District: Kishoreganj.

In the Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)

Present:
Mr. Justice J.B.M. Hassan
And
Mr. Justice Md. Toufiq Inam

Death Reference No. 63 of 2018.

The State
-Versus-
Md. Shah Alam,
----- Condemned-Prisoner.
Mr. Mohammad Osman Chowdhury, D.A.G. with
Mrs. Ayasha Akhter, A.A.G,
Mr. Mir Moniruzzaman, A.A.G and
Mr. Md. Tareq Rahman, A.A.G.
----- For the State.
Mrs. Nargis Akter, Advocate,
--- State-Defence lawyer for the condemned-prisoner.

With
Jail Appeal No. 164 of 2018.
Md. Shah Alam,
------ Condemned-Prisoner-Appellant.
-Versus-
The State
------- Respondent.

Mrs. Nargis Akter, Advocate,
------ For the Condemned-Prisoner.
(As State-Defence-Lawyer).

Mr. Mohammad Osman Chowdhury, D.A.G. with
Mrs. Ayasha Akhter, A.A.G,
Mr. Mir Moniruzzaman, A.A.G, and
Mr. Md. Tareq Rahman, A.A.G.
----- For the State.

Heard on: 01.12.2024, 02.12.2024, 03.12.2024, 08.12.2024.
and
Judgment delivered on: 11.12.2024.

Md. Toufiq Inam, J:

Both the Death Reference No.13 of 2018 and the Jail Appeal No. 164 of 2018 have arisen out of the judgment and order of conviction and sentence dated 30.05.2018 passed by the learned Judge of Nari-O-Shishu Nirjatan Daman Tribunal No.1 Kishoreganj, in Nari-O-Shishu Nirjatan Daman Case No.168 of 2015 convicting the sole accused Md. Shah Alam to death under section 9(2) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003) along with a fine of taka 40,000 and also sentencing him under section 7 of the said Ain to suffer rigorous imprisonment for 14(fourteen) years and to pay a fine of taka 20,000 (twenty thousand) in default to suffer rigorous imprisonment for 6(six) months more, directing both the sentence to run concurrently for murdering the child-Afruza, a 3½-year-old baby, during rape.

Md. Nayan Mia (PW1), a grief-stricken father of 3½-year-old Afruza, lodged an FIR on 17.05.2014 against the sole accused, Md. Shah Alam. He alleged that on the night of 16.05.2014, at approximately 11:00 p.m., he returned home after driving his auto-rickshaw. Upon arrival, he found his wife asleep in their room with their two daughters, Mim (7 years old) and Afruza (4 years old), sleeping beside her. Md. Nayan Mia went to a nearby mosque to wash his hands and feet at the tub-well, closing the room's door on his way out. When he returned about 15 minutes

later, he discovered that Afruza was missing. He woke his wife and asked about Afruza's whereabouts, to which his wife replied that Afruza had been there moments earlier. The family began searching frantically. During their search, Md. Nayan Mia, along with Ripon and Khohon, spotted the accused running towards the southern direction. At around midnight, Pultu Mia (PW3), located about 1500–2000 yards away, shouted that Afruza's body had been found near Baganbari mosque. Md. Nayan Mia and others rushed to the scene and discovered Afruza's lifeless, naked body, with visible injuries and bleeding from her private parts. Paltu Mia (PW2) and Sharong (PW4) saw the accused, Md. Shah Alam, fleeing the scene under the beam of torchlights. The police arrived at the location, thoroughly searched for the accused, and apprehended him later that night from the Kastuarchar area with the help of local residents. In presence of witnesses and police officers, the accused admitted to taking Afruza from her bed and raping her, which caused her death.

Subsequently, Kishoreganj Police Station registered Case No. 19 dated 17.05.2014. The police prepared an inquest report, seized alamots, and sent Afruza's body to the morgue for an autopsy. Md. Shah Alam was formally arrested on 17.05.2014, and the investigation commenced.

On 17.05.2014 the sole accused Shah Alam made a confessional statement to the Magistrate (PW5), who recorded the same under section 164 Cr.P.C. and the accused admitted his guilt as under:

"গতকাল ১৬/০৫/২০১৪ ইং তার ১১টায় নয়ন মিয়ার বাড়ীতে যাই। আমি যাই সেখানে আমার মাকে খুঁজতে কিন্তু তাকে পাইনি। আমি একটা ঔষধ খাই যেটা খেয়ে মাথা ঠিক ছিলো না। তারপর আমি আফরোজাকে টানাটানি শুরু করি। এর আগে আমি বড় মেয়েটাকে চেস্টা করে পারিনি। পাশের ঘরে যেয়ে দেখি নয়ন মিয়ার বউ ও তার ছোট মেয়ে আফরোজা শুয়ে আছে। তখন আমি আফরোজাকে তুলে নিয়ে সেখান থেকে আধা কিলোমিটার দূরে একটা জামিয়া মসজিদের পূর্ব পাশে একটা গলি আছে সেখানে তাকে শুইয়ে দিয়ে তার হাফ প্যান্ট খুলে নিলাম। মেয়ে চিৎকার দেবার আগেই তার গলা চেপে ধরি এবং তার গালে একটা কামড় মারি। আফরোজা ঠ্যাং দুইটা ফাঁক করে ধরে আমার লিঙ্গটা তার যোনী দেখে ঢুকায়। মেয়েটাকে চেপে ধরে ধর্ষণ করাবস্থায় মেয়েটা শব্দ করে তখন নাইট গার্ড লাইট মারে কিন্তু আমাকে দেখতে পায়নি শুধু আমার প্যান্ট ও গেঞ্জি দেখতে পায়। আমি ধর্ষণ শেষে পালিয়ে যাই। ততক্ষনে মেয়েটা মারা গেছে। এই আমি জানি।"

Sub-Inspector Shafiqul Islam (PW7) upon investigation found prima-facie case against the accused Shah Alam and submitted charge sheet No.399 on 08.12.2014 under sections 7/9(2) of Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003) ["the Ain 2000"].

On perusal of materials on record and upon hearing the parties, the learned Tribunal framed charge on 17.08.2015 against the sole accused-Shah Alam under section 7/9(2) of the Ain 2000. To bring the charge home against the sole accused the prosecution examined as many as 8 witnesses in their support including the informant, the local witness, the concerned doctor, the investigation officer of the case and the magistrate.

After conclusion of the prosecution evidence accused, Shah Alam was examined in accordance with section 342 Cr.P.C. and during such examination he pleaded not guilty being an innocent person and declined to adduce any evidence in support of his defence. The defence version of the case as it transpires from the trend of cross examination that the accused is totally innocent; he is in no way connected in the alleged offence.

Later, upon conclusion of the trial, the learned Tribunal by the impugned judgment found the accused, Shah Alam guilty and sentenced him to death under section 9(2) of the Ain, 2000 along with a fine of Tk. 40,000 (forty thousand) and also sentenced him under section 7 of the Ain to suffer rigorous imprisonment for 14 years together with a fine of Tk. 20,000 (twenty thousand) in default to suffer rigorous imprisonment for 6(six) months more. Following this capital sentence, the Tribunal has made a statutory reference to this court pursuant to section 374 Cr.P.C for confirmation of the sentence awarded. The reference has been registered as Death Reference No. 63 of 2018. On the other hand, the convict-prisoner preferred Jail Appeal No.164 of 2018 praying for acquittal from the charge levelled against him.

We have taken up both the Death Reference and the connected Jail Appeal together for hearing and those are being disposed of by this single judgment.

Mr. Mohammad Osman Chowdhury, the learned Deputy Attorney General, assisted by Mrs. Ayasha Akhter, Mr. Mir

Moniruzzaman, and Mr. Md. Tareq Rahman, submits that the date, time, place, and manner of the heinous offence were corroborated by the testimonies of the prosecution witnesses (PWs), the confessional statement of the accused, and both the post-mortem and DNA reports. He asserts that the prosecution had successfully proved the case beyond reasonable doubt. He prays for the maintenance of the impugned judgment and the order of conviction and sentence awarded by the Tribunal.

Mrs. Nargis Akter, learned state-defence counsel for the condemned prisoner, contends that-

I. There was no eyewitness to the incident.
II. The prosecution witnesses, being close relatives and neighbors of the informant, were interested witnesses, rendering their testimonies unreliable.
III. The recording magistrate (PW5) did not mention the precise time of recording the accused's confessional statement, suggesting that it was recorded beyond office hours and therefore lacked credibility.
IV. The accused was under the influence of drugs at the time of the offence and could not have formed the necessary intent.
V. The post-mortem report mentioned a "bruise over the neck," which was inconsistent with the prosecution's claim of strangulation.
VI. The DNA report did not identify the accused as the source of the seminal fluid found on the victim.

Citing 74 DLR (AD) 2022, 103 and 66 DLR (AD) 2014, 183, she beseeches the court to either acquit the accused or commute his sentence due to his age.

Refuting the defence arguments, the learned Deputy Attorney General submits that-

I. the DNA report confirmed the presence of human seminal fluid in the victim's genitalia and matched the bite marks on her body to the accused.

II. The confessional statement of the accused, recorded immediately after the incident under Section 164 of the Cr.P.C., was corroborative, voluntary, and credible.

III. The accused did not retract his confession at any stage, nor did he allege coercion or torture during his examination under Section 342 of the Cr.P.C.

IV. Citing 4 BLC (AD) 223 (Khalil Mia v. State), Mr. Chowdhury argues that the absence of any retraction or complaint of intimidation further validated the confession.

To arrive at a correct decision, let us reassess the testimonies of prosecution witnesses alongside the medical and DNA report.

PW1-Nayan Mia, the father of the victim as informant, deposes that on the date of occurrence at about 11.00 p.m. he came back home after auto drive and found his wife sleeping; he dropped

the money home and went to the garage. He then returned home within fifteen minutes and found his younger daughter Afruza missing. He asked his wife to get up and she replied that Afruza was just here, they started hue and cry and upon hearing this people gathered there and searched her. They went to the nearby bazar to see whether Afruza was there with Kamu Chacha who worked there as a guard. But she was not there, while they were returning, they found that accused Shah Alam is fleeing. At that moment his uncle Paltu Mia, PW2 shouted saying that Afruza has been found. PW1 further states that I ran to the place of occurrence which is 2000/2500 yards north-east from his house and found Afruza is lying dead and bleeding on her genitalia, she was found unclothed. PW1 deposes that Paltu informed us that he heard screaming upon focusing the torchlight, at that moment Paltu saw accused Shah Alam was fleeing away. Later, police arrived there and arrested the accused, who confessed that he kidnapped her, rapped her near Baganbari mosque and killed her by strangulation. PW1 identified the FIR and his signature thereon as exhibit-1, 1/1. PW1 in his cross-examination states that we went to police station when accused was taken there, then accused Shah Alam confessed that he killed the victim after rape.

PW2, Md. Paltu Mia, deposes that adjacent to the mosque a building construction was going on, where he was engaged as a guard to look after cement, sand, bricks and motor. At the time of the incident, he went near the mosque to check on the motor, he heard the scream of a girl coming from inside the jungle. He

then flashed the torchlight and saw the accused, Shah Alam, running away from the jungle of Baganbari. He immediately shouted, and another guard named Sharong came running towards him. When the accused fled, he entered the jungle and saw the dead body of a child. There were bite marks on her both cheeks, and blood was coming from her urinary passage. He recognized the child as Afruza, who was approximately 3 to 4 years old. Seeing the dead body, he screamed, and then the Imam, huzur from the mosque arrived. He then ran to Nayan and told him that Shah Alam had killed his daughter Afruza in the jungle and fled. Nayan, along with his father, wife, and other people, arrived and retrieved the body. Later, the police were informed, and after searching all night, the police and the local people apprehended the accused, Shah Alam, from the Kastuarchar area. The accused confessed to the police and later also admitted to the crime before the magistrate. The accused is currently in the dock.

During cross examination, PW2 states that he works as a night guard. At the time of the incident, he was on night duty at Kazi Kamal’s house. The Informant is his nephew. The distance between Kazi Kamal’s house and the Informant’s house is less than 1/4 mile. During the incident, he saw Shah Alam running away. When he shouted, the other night guard, Sharong, and two huzurs (religious scholars) from the mosque arrived. After seeing Shah Alam running away, he found the dead body. He saw Shah Alam fleeing from the jungle. He denies the suggestion that he suspected him solely based on his clothing. The distance between

Kamal's house and the Informant's house is about 300-400 yards. He did not know beforehand that the victim had gone missing that night. He met the mosque's Imam after the body was discovered. Both of them (Imams) have since passed away. Khalil, Jalil, and several others arrived at the scene. After Shah Alam fled, he saw the body and screamed, attracting a crowd. He did not personally witness Shah Alam raping or killing Afruza. He only heard from others that the accused confessed to the crime. The accused sells and consumes drugs.

PW3, Abdul Jalil, states that he rushed to the place of occurrence upon hearing hue and cry and found the victim lying unclothed. PW2 and PW4 told that accused Shah Alam killed her by strangulation after committing rape. Police arrested the accused on that night and collected swab from his mouth. In his cross examination PW3 states that seeing the blood he opined it as a rape. He denies the suggestion that confession was obtained by torture.

PW4, Sharong alias Al-Amin, testifies that he discovered the unclothed body of the deceased and observed bleeding on the mud and in her genital area. He states that the accused, Shah Alam, forcibly raped Afruza and then killed her. During cross-examination, he mentions that he saw the accused fleeing the scene but was unable to apprehend him.

PW5, Mohammad Hossain, the Magistrate who recorded the confessional statement of the accused, testifies that on

17.05.2014, he recorded the statement voluntarily given by the accused. He identified the statement along with his signatures. During cross-examination, he confirmed that he is a Magistrate, not a police officer, and denied the defense's suggestion that the statement was not given voluntarily.

PW6, Rasel, deposes that he saw the victim's dead body in the jungle and heard that the accused was responsible. He also witnessed a light green-colored T-shirt with a motorbike mark on its left side.

PW7, Md. Shafiqul Islam, the Investigating Officer, testifies that he visited two crime scenes, prepared a seizure list, and collected the accused's buccal swab using swab sticks for DNA testing. He seized a light green-colored T-shirt and a green full-pant with mud marks. Additionally, he collected a buccal swab from the bite marks on the victim’s left cheek and obtained crime scene samples from the victim’s throat for DNA profiling. He arrested the accused and presented him before the Magistrate after the accused expressed his willingness to confess. He also recorded witness statements under Section 161 Cr.P.C. During cross-examination, he states that PW2, Paltu, informed him that he saw the accused fleeing the scene.

PW8, Dr. Mohammad Ali, who carried out the autopsy of the victim, deposes that he found-

1. Lacerated wound over the lower part of vagina in various size, Injury in libia majora minora, posterior part of vaginal walls and tearing of the hymen. vagina- এর নীচের অংশে ছেড়া জখম এবং Labia Mijora I Labia minora- তে জখম পাই, vagina-এর ভিতরে পিছনের দিকের ওয়ালে জখম পাই এবং হাইমেন ছেড়া পাই ।

2. Eliptical bruise over the Left check about (3x2) cm. (ভিকটিমের বাম গালে Eleptical কালচে দাগ পাওয়া যায়)

3. Bruise over the upper lip about (2x1) cm. (উপরের ঠোটে (2x1) সেন্টিমিটার আকারের কালচে দাগ)

4. Bruise over the neck about (3x2)cm. (গলার উপর প্রায়(3x2) সেন্টিমিটার আকারের কালচে দাগ)

5. Swelling over the left nasal aparture about (2x2) cm. (নাকের বাম পার্শ্বের উপর (২x২) সেন্টিমিটার আকারের ফোলা জখম)

6. Swelling over the back of the right forarm about (3x2) cm. (ডান হাতের কনুইয়ের নীচে পেছন দিকে (৩x২) সেন্টিমিটার আকারের ফোলা জখম ।

7. Tongue bite present.(ভিকটিমের জিহ্বা কামড় দেয়া অবস্থায় ছিল)

On dissection, ecchymosis and extravasated clotted blood found in and around the abovementioned injuries, Vaginal swab and

preservative sent for cytology and DNA Test. (জখম জায়গার মধ্যে ও চারপার্শ্বে বিন্দু বিন্দু রক্ত (Eechymosis) এবং জমাট বাধা রক্ত পাওয়া যায়). He kept the pinion pending until cytology and DNA Report. However, later, after obtaining DNA result, he reported that human seminal fluid is identified on exhibit 3 (Vaginal Swab). But Exhibit 3 (Vaginal Swab) yielded no DNA suitable for analysis due to improper preservation with Formalin. Therefore, the result of DNA Analysis is inconclusive. Vaginal Swab এর মধ্যে মানুষের seminal fluid DNA Test-এ পাওয়া গেছে। ফরমালিন দ্বারা preserve করায় বাকী ডি.এন.এ টেস্ট করতে পারেনি। The DNA profile obtained from the swab collected from Bite mark on victim matches with the DNA profile obtained from the Buccal swab, said to be of মোঃ শাহ আলম। ভিকটিম আফরোজা এর ১৭-০৫-১৪ ইং তারিখের HVS for microscopical Examination- Epi cells plenty, R.B.C Plenty, spermatozoa not found মর্মে Pathological Report-এ উল্লেখ আছে ।

Considering all the matters like inquest Report, chalan, post mortem examination and dissections, DNA Analysis Report and microscopic examination of high vaginal swab, PW8 opined that the cause of death was due to shock and hemorrhage resulting from a forceful sexual assault. The injuries sustained were antemortem and homicidal in nature.

During cross-examination, the medical expert (PW8) testifies that he withheld finalizing the postmortem report until receiving the Cytological and DNA reports. Upon analysis, he detected

human seminal fluid in the vaginal swab of the victim but was unable to determine its source due to improper preservation with formalin. However, the DNA analysis conclusively established that the buccal swab collected from the accused, Shah Alam, matched the DNA profile found in the swab collected from the bite marks on the victim's cheek, confirming that the accused had bitten the victim.

The learned Deputy Attorney General argues that the accused, while in police custody, made an extrajudicial confession admitting his guilt and involvement in the crime. This confession, it was argued, is consistent with his judicial confession of the accused recorded by PW5, the Magistrate. However, we are of the view that an extrajudicial confession made to the police at the police station is inadmissible according to section 25 of the Evidence Act.

Mr. Chowdhury further submits that the confessional statement of the accused Shah Alam was recorded by the learned Magistrate (PW5) in accordance with Sections 164 and 364 Cr.P.C. The Magistrate followed all procedural safeguards, including issuing statutory warnings, ensuring voluntariness, and certifying the statement. The confession was recorded immediately after the incident, adding to its credibility. The accused did not allege coercion or torture during his examination under Section 342 Cr.P.C., nor did he file any petition for retraction of his confession. As held in *Khalil Mia v. State*, *4 BLC (AD) 223*, a confession made voluntarily and corroborated

by other evidence is admissible and reliable. Considering the confessional statement, corroborating testimonies, and scientific evidence, the Tribunal found no inconsistency in the prosecution's case.

Now let us consider whether the confessional statement of the accused was voluntary, true and inculpatory one and corroborative with other evidence on record. It is the fact that a baby of 3½-year-old had been kidnapped and then raped culminating in her death. The investigating officer sent the accused Shah Alam to the learned magistrate 1st class who recorded his confession, on 17.05.2014, in accordance with section 164 and 364 Cr.P.C. and this statement was made on the following day of the incident i.e. the statement was made immediately after the event which can be considered as more credible than one made after prolonged interrogation.

There is no denying of fact that the confessional statement of the accused Shah Alam has been recorded in the prescribed form. A reference to the confessional statement nearly shows that the learned magistrate PW5 has recorded the same after substantially complying with all legal formalities. It divulges that he has given all statutory warning to the confessing accused before recording the confessions the learned magistrate has explained to the confessing accused that he is not bound to make any confessions and if he does so, that may be used as evidence against him and thereafter the learned magistrate, PW5 has become satisfied upon

questioning the accused that he is making the confession voluntarily.

Be that as it may, the learned state-defence counsel contends that the accused's confessional statement was obtained through police torture, oppression, and mistreatment. But we do not find that the learned Magistrate recorded the confession in contravention of the mandatory provisions of Section 164(3) Cr.P.C. Furthermore, after recording the confession, the Magistrate duly appended the required certificate, affirming its compliance with legal procedures.

Furthermore, the condemned prisoner, Shah Alam, did not file any petition to retract his confessional statement. Even during his examination under Section 342 Cr.P.C., the Tribunal presented all the incriminating allegations against him, including the confessional statement he made before the magistrate, giving him an opportunity to provide an explanation. However, he neither offered any explanation nor raised any complaint alleging that his confession was obtained through torture, coercion, or duress. In this regard, reliance can be placed on the case of *Khalil Mia (Condemned Prisoner) vs. State*, reported in *4 BLC (AD) 223*, wherein our apex court, in paragraph 8, held that the confession was explicitly brought to the notice of the condemned prisoner during his examination under Section 342 Cr.P.C. However, he did not raise any objection regarding the nature of his confession. Consequently, both the trial court and the High

Court Division rightly accepted the confession as true and voluntary.

The confessional statement given to the Magistrate aligns with the medical and DNA reports. Therefore, there is no reason to doubt that the confession of the condemned prisoner was made of his own free will, without any coercion or external influence. Consequently, the confession of the accused appears to be both voluntary and true.

In cases lacking eyewitness accounts, the prosecution relies on circumstantial evidence alongside oral testimony. From the testimonies of the prosecution witnesses, the postmortem report, and the DNA report, it is evident that the victim, a 3½-year-old child, was raped and murdered. The accused kidnapped the victim from her mother's lap, taking her approximately 2000–2500 yards away to a secluded area near a mosque. The choice of location and timing (11:15 PM) reflects the accused's deliberate 'intent' to commit rape, as such places in rural areas are typically deserted at that hour.

PW1 (Md. Nayan Mia), the victim's father and informant, testifies about discovering his daughter missing and later finding her lifeless and unclothed body. He stated that the accused admitted his guilt in presence of the local residents and the police. PW2 (Md. Paltu Mia), a guard near the crime scene testifies to seeing the accused flee and discovering the victim's body with injuries, including bleeding in her genitalia. PW4

(Sharong alias Al-Amin) corroborated PW2's testimony, adding that he saw the accused fleeing the scene.

Although the DNA profiling of seminal fluid was inconclusive due to improper preservation, the medical reports, DNA analysis—specifically the match between the accused's buccal swab and the bite marks on the victim—eyewitness testimony, and the judicial confession collectively establish a cohesive chain of evidence conclusively linking the accused to the crime. Nonetheless, after meticulously examining- (i) both the inquest and postmortem reports regarding injuries and the cause of death, (ii) the DNA profile matching the accused's buccal swab with the bite marks on the victim, (iii) the testimonies of prosecution witnesses, and (iv) the judicial confession of the accused together strongly ties the accused to the crime scene and the offence. We are fully satisfied that the prosecution has successfully established an unbroken chain of evidence against the accused Shah Alam.

The defence counsel further argues that the accused, under the influence of drugs or medication at the time of the crime, lacked the mental capacity to form 'intent'. However, it is well-settled that voluntary intoxication or self-consumption of drugs cannot be used as a defence in criminal cases. Acts of rape together with murder are "inherently intentional", regardless of the accused's intoxicated state.

It must be emphasized that rape is an inherently intentional and non-consensual act, wherein the perpetrator deliberately disregards the victim's autonomy and bodily integrity. In this case, the victim, Afruza, a 3½-year-old child, was incapable of giving consent in any form. Consequently, the penetration into her genitalia constitutes an unequivocal act of rape, meeting the threshold of a grave criminal offence.

With regard to defence's argument as to lack of "premeditation" of murder on the part of the accused, it is our considered view that while 'premeditation' is generally a prerequisite for establishing the offence of murder. However, cases involving rape followed by murder, especially when the victim is a child, are classified as aggravated offences; under Section 9(2) of the Ain 2000 no premeditation or prior planning is required when 'murder' is committed in connection with 'rape'.

The kidnapping, rape, and murder of a 3½-year-old child are universally recognized as among the most egregious offences. The victim, a defenseless child, was subjected to severe violence that violated multiple legal protections. The brutality of the crime, including injuries to her genitalia, bite marks on her cheeks, and the cause of death, amplifies the moral and legal outrage surrounding this case.

In this instance, the post-mortem and inquest reports reveal seven injuries, including lacerated wounds of varying sizes on the lower part of the vagina, injuries to the labia majora and minora,

and tears in the posterior vaginal wall and hymen, causing excessive bleeding in the genitalia. Additionally, bite marks on the cheeks, a bitten tongue, and the presence of human seminal fluid in the vaginal swab were identified. The DNA report confirmed that the accused's buccal swab matched the bite marks on the victim's cheeks. Testimonies from prosecution witnesses, the forensic evidence, and the accused's own confession are consistent and mutually corroborative, establishing an unbroken chain of circumstances against the sole accused.

The heinousness of the crime, the victim's age, and the deliberate nature of the offence constitute aggravating factors. The accused initially attempted to kidnap the victim's older sister, Mim (aged 7 years) failing which he targeted the victim-Afruza, (aged 3½-years). He executed the crime with premeditation, selecting a secluded area at night.

Even though improper preservation of the seminal fluid with formalin prevented DNA profiling, the overwhelming evidence leaves no room for doubt. The crime took place on a fateful night in a secluded jungle, and the victim was a 3½-year-old child. Given these facts, there is no slightest possibility that the bite marks and seminal fluid belong to anyone other than the accused. Since his buccal swab matched the bite marks found on the victim, it is inescapably clear that the rapist and murderer is none other than the accused, Shah Alam. His confession, along with the other evidence on record, unequivocally supports this conclusion.

The incident undermines the sanctity of human life and instills deep fear, particularly among parents and children. This crime has lasting psychological and emotional consequences for the victim's family and the wider community. It represents a grave violation of fundamental human values, morality, and decency. The brutality of the act, combined with the age of the victim-Afruza, intensifies the moral outrage surrounding the case.

Having carefully considered the facts and evidence presented, we find no justification to interfere with the Tribunal's decision regarding the conviction of the sole accused under Sections 7 and 9(2) of the Ain, 2000.

In criminal cases, mitigating factors are circumstances that may justify a reduction in the severity of a sentence within the legally permissible range, even when the accused is found guilty. In this case, the accused's lack of a significant prior criminal record and his prolonged imprisonment of over 10 years, including seven years on death row, undoubtedly qualify as mitigating factors. However, in our considered opinion, these factors hold little weight when compared with the cruelty of the circumstances surrounding the offence.

However, the sole accused, Shah Alam, voluntarily confessed/ admitted to his guilt at the earliest opportunity knowing that such an admission could lead to his conviction. Despite this, he never sought to retract his confession at any stage of the proceedings.

Upon careful scrutiny, we have found his confession to be lawful, willful, and truthful. Consequently, we regard it as a clear acknowledgment of his guilt, a willingness to cooperate with the judicial process, and an expression of genuine remorse. Furthermore, in light of the principle established by our apex court in *74 DLR (AD) 2022, 103*, we believe that the accused should be afforded an opportunity for rehabilitation.

Thus, his sentence of death is commuted to imprisonment for life. This judgment seeks to balance justice for the victim and her family with the potential for the accused to reform and reintegrate into society after serving his sentence awarded.

In the result:

1. The Death Reference No.63 of 2018 in relation to the Condemned-Prisoner Md. Shah Alam son of late Falu, Village-Gaital Nayapara, Police Station and District-Kishoregonj, is rejected and the connected Jail Appeal No.164 of 2018 is dismissed with modification of sentence as under:

    (a) The sentence of death as imposed under Section 9(2) of Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003) by the learned Judge of Nari-O-Shishu Nirjatan Daman Tribunal No.1, Kishoregonj in Nari-O-Shishu Case No. 168 of 2015 is **commuted to imprisonment for life** with a fine of Tk. 1,00,000 (one lac) in default to suffer rigorous imprisonment for 1(one) year more; and

(b) The sentence imposed upon him by the Tribunal under Section 7 of Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003) to suffer rigorous **imprisonment for 14 (fourteen) years** with a fine of Tk. 20,000 (twenty thousand) in default to suffer rigorous imprisonment for 6(six) months more is hereby upheld. **Both the sentences (a) and (b) above will run concurrently.**

2. The authorities concerned, including the jail authority are directed to transfer the condemned prisoner Md. Shah Alam, son of Late Falu, from the condemned cell to the general prison at once; and

3. The convict will get the benefit of Section 35A of the Code of Criminal Procedure and other remissions as permissible under the Jail Code.

Send down the LC records.

Communicate this order to concerned authorities at once together with a copy of this judgment.

(Justice Md. Toufiq Inam)

J.B.M. Hassan, J:

I agree.

(Justice J.B.M. Hassan)

Sayed. B.O.
Ashraf/ABO.