

Present:
Mr. Justice Md. Atoar Rahman
And
Mr. Justice Md. Ali Reza

Death Reference No. 24 of 2018

The StatePetitioner

-Versus-

Md. Faruk @ Nobi and othersConvicts

With

Criminal Appeal No. 2425 of 2018

Md. Faruk @ Nobi and othersConvict-appellants

-Versus-

The State

.....Respondent

And

Jail Appeal Nos. 83 and 84 of 2018

Md. Faruk @ Nobi and othersConvict-Appellants

-Versus-

The State

.....Respondent

Mr. M.D. Rezaul Karim, Deputy Attorney General with

Ms. Sultana Akter Rubi,

Ms. Farhana Afroze Runa,

Mr. Mohammad Abdul Aziz Masud and

Mr. Md. Shamim Khan, Assistant Attorney General

.....for the State

Mr. Md. Helal Uddin Mollah, Advocate with

Ms. Syeda Maimuna Begum, Advocate and

Ms. Syeda Farah Helal, Advocate

.....for Condemned-prisoner Mohammad Ali

Mr. Momotaz Begum, State Defense Lawyer

.....for the absconding Convicts

Mr. Md. Bodiuzzaman Tapadar, Advocate with

Ms. Sultana Jahan Bithey, Advocate

.....for Condemned-prisoner Faruk

Heard on: 11.07.2024, 25.07.2024, 01.08.2024,

22.08.2024 and 29.08.2024

Judgment on: 04.09.2024.

Md. Ali Reza, J.

This is a reference under section 374 of the Code of Criminal Procedure (hereinafter called in as the Code) made by Additional Sessions Judge, Chandpur for confirmation of death sentence passed against accused Yasin Bepari, M.A. Khaleq Molla, Selim, Mohammad Ali and Faruk alias Nabi by judgment and order dated 20.02.2018 in Sessions Case Number 180 of 2010 convicting them under sections 302/34 of the Penal Code. The condemned-prisoner Faruk also preferred Criminal Appeal Number 2524 of 2018 as well as Jail Appeal Number 83 of 2018 and Mohammad Ali also preferred Jail Appeal Number 84 of 2018 against the judgment and order of conviction passed against them sentencing them to death by hanging. The reference and appeals are taken up

and heard together and disposed of by this common judgment.

The prosecution case in brief is that Md. Robiul Darzi lodged a First Information Report (FIR) with Matlab Uttar Police Station on 15.10.2008 alleging that his son Masud used to work as an employee in Badal's oil shop in Matlab Daxmin Bazar. He came home two days before last Eid. On 05.10.2008 at around 7.30 PM Mohammad Ali went to his house and called Masud. Then his wife Rohima went out and asked Ali about what the matter was. In reply he said that he had a talk with him. Masud then told his father that he would be back soon and went out with Ali. But Masud did not return home that night and he started looking for him. Next day at around 7.00 O'clock in the morning he went to the house of Ali and asked him about Masud in presence of witnesses to which he replied that he along with Masud, Yasin Bepari, Faruk alias Nabi gossiped by the side of road close to the house of Alfu Pradhan till half past nine and from there they went to the shop of Afzal and took puffed rice and from there they went close to the bridge at 10.30 PM which was 50 yards

away and Ali then left them and went home. After not finding his son he informed the police station about Masud's disappearance and lodged general diary 513 on 14.10.2008. After making inquiries at the houses of his relatives and finding no trace of Masud he searched with people around the place where they stayed that day. At one stage of search he found the body of his son from the ditch of one A. Wahab of Mouza Goalbhaor floating under hyacinth of the water on 15.10.2008 at around 10.30 AM in presence of A. Haq (PW 10). He identified the body by looking at his lungi, shirt and wrist watch. People came from nearby and saw the body. Police after receiving information went to the spot and raised the body and prepared inquest. His son's wearing lungi was squeezed around the throat. Yasin took a woman about a year ago at his son's shop. The shop owner caught them and sent them to police station. But Yasin has been fostering grudge upon Masud blaming him for such capture. Moreover Yasin kept his son's mobile phone for about 6(six) months. For these reasons he was firmly convinced that Yasin, Ali, Faruq, Khaleq, Selim along with others premeditatedly called his son

at around 10.30 PM on 05.10.2008 and killed by suffocating him with lungi and hid the body under the hyacinth of the reservoir. Police sent the dead body to the morgue for post mortem. Hence the FIR was lodged against the accused persons under sections 302/201/34 of the Penal Code.

The police after investigation submitted charge sheet on 30.05.2009 and the accused persons were placed on trial before Additional Sessions Judge, Chandpur on 26.09.2010 being charged under sections 302/201/34 of the Penal Code.

The prosecution examined as many as 15 witnesses including the formal witnesses to prove the case. The defence pleaded innocence and false implication in the case. The defence version of the case is that the police obtained confession from accused Khaleq and Yasin on 13.11.2008 and 24.11.2008 respectively by merciless beating and torture with electric shock. The further case of the convicts is that Khaleq by a petition dated 08.09.2009 and Yasin also by a separate petition on 23.09.2009 retracted their confessions and those petitions were kept with the record respectively on 14.09.2009 and 30.09.2009.

After conclusion of examination of prosecution witnesses accused Cherag Ali Molla, Faruq, Mohammad Ali, Keramat were examined under section 342 of the Code to which they reiterated their innocence.

On consideration of 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.

Mr. M.D. Rezaul Karim, learned Deputy 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 statements made by Khaleq and Yasin are sufficient for conviction which the trial Court found as true and voluntary and the retractions made by them are absolutely false. He further submits that the case as made out by the prosecution is well supported by corroborative reliable and substantive evidence which shows that the offence is atrocious and outcome of revenge. He then very candidly submits that in the instant case the confessional statement of a co-accused can be used against other accused persons since

there is corroboration by other direct or circumstantial evidence. He next submits that PW 3 while performing his business has correctly followed the provisions of section 364 read with section 164 of the Code. He finally submits that all the prosecution witnesses are impartial and competent and there is no falsehood in their evidence on any point thus convicting and sentencing the condemners by the Court on the basis of confessional statements supported by evidence stand commendable and just and the impugned judgment calls for no interference by this Court. He referred to the cases of Md. Selim Vs. State, 4 BLC 261; Anisur Rahman Vs. State, 6 BLD(AD) 79; Rezaul Haq Vs. State, 42 DLR 440.

On the other hand Mr. Md. Bodiuzzaman Tapader, learned Advocate appearing for condemned prisoner Md. Faruq alias Nobil opposes the reference and submits that the impugned judgment is bad in law and the prosecution has failed to prove the case beyond reasonable doubt. He strongly submits that there is no eye witness in this case and the confessional statements are not true and voluntary being not supported by any corroborative substantive evidence and the

Court failed to appreciate that the confession of co-accused cannot be used against the appellant without any corroboration. He draws our attention on the GD entry and contends that the subsequent FIR exhibit-3 does not contemplate the true state of things and evidence shows that it is actually a subsequent ornamentation to implicate the appellant and other convicts. He also submits that the prosecution case is suspicious and manipulated inasmuch as the FIR was lodged after a long delay without any satisfactory explanation. He then points out that the confessional statements are not true and voluntary being not made in accordance with the provisions laid down in section 164 read with section 364 of the Code and custody of the makers beyond 24 hours is unauthorised and catastrophic according to section 167 of the Code. He draws our attention to the point that abscondence of an accused can be treated corroborative to the evidence of eye witness but not to the confessional statement of another accused and absconsion itself is not conclusive evidence to infer either of guilt or guilty conscience and the finding of the trial Court is perverse and

misconceived. He unfolds section 114(g) of the Evidence Act and submits that the prosecution has not only withheld the vital witnesses but also not given any explanation for such repulsion which invites adverse presumption. He finally submits that there is good ground in the appeals which may be allowed and the reference may be rejected. In support of his contention he refers to the cases of Akhtar Hossain Vs. State, 44 DLR 83; Rezaul Karim Vs. State, 55 DLR 382; Sanwar Hossain Vs. State, 45 DLR 489; Alamgir Hossain Vs. State, 22 BLC(AD) 155; State Vs. Sarowaruddin, 5 BLC 451; State Vs. Babul Miah, 63 DLR(AD) 10; Belal Vs. State, 54 DLR 80; Dolon Vs. State, 64 DLR 501; Raham Ali Vs. State, 1976 Cr. LJ 17.

Mr. Md. Helal Uddin Mollah, learned Advocate appearing on behalf of condemned prisoner Mohammed Ali Munshi also supports the appeal and confronts the reference and adopts the submissions made by Mr. Tapader. He further puts on that columns 1, 2 and 10 of the confessional statements of both accused are blank which prove that they were arrested earlier but kept in illegal detention before

producing them to magistrate and the house of Yasin which is claimed to be the first place of occurrence is not shown in the sketch map and index of the case and the same creates doubt on the entire story of prosecution. He further adds that none of the prosecution witnesses informed the incident to any authority till the GD lodged on 14.10.2008 after 9 days of the incident and it is also very surprising that no name of any accused was mentioned in the GD and the same creates reasonable doubt and law says that benefit of doubt shall always go in favour of the convicts but the Court below misconceived the law and fact of the case and arrived at a wrong conclusion. In support of his submission he refers to the cases of Jamal Vs. State, 40 DLR(AD) 38; State Vs. Khasru, 43 DLR(AD) 182 and finally prays that reference may be rejected and the appeal may be allowed.

Ms. Momotaz Begum appeared as state defence lawyer and adopted the submissions of Mr. Tapader and Mr. Molla.

In order to consider the submissions of the contending parties as well as the merit of the case it is now necessary to

examine and analyze the material evidence on record to arrive at a proper conclusion.

Informant Robiul Darzi is PW 1 and father of victim Masud. He stated that later in the evening on 05.10.2008 accused Mohammad Ali called his son Masud Rana. On his coming out Mohammad Ali said that he had something to say to Masud. Then Ali took his son who did not come back that night. He could not find his son despite long search and on next morning he informed his brother PW 2 and nephew PW 5 about the incident and they went to Mohammad Ali's house at 7 AM. They found him sleeping in his house and he woke up on their call and told that Yasin had asked him to call Masud. He further told that he along with Masud, Yasin, Faruk gossiped on the road in front of the house of Alfu Prodhan and then they took puffed rice from Afzal's shop. Mohammad Ali then went back to his home and Yasin, Faruk and Masud went west to the bridge. PW 1 further stated that Khaleq and Selim came while they were talking to Mohammad Ali. Khaleq and Selim scolded Mohammad Ali and said about what he was talking and they told PW 1 to go back home

without anxiety and his son would be back. The time when PW 1 rang up to his son's mobile the other side responded that his son would be back. But as he did not come PW 1 lodged GD 513 on 14.10.2008. At one stage of search PW 10 found the dead body of Masud under the hyacinth of marshland of Abdul Wahab on 15.10.2008 at 10.30 AM. A black wearing lungi was wrapped around the neck of the dead body whose skin fell off from different places. He had wrist watch and shirt worn with his body. On receiving information police came to the spot and exhumed the body and prepared inquest. Dead body was then sent to morgue for autopsy. As a result of previous enmity the accused persons strangled his son to death and hid his body under the hyacinth. Masud used to work in an oil shop in a market of south Motlob. A year before the incident Yasin brought a girl from Dhaka and expressed his desire of spending one night with her in that shop. But Masud refused and Yasin along with that girl was apprehended by the police for which Yasin spent 20 thousand taka for bail what he borrowed from accused Khaleq. That was Yasin's enmity with Masud. PW 1 filed the FIR in Motlob

Uttar Thana mentioning the names of the accused on the day when the dead body of his son was found. Khaleq and Yasin made confessional statements. In cross examination he admitted that he did not mention the names of the accused in the GD. He stated that there was no enmity between accused Faruq and his deceased son. He also stated that hostility between Yasin and Masud built in because of not offering Yasin and the girl any place to stay. He further stated that he heard the names of the convicts from Mohammad Ali and accordingly submitted FIR. He also stated that he did not produce the shop keeper Afzal as witness. He denied the suggestion that Yasin confessed because of torture.

PW 2 Abul Hossain Dorji is the brother of PW 1. He stated in examination-in-chief that later in the evening on 05.10.2008 Mohammad Ali summoned Masud who had not come back for which a GD was lodged on 14.10.2008 followed by FIR on 15.10.2008. The convicts strangled Masud to death for enmity with accused Yasin. In cross examination he admitted that he lodged GD on 14.10.2008 in which there was no disclosure of the names of the convicts. He also stated

that there was enmity between Yasin and Masud and he did not know whether Yasin after his arrest was beaten up. He also admitted that Afzal told them that Yasin, Faruk, Selim took Masud to his shop at 10 PM for eating puffed rice on the night Masud disappeared.

PW 3 Abdur Rahman who is the magistrate stated in examination-in-chief that he recorded the confessional statements of accused Khaleq and Yasin on 13.11.2008 and 24.11.2008 respectively under section 164 of the Code following the provisions laid down in section 364 and their confessions are true and voluntary. In cross examination he denied the suggestion that confession was given due to torture and fear.

PW 4 Dr. Sirajul Islam proved the autopsy report and stated in examination-in-chief that death was due to asphyxia resulting from strangulation which is antemortem and homicidal in nature. In cross examination he denied the suggestion that the report was false.

PW 5 Nazrul Islam is the maternal cousin of the deceased admitted in evidence that he got knowledge of the

incident from PW 1. He stated in cross examination that accused Yasin was caught from Jhenidah and there is no name mentioned in the GD.

PW 6 Syed Hossain Khan is neighbour and he also heard the incident from PW 1 and he was present at the time of lodging GD on 14.10.2008 and the dead body was found on 15.10.2008 at 10.30 AM and he was a witness to the inquest report. He further stated in examination-in-chief that there was enmity between Yasin and Masud. In cross examination he denied the suggestion that these convicts are not involved in the incident.

PW 7 Keramat Ali is also a neighbour and he stated in examination-in-chief that GD was lodged in his presence on 14.10.2008 and the dead body was found on 15.10.2008 under hyacinth of a reservoir of paddy field. He also stated that there was enmity between Yasin and Masud. He admitted in cross examination that he heard about the event and the names of the accused persons from PW 1.

PW 8 Rahima Begum is the mother of victim Masud. She stated in examination-in-chief that Mohammad Ali called

away his son from the house on 05.10.2008 at 7.30 PM and Masud did not come back home and a call came from the mobile of his son informing his son had gone on a trip and would be back in a few days. In cross examination she stated that PW 1 told her how her son had died. She also admitted that PW 1 lodged GD and she could not say as to who was suspected.

PW 9 Borhanuddin is the local UP chairman and he stated in examination-in-chief that he went to the spot after having information and victim's father lodged GD being unable to find his son and his dead body was found the next day. In cross examination he admitted that he was present at the time of lodging complaint and no one was suspected in the GD and 5 persons were accused in FIR.

PW 10 Abdul Haq stated in examination-in-chief that PW 1 lodged GD with police station and about 10 days after victim's disappearance his dead body was found on 15.10.2008 upon search by PW 10 under the hyacinth of a reservoir belonging to A. Wahab and then he shouted and the people and police came and with the help of scavenger police

recovered the body. Then he again stated that police came 1 hour later after he saw the dead body. He stated in cross examination that he had not heard of the name of any accused at the spot.

PW 11 Abdul Wahab who was the second investigating officer stated in examination-in-chief that he took over the investigation from PW 12 on 18.10.2008 and he found similarity in sketch map, index, statement under section 161 of the Code, seizure list, inquest from the case diary and he caught accused Khaleq from Dhaka with the help of RAB and Yasin from Moheshpur, Jhenidah with the help of local police. He produced Khaleq before magistrate for confessional statement on 13.11.2008 and Yasin on 24.11.2008. He also stated that due to outrage the accused persons caused disappearance of the dead body after killing the victim. Finding *prima facie* case in the complaint he submitted police report 49 on 30.05.2009 recommending trial under sections 302/201/34 of the Penal Code. He further stated that nephew of Khaleq named Selim was beaten by Masud before few months prior to the occurrence and when Masud was

questioned he misbehaved with Khaleq and also with Arshad who is the brother of Khaleq and a next door neighbour of Masud and they have dispute with regard to the demarcation of the homestead. In cross examination he admitted that he arrested Khaleq from Jatrabari but he did not lodge any GD in Jatrabari police station. At first RAB apprehended Khaleq but he did not know when he was caught and no RAB personnel is summoned as witness. He also admitted that he produced Khaleq in Motlob Uttar Thana on 13.11.2008 at 8 AM. RAB 10 took custody of Khaleq from Dhalpur in the evening on 11.11.2008. RAB arrested accused Khaleq at 3.45 AM. He further admitted that he took custody of accused Khaleq from RAB and they with the help of patrol police carried out expedition to Kanchpur Jatrabari and all possible places of Dhaka for apprehending other accused on 12.11.2008 at 5.10 AM. He started for Motlob Uttar Thana from Dhaka on 12.11.2008 at 1.15 PM and reached there on 12.11.2008 at 8.30 PM and he sent Khaleq to Chief Judicial Magistrate, Chandpur on 13.11.2008 at 9.25 AM and was present there till 3.15 PM and Court sent accused Khaleq to jail after recording

his confession under section 164 of the Code. He further admitted that Yasin was arrested by the police of police station Moheshpur under District Jhenidah on 22.11.2008 and he himself went Moheshpur to bring accused Yasin and nobody of Moheshpur Thana was cited as witness in this case. He started from Moheshpur on 23.11.2008 at 7.15 AM. Yasin was produced before Chief Judicial Magistrate, Chandpur on 24.11.2008 at 9.15 AM for recording confessional statement.

PW 12 SI Akram Hossain stated in examination-in-chief that he prepared inquest, sketch map, index, seizure list and took statement of the witnesses under section 161 of the Code. PW 1 lodged GD Number 513 dated 14.10.2008 upon which message was sent to all over Bangladesh by message bearing number 300 dated 14.10.2008. He admitted in cross examination that it is true that no name of any accused is mentioned in the GD.

PW 13 Nuruzzaman is victim's maternal uncle and he stated in examination-in-chief that he was a witness to inquest and in cross examination he denied the suggestion that the corpse was not of victim.

PW 14 Sazib Das stated in examination-in-chief that victim's maternal uncle Afzal along with 2/3 persons went to him for recording a cassette from memory card of a mobile phone and he heard them say that there is conversation therein about a homicide and in cross examination he admitted that he had no knowledge of case of murder.

PW 15 Shushil Chandra Majhi is a scavenger and stated in examination-in-chief that he along with police recovered a dead body from a reservoir of village Goalbhaor on 15.10.2008 and sent the dead body to morgue. Defence declined to cross examine him.

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

It appears that the trial Court convicted and sentenced the accused persons to death under sections 302/34 of the Penal Code mainly on the finding that Faruk immediately after the murder of the victim remained absconding till 27.02.2012 and his long absconding reflects his guilt-ridden mindset with regard to the alleged murder and also found that accused Yasin and Selim after obtaining bail absconded to evade the

test under section 342 which reflects their guilty mentality and accused Khaleq also could not escape the liability of his guilty mindset as he absconded since 26.09.2016. The Court further found that accused Yasin and Khaleq made voluntary and spontaneous confessions which are inculpatory in nature and subsequent retractions disowning liability being not accepted do not remit them from such allegation. The Court likewise found that even if the confessional statements contain a mixture of truth and falsehood those support the claim of the prosecution and the testimony of the witnesses presented by the prosecution has been established in this case as true, credible and admissible.

Now the point for determination in this reference and appeals is that whether the murder of victim Masud by the convicts 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 case of the prosecution starts with the fact that in presence of PW 1 and 8 accused Mohammad Ali called for

victim Masud on 05.10.2008 at around 7.30 PM saying that he had conversation with him. Masud went away with Mohammad Ali but never came back and he was not traced out despite long search. Masud's father PW 1 along with PW 2, PW 5, PW 6, PW 7, PW 13 went to the police station Motlob Uttar Thana and in presence of SI Akram Hossain PW 12 lodged a general diary bearing number 513 on 14.10.2008 after 9 days of disappearance of victim. The message to all over the country was sent on the same day by message number 300 dated 14.10.2008 pursuant to that GD. The delay in lodging the GD is explained away as is seen from its recital that the delay caused due to being busy in searching out the victim. The GD is an admitted document and the same was tendered in evidence by PW 12 but mistakenly not marked in evidence although the same along with the related message is available in the record. The GD shows that Masud disappeared from the house on 05.10.2008 approximately at 7 PM. There is no name mentioned in the GD suspecting or accusing anybody and it has not been mentioned that convict Mohammad Ali took the deceased with him from the house of

the informant. The inquest report is exhibit-1 which shows that PW 12 started inquest on 15.10.2008 after getting the dead body at 1.15 PM and in the report PW 1 himself is the identifier and PWs 2, 5, 6, 10, 13 are witnesses. Exhibit-1 further denotes that the signatories and the relatives of the deceased revealed that the body of the deceased was found that day after going missing in the evening of 05.10.2008. It is very unusual and surprising that no name of any suspected or accused person has been proposed and brought forward in the GD or inquest. Learned DAG referring to the evidence of PW 2 submitted that the prosecution has explained away as to why the names of the convicts were not mentioned in the GD as PW 2 stated in cross examination that the names of the accused have not been mentioned in the GD with the hope of getting his nephew back. But on the other hand PW 6 admitted in cross examination that these convicts were not suspected at the time of lodging GD. Moreover after getting the dead body in presence of father and so many witnesses it was very natural and immensely covetable considering the usual course of human nature and common prudence that at

least the allegation of calling Masud by accused Mohammad Ali on 05.10.2008 from the house of PW 1 should have been disclosed during preparation of the inquest report. When the dead body was found at 1.15 PM after 10 days of his disappearance the question on context of fear of losing the victim is paranormal. As the names of the accused are neither mentioned in the GD nor in the inquest the case becomes highly suspicious. It is absolutely incredible that despite the long agony of the parents and relatives of the victim the names of the accused will not be disclosed after 9 days on 14.10.2008 at the time of lodging GD or in exhibit-1 made after 10 days when the body was found on 15.10.2008. Exhibit-3 the FIR was submitted on 15.10.2008 at 9.15 PM where all of a sudden after around 8 hours of holding inquest the names of the accused with a narrative were exposed which create doubt in the mind. Due to such belated and abrupt disclosure the story of calling away the deceased by accused Mohammad Ali seems to be a second thought. The general diary (GD) being earlier one in reality is the FIR under section 154 of the Code and exhibit-3 recorded later is a statement

under section 161 of the Code. This view finds support from the cases of Muslimuddin Vs. State, 38 DLR(AD) 311; State Vs. Md. Abdur Rahim Khan, 9 BLC 653.

It is noticeable that after disappearance of victim Masud on 05.10.2008 at around 7.30 PM PW 1 never called his son on mobile. He would have called his son before or after midnight. But prosecution did not make out any such case. PW 8 stated in examination-in-chief that a call came from her son's mobile informing that her son Masud went out for a trip and he would be back within some days. But this is also not the case made out by prosecution. Since no name of any accused was disclosed in the delayed GD or inquest this point raises serious doubt and weakens the case of the prosecution.

Accused Abdul Khaleq Molla and Yasin Bepari made confessional statements under section 164 of the Code. PW 11 Abdul Wahab admitted in cross examination that he detained accused Khaleq from RAB 10 at Jatrabari in the evening on 11.11.2008 and sent him to Judicial Magistrate on 13.11.2008 at 9.25 AM. Khaleq was not sent to local police station. PW 11 also admitted in cross examination that he arrested accused

Yasin from Moheshpur, Jhenidah on 22.11.2008 and sent him to Judicial Magistrate of Chandpur on 24.11.2008 at 9.15 AM but he was not produced before local police station. The confessional statements of Khaleq and Yasin are exhibits 4 and 5 respectively. From reading of those exhibits it appears that column 2 of both confessions were not filled up and are blank. Column 2 relates to date and time of arrest and of production before Court for recording confession under section 164 following the procedure laid down in section 167 of the Code. In the instant case it is evidently clear that the makers were produced before the Court long after 24 hours which also violates article 33(2) of the Constitution. The recording magistrate did not properly follow the requirement of section 164 read with section 364 of the Code. The defence has seriously challenged the manner of recording as well as the genuineness and uprightness of those statements. There is no evidence that the makers were detained in police custody under an order of remand of any magistrate and hence their such custody beyond 24 hours is unauthorised and fatal. The police having violated the provision of section 167 of the

Code in not producing the makers within 24 hours of their arrest and kept them in police custody for about 2 days without any sanction from legal authority such custody without permission of magistrate is illegal resulting thereby the confessional statements are not voluntary and true. Furthermore since Khaleq and Yasin were admittedly produced before magistrate for making confessions long after 24 hours and column 2 of exhibits- 4 and 5 having not been filled up the retraction petitions filed by Khaleq and Yasin on 08.09.2009 and 23.09.2009 respectively which were kept with the record on 14.09.2009 and 30.09.2009 respectively controverting the statements made under section 164 of the Code bear weight. From reading of exhibits 4 and 5 it appears that at the very crucial time of killing two different scenarios have been depicted. In exhibit-4 accused Khaleq was outside the room to keep watch over if someone came and after hearing scream from inside the room he ran away from the place. But in exhibit-5 Yasin differently stated that Khaleq was beside the door and he took leading part in killing the victim. Khaleq stated that Keramat and Cherag were inside the room

but Yasin stated that they were outside the room to guard them. These confessional statements apparently generate dilemma in the mind and those does not appear to be true and voluntary being questionable and ambiguous. In the facts and circumstances of the case in hand the confessional statements being questionable have no presumption of correctness under section 80 of the Evidence Act.

It is univocal and definite case of the prosecution that accused Mohammad Ali called upon victim Masud from his house within the knowledge of PW 1 and 8 on 05.10.2008 at around 7.30 PM and they along with accused Yasin and accused Faruk went to the shop of Afzal son of Sobhan Howlader of Village Ludhua of Police Station Motlob Uttar for taking puffed rice and spent there an overlong time. Certainly the man Afzal was a very important and potential witness to bring the case of the prosecution home but he was neither examined nor was any explanation offered for his suchlike omission. It was very necessary to prove the fact that Mohammad Ali called Masud and met Yasin and Faruk by examining Afzal as Mohammad Ali was lastly seen with the

victim and in such event prosecution would have been able to show some link with the narrative as made out in the FIR and it also might have touched the pertinence of confessional statement. Since Afzal being a vital witness was not examined an adverse presumption under section 114(g) of the Evidence Act has got to come under consideration against the prosecution.

There is no eye witness in this case. The confessional statements are found to be not true and voluntary. The confessions also were retracted by the makers themselves repudiating the correctness of their earlier statements and in the present case the confession of Khaleq could not be said to be corroborated by the confession of Yasin. Moreover the statement of a co-accused does not fall within the definition of evidence as given in section 3 of the Evidence Act because the statement is not made on oath and in presence of other accused and more importantly the authenticity of such statement is not tested by cross examination. Therefore such statement is very weak evidence against any co-accused if the same is regarded as evidence under section 30 of the Evidence

Act. The Court should not act upon such statement to sustain a conviction of co-accused without full and strong corroboration in material particulars both as to the crime and his connection with the crime. In the instant case the trial Court erred in law in taking the confessional statements of co-accused as substantive evidence against other accused and passed the conviction without showing corroboration by any independent trustworthy evidence.

The finding of the trial Court on absconsion of Yasin, Khaleq, Selim, Faruk is wrong in that absconsion by itself is not conclusive evidence to infer either of guilt or guilty conscience and the fact is that the absconsion of an accused is corroboration of direct evidence of eye witnesses connecting the accused with the crime but absconsion of an accused cannot be treated to be corroboration of the confessional statement of another accused so as to base thereon conviction of the absconding accused. In view of the ratio laid down in the case of Alamgir Hossain Vs. State, 22 BLC(AD) 155 we find merit in the submission made by Mr. Tapader and accordingly the same is accepted.

From reading of exhibit-1 along with PWs 1,6,7,8,11 it also appears that prosecution has made out a case on motive that accused Yasin took a woman at night about a year ago in the shop of victim Masud. The shop owner caught them and handed them over to the police. For such reason Yasin was indignant and sure that Masud was responsible for such arrest but the police report dated 30.05.2009 shows that in the dawn on 27.11.2007 Yasin and the girl were found by the local people in an objectionable state at maxi stand and taken to the police station. Thus it is clear that the prosecution failed to prove the incident of prior outrage in Yasin's mind and the motive suggested by them is unfounded because Yasin was caught from the maxi stand but not from the shop of Masud.

The prosecution failed to prove the charge leveled against the convicts under section 302 of the Penal Code beyond reasonable doubt and the learned Additional Sessions Judge failed to appreciate the evidence as well as the fact and circumstance of the case and wrongly convicted them 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 Criminal Appeal 2425 of 2018 and Jail Appeals 83 and 84 of 2018.

In the result, the Death Reference Number 24 of 2018 is rejected and Criminal Appeal Number 2425 of 2018 and Jail Appeal Numbers 83 and 84 of 2018 are allowed. The judgment and order of conviction and sentence dated 20.02.2018 passed by the Additional Sessions Judge, Chandpur in Sessions Case Number 180 of 2010 arising out of Motlob Uttar Police Station Case Number 05 dated 15.10.2008 corresponding to G.R. Case Number 89 of 2008 under sections 302/34 of the Penal Code is hereby set aside and the absconding Yasin Bepari son, son of Md. A. Rahim Bepari of Village Dakkhin Lodhua (Bazrakanda), Md. Abdul Khaleq Molla, son of late Nawab Ali Molla of Village Pashchim Lodhua (Molla Bari) of Police Station Matlab, Md. Faruk @ Nobi, son of Md. A. Barek Bepari of Village Pashchim Lodhua (Bepari Bari), Md Selim Mazhi, son of Abul Kashem Mazhi of Village Dakkhin Lodhua, Mohammad Ali Munshi,

son of late Mokhlesur Rahman Munshi of Village Pashchim Lodhua (Munshi Bari) are hereby acquitted of the charge under section 302 of the Penal Code leveled against them. The accused persons be set at liberty forthwith if not wanted in any other cases.

Send down the lower Courts' record along with the copies of this judgment to the concerned Court and the jail authority at once.

Md. Atoar Rahman, J:

I agree.

Naheer, B.O.