examination-in-chief that accused Ashraf dug up the ground soil of the bed room of PW 3 by a pole axe and grappled victim Hazera with a desire to commit rape but having been failed he stabbed under the left breast and in 6/7 different places of the body with knife. At the time of accused's exit and hearing scream PW 5 got out of his room and lit the torch and saw the accused ran away. After entering the occurrence room he saw the victim was trembling and he

called his wife and poured water on her head. The neighbours came. The victim got her sense back and censured that accused Ashraf hit her with a sharp knife. He signed in the seizure list and inquest report as Exhibit- 2/2, and 3/1 respectively. In cross examination he admitted that he asked his wife to pour water on victim's head and he went out to call out people and at first met with PW 2 Lokman. After returning to the spot he saw the parents of the victim present there. After pouring water he had no talk with victim. He saw the accused sitting in the Bhotbhoti. He denied the suggestion regarding land dispute with Ashraf.

PW 6 Md. Shafiqul Islam is a local man. He stated in his examination-in-chief that one Amir Ali at around 2/2.30 AM told him through phone call to come quickly because there has been an uproar in his locality. On reaching Olil Mia's house he saw hole in the east side of the house. After getting into room he saw a lady with injuries under her left chest and other parts of the body caused by knife and he also saw the accused was detained in the house of Mozor Member. In the next morning, police arrested the detainee and took to his house wherefrom

he himself brought out the sharp knife from the thatched roof and confessed the killing of victim Hazera. On interrogation of the police the accused replied that he burgled into the room and wanted to rape the victim and being failed dealt her blows with knife. Police seized the knife in his presence. In cross examination he admitted that when he reached there he found victim Hazera dead. Convict sat down in the bhotbhoti wherefrom he was caught. He denied the suggestion that accused did not kill or confess the killing in front of everybody or PW 2 through PW 3 filed the case falsely.

PW 7 Md. Ashraf Ali from Akhrapara stated that at 2/2.30 AM people started loud uproar. He ran to Olil's house and saw her mother and mother-in-law were pouring water on victim Hazera's head. After sometimes victim gained sense and told that accused Ashraf entering into her room tried to rape her and hit with knife on resistance. He further stated that after sometimes he saw the accused going to bring bhotbhoti for taking the patient to hospital. He saw blood in the hand of the accused. In cross examination he stated that at 2/2.30 AM accused Ashraf went to bring bhotbhoti for

carrying the injured lady to hospital and further stated that he went to the spot at 2/2.30 AM. Nobody sent the accused to bring bhotbhoti but he went voluntarily. He admitted that after reaching the spot he saw pouring of water on head. He denied the suggestion that the victim did not regain sense or say something or the accused was falsely implicated.

PW 8 Md. Hazrat Ali in his testimony stated that on hearing scream approximately at 2/2.30 AM he went to the occurrence house and saw PW 4 pouring water on victim Hazera's head. After this on her gaining consciousness victim told that the accused hit her with knife which PW 8 heard. Victim further told to look after her son. She died shortly after saying this. Then local people caught accused Ashraf. They saw blood in his hand and he confessed in front of all that he committed the offence. In cross examined he stated that PW 6 came after him with 30/40 persons. Accused went to bring van and he could not say who sent the accused. Victim Hazera could speak after pouring water which he heard. Accused was present being person of neighbouring house and he went to bring van. PW 2 is the uncle of PW 3. He denied the

suggestion that PW 2 causing the incident gave false testimony against the accused.

PW 9 Md. Shariful Haq is the magistrate and in his examination-in-chief he stated that maintaining the procedure properly as provided under section 164 of the Code he recorded the confession of accused Ashraf Ali which is Exhibit-4. He proved his signatures Exhibits-4 series. In cross examination he denied that the accused confessed for fear of police and the confession is not of him.

PW 10 Mostafizur Rahman was the 3rd Investigating Officer stated in his examination-in-chief that he visited the place of occurrence and found the index and sketch map correct. He made a seizure and prepared a list on seizing pole axe, a blood-stained knife of eleven and half inch long with handle, an old blood-stained bed sheet, a piece of red-coloured blouse, a piece of a print sharee and piece of a blue-coloured petticoat. The charge under section 302 of the Penal Code being primarily proved against the accused through an over-all investigation charge-sheet 113 dated 13.08.2011 was submitted. The signatures given in the map, index, seizure lists

prepared by Zahurul Islam are known to him and those are marked as Exhibits-2, 3, 5, 5 series, 6, 6 series. A pole axe (khonta) and a blood-stained knife, one blood-stained bed sheet, one piece of crimson blouse, one piece of printed sharee and one piece of blue-coloured petticoat are material Exhibits-I, II, III, IV, V, VI respectively. In cross examination he stated that he was the third Investigating Officer and submitted charge sheet. He denied the suggestion of the defence that confession was not voluntary or the accused was implicated in course of events at night or he did not investigate properly.

These are all of evidence on record adduced by the prosecution.

It appears that the trial Court convicted and sentenced the accused to death under section 302 of the Penal Code mainly on the finding that PW 2 saw the accused to run to the south and he was stopped and on query he replied that he was going to bring bhotbhoti and subsequently PW 2 after having knowledge of the severe injury of the victim caught and detained the accused in a room of Mozor Member and went

to the accused's house with police and recovered blood-stained knife and pole axe from the thatched roof as shown by the accused which proves that accused Ashraf committed murder and further found that the confessional statement of the accused recorded under section 164 of the Code is found true and voluntary and the same proves the case of the prosecution beyond reasonable doubt.

Now the point for determination in this reference and appeal is that whether the murder of victim Hazera by accused Ashraf as alleged by the prosecution has been proved beyond all reasonable doubt and the Additional Sessions Judge is justified in passing the impugned judgment and order of conviction and sentence.

The law is well settled that a confessional statement should not only be voluntary but it must be true. For the purpose of bringing in and about its truthfulness a confessional statement should be compared with remaining evidence of prosecution and probability of the case would also be relevant. The confessional statement Exhibit-4 recorded by PW 9 is reproduced below:

“আমি গত ০৭/০৫/২০১১ ইং তারিখ শনিবার দিবাগত রাত ১২.০০ ঘটিকার পূর্বে ঘরের সিঁদ কাটিতে থাকি এবং ০৮/০৫/২০১১ ইং তারিখ রাত ১/১.৩০ ঘটিকার সময় আমার বেয়ানের ঘরে ঢুকি। ঘরে তাহার মেয়ে ও সে ছিল। বেয়ানের নাম খেয়াল নাই। পরে বেয়ানের শরীরে হাত দেই। অতঃপর সে উঠে বসে। আমি চৌকির নীচে ঢুকে পড়ি। আমি তাহার সাথে দৈহিক মেলামেশা করার জন্য যাই। পরে বেয়ান শুয়ে পড়লে আমি আবার তাহার পাঁয়ে হাত দিলে সে চিৎকার করতে থাকে। সে চিৎকার দেয় বলে আমি তাহার বুকের নীচে, উরুতে, হাতে চাকু দিয়ে আঘাত করি পরে সে মারা যায়। আমি বের হয়ে আসি।”

To begin with it is important to notice that there is no eye witness to the occurrence and the intention denoting aim or purpose of the accused is to rape the victim. Generally prosecution is not obliged to prove the motive of killing in every case. But if any motive is suggested it is the duty of the prosecution to prove the same.

An accused is called guilty of a criminal offence if both the *actus reus* and *mens rea* can be proven and intention is an integral part of *mens rea* which is the mental element of a

criminal offence. *Actus reus* means guilty Act. *Mens rea* refers to the offender's mental state at the time of crime.

From reading of the above mentioned confession we find a peculiar and weird situation and circumstance. Here in this case after unusual struggle for around one and half hours accused Ashraf entered the room and touched the body of the victim for which she woke and sat up and the accused instead of threatening her with the knife crawled under the bed. The first question is whether he was that ashamed for which he intended to keep him hiding instead of raping although was infatuated and excited.

The next question is that he could have an easy access only by calling the victim's name because he as it reveals from confession was acquainted with Hazera. It is not normal to concede so much labour and pain to enter into the room. But since he entered the room by digging the soil spending a long time it can be presumed that the victim was not so known or intimate to him as disclosed in the confession. That was dark in the night and there is nothing in evidence to prove that victim Hazera definitely identified accused Ashraf in the dark

of the night and thus it is presumed that the statement on intimacy as “Beai” is untrue.

It also appears from the confession that at that stage victim Hazera then lay down without screaming or uttering a single word by telling accused Ashraf to get out. It further transpires that when Hazera lay down he touched her leg again and she started screaming. Here again and again questions and doubts arise in the mind that why a crazy rapist would hide under the bed or later on touch the leg without touching other private parts of her body and pointing knife to her throat and putting his hands on her mouth with threat of killing her.

So it is apparent that the accused did not go for rape because he did neither snuggle nor scuffle with Hazera as the case made out in the FIR rather according to Exhibit-4 he crawled under the bedstead and later on touched the leg instead of the private parts of the body. Exhibit-4 does not show that he ever pointed the knife and threatened her with death in the event of her refusal to have copulation and as such the motive of killing her with the knife for the failure of raping is unfounded, irrational and preposterous.

Furthermore, it is admitted that Hazera had a male child of one and half years but the confession shows that the child is a female and it is apparent that the child was silent.

Accused also stated that because of her scream he stabbed under her chest, on thigh, hand and later on she died and he came out. It further appears here that the statement was not true and voluntary inasmuch as convict Ashraf as alleged did not see her dead on the spot.

If the accused according to confession left victim Hazera dead then the case of prosecution on dying declaration falls through. On the other hand if the dying declaration is taken to be true in that case the confession on leaving Hazera dead becomes untrue. So there is a considerable missing of link in the facts and circumstances of the case. The Court below failed to appreciate this important aspect affecting the merit of the case.

Thus from reading of the confessional statement itself it is clear and evident that the same is not true. This confession goes against the usual course of human conduct and common prudence. In this case as discussed above we find that the

prosecution has not been able to prove the motive of rape suggested by them. In the instant confession neither *actus reus* nor *mens rea* is present to prove the charge leveled against convict Ashraf under section 302 of the Penal Code.

According to the evidence of PW 2 Lokman his house is two hundred yards away from the place of occurrence and in between there are houses of Mozaffar, Khalil Munshi and Monir Uddin but none of them was examined as witness. PW 2 heard the scream from such distance and started moving towards the spot with a torch and when he reached half the way he saw condemned-prisoner Ashraf running towards south. Then he stopped Ashraf and asked him where he was going. From this evidence it is clear that Ashraf stopped and faced PW 2 but PW 2 did neither see Ashraf carrying any pole axe or knife with him nor was he nervous and clothed with dust and blood in any part of his body. PW 2 has no such case. PW 5 Jabbar who is the father of PW 3 and father-in-law of victim Hazera also hearing scream came out of the room and saw through focus of torchlight that accused Ashraf was running out.

While PW 2 stopped and asked Ashraf where he was going he replied that the wife of PW 3 was seriously injured and he was going to bring bhotbhoti from the house of Mozor Member. Then PW 2 went to the place of occurrence and heard the incident of stabbing and before victim's death he left the place to catch the accused and went to Mozor Member's house where he found Ashraf sitting in bhotbhoti and smoking. From this place accused Ashraf was apprehended and detained which is also supported by PW 5 Jabbar, PW 6 Shafiqul, PW 7 Ashraf Ali and PW 8 Hazrat.

So according to the clear case of prosecution the movement of Ashraf was upto the bhotbhoti of the house of Mozor Member from the place of occurrence and nowhere else ever. He did not go anywhere except from place of occurrence to the bhotbhoti of Mozor Member before he was caught and detained in the house of Mozor Member till his arrest by police.

Therefore it is apparent that after such incident accused Ashraf never went to his house. So there is no answer to the question that how the pole-axe and the blood-stained knife

reached to his house. Neither PW 2 nor PW 5 or PW 7 saw that condemned-prisoner Ashraf was carrying a pole-axe and knife. The confessional statement also does not disclose the whereabouts of pole-axe and knife whether those were left to the place of occurrence or carried away to the house of the accused by himself.

The first Investigating Officer Zahurul Islam who seized the pole-axe and the blood-stained knife at 7.30 AM on 08.05.2011 was not examined and it is also not explained away why this important witness was not examined. PW 2, PW 5 and PW 6 claimed to be present at the time of seizing pole-axe and knife. PW 6 says in his examination-in-chief that accused himself brought out the sharp knife from the thatched roof of his room. But in order 29 dated 29.06.2014 Additional Sessions Judge found that the blood-stained knife was recovered from the kitchen. The seizer list Ga also shows that the knife was recovered from kitchen.

As we found accused Ashraf never went to his house after the incident the seized knife material exhibit-II is not the alleged knife prosecution wants to believe the Court.

Prosecution could have examined the knife through scientific method and submitted a forensic report in view to bring the charge home against the accused beyond all reasonable doubt. The case of the prosecution is highly suspicious and law does not permit to convict a person on suspicion.

Prosecution has made out a case of dying declaration that after pouring water on her head victim Hazera regained her sense and in presence of father PW 1, distant neighbor Lokman PW 2 who is the cousin of husband PW 3, mother PW 4, father-in-law PW 5, local person PW 7 and local person PW 8 she disclosed that accused Ashraf came to rape her and he being resisted stabbed her with knife. PW 2 stated in cross examination that the witnesses are relatives of victim's husband. PW 3 stated in cross examination that witnesses are of neighboring villages and they saw Hazera senseless. PW 5 stated in cross examination that Hazera had not spoken to him after pouring water but spoke to her mother and mother-in-law. PW 7 says in his evidence that condemned-prisoner Ashraf hit her with knife and after sometimes he saw Ashraf went for bhotbhoti to take Hazera to Hospital and this

evidence is absolutely contrary to the evidence of PW 2 and PW 5 because they saw Ashraf running away while PW 7 saw Ashraf in the place of occurrence.

PW 8 added some extra words in his evidence stating that Hazera asked to take care of her boy but no other witness has made such statement. Moreover, the most important aspect on this point is that the husband of the victim PW 3 admitted in evidence that there are many dwelling houses around his homestead and many people live there and thereafter he disclosed the names of as many as 23 adjacent neighbours who according to his statement are witnesses. But surprisingly none of the above most competent and disinterested witnesses was examined in support of the dying declaration.

The Court has full authority to check the authenticity of the statement made by the declarant. The accused can be convicted on the basis of dying declaration only when the Court acknowledges that the declaration made is truthful in its whole content but here we find that such declaration is not proved in evidence to the satisfaction of the Court and there is

nothing on record to assess the physical capability of making such a declaration by Hazera. The dying declaration having not been free from reasonable doubt the accused is entitled to the benefit.

Furthermore, the husband of victim Hazera deposed as PW 3 wherein he stated that he went to Mymensingh for treatment of eye. He received phone call at 3/3.30 AM. After receiving the call he started from Mymensingh and reached home at 10.30 AM and at first went to the police station. He stated in evidence that at first one Farid informed him through phone. This Farid was nowhere introduced or examined. He did not adduce any evidence to explain when he reached Mymensingh or who gave treatment at what time or why he did not return home or where he stayed at night or how he reached home. He did not produce any prescription in evidence. He being husband would have to prove by positive and reasonable evidence that he was absent from the house when his wife was murdered and explain by credible evidence how his wife came to meet her death. It is sad but true that

prosecution did not pay due attention to this point in a case where someone's wife is killed.

Besides this Mozor Member who was cited as witness 3 in the charge sheet and an important person found everywhere in the case was not examined as witness. He being the local Member informed police after victim's regaining consciousness as evident from the cross examination of PW 2. Accused was apprehended and detained in his house and also arrested from there. He is the competent person to disclose as to why accused Ashraf stayed in the bhotbhoti belonging to Mozor Member instead of fleeing away after such alleged commission of offence.

The doctor who prepared the autopsy report was also not examined. PW 5 deposed that he saw Ashraf in the light of torch but this statement is not corroborated and not in the FIR nor was the torchlight seized. This appears to be subsequent embellishment. The statement made in the FIR was not reflected in the confessional statement and this confession does not show that there was any grapple or scuffle with victim Hazera.

Prosecution is required to prove the charge beyond all reasonable doubt failing which the benefit goes to the condemned-prisoner and he is entitled to acquittal. The fact and circumstance of this case do not indicate that the confessional statement is true. Accused did not state that he scuffled with or apply force on Hazera or was even resisted by her according to the case made out by the prosecution. No neighbours as claimed in the FIR and introduced by PW 3 was examined. No endeavor was made by the prosecution to obtain the finger prints of material exhibits- I and II and compare the same with those of the accused.

The prosecution having failed to prove the charge leveled against accused Ashraf under section 302 of the Penal Code beyond reasonable doubt the learned Additional Sessions Judge could have acquitted him. But the learned judge failed to appreciate the evidence as well as the fact and circumstance of the case and most illegally convicted the accused with sentence to death which is not sustainable in law.

In view of above discussions and findings, we do not find any substance in this Death Reference and the same is

liable to be rejected but we find merit in Jail Appeal 71 of 2018.

In the result, the Death Reference 20 of 2018 is rejected and Jail Appeal 71 of 2018 is allowed. The judgment and order dated 14.02.2018 passed by the Additional Sessions Judge, Sherpur in Sessions Case 206 of 2011 corresponding to G.R. 67 of 2011 of the Court of Judicial Magistrate, Nalitabari, Sherpur arising out of Police Station Case 04 dated 08.05.2011 is hereby set aside and the condemned-prisoner Ashraf Ali, son of late Kubbat Ali of village Muakora of Police Station Nalitabari of District Sherpur is hereby acquitted of the charge under section 302 of the Penal Code leveled against him. The accused be set at liberty forthwith if not wanted in any other cases.

The lower Court's records along with a copy of this judgment be sent down at once.

S M Kuddus Zaman, J:

I agree.

Naher, B.O.