

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

Present:

Mr Justice Md Atoar Rahman

And

Mr Justice Biswajit Debnath

Death Reference No 108 of 2018

The State

-Versus-

Md. Jafor and another

With

Jail Appeal No 156 of 2023

Md. Jafor

-Versus-

The State

Mr Md. Hafijur Rahman Khan, Advocate

For both convicts and the appellant

Mr Md Emran Khan (Rony), DAG with

Mr Muhammad Safwan,

Mr Zillur Rahman,

Mr Khalilur Rahman,

Mr Amran Hossain, AAGs

----- for the state

Heard on: 11.01.2026, 12.01.2026, and

13.01.2026

and Judgment on 21.01.2026

Md Atoar Rahman, J:

This death reference, being Death Reference No. 108 of 2018, has been made by the learned Special Sessions Judge (Druto Bichar Tribunal No. 4), Dhaka, under section 374 of the Code of Criminal Procedure, 1898 (hereinafter referred to as

“the Code”), for confirmation of the death sentences awarded to the condemned prisoner Md. Jafor and convict Md. Jamal Hossain (absconding) by judgment and order dated 05.09.2018 passed in Special Sessions Case No. 431 of 2016, arising out of Kadamtali Police Station Case No. 47(1)09, corresponding to G.R. Case No. 47 of 2009.

By the aforesaid judgment and order, the learned trial Judge convicted the above-mentioned convicts under sections 302/34 of the Penal Code and sentenced each of them to death thereunder, and the co-accused Abul Bashar, Md. Billal, and Md. Jafor Molla were acquitted of the charges.

Against the aforesaid judgment and order of conviction and sentence, convict Md. Jafor preferred Jail Appeal No. 156 of 2023.

The death reference and the jail appeal have been heard together and are being disposed of by this common judgment.

The prosecution case, in short, is that the informant Md. Mohiuddin, Sub-Inspector of Police, Kadamtali Police Station, Dhaka Metropolitan Police (DMP) (also the first investigating officer of the case), on 25.01.2009, while on patrol duty along

with his accompanying force, was informed at about 6:00 pm by the duty officer of the police station that the dead body of an unknown youth was lying at Muradpur High School Road in a narrow gali (lane) between holding Nos. 168 and 169. On receipt of such information, he, along with his force, rushed to the place of occurrence at about 6:15 pm and found the slaughtered dead body of a young man. He thereafter held inquest over the dead body, prepared an inquest report, and sent the dead body to the morgue of Dhaka Medical College for autopsy.

Thereafter, on 25.01.2009, the informant Md. Mohiuddin lodged the First Information Report (FIR) with Kadamtali Police Station against unknown persons under sections 302/34 of the Penal Code. On the basis of such FIR, Kadamtali Police Station Case No. 47 dated 25.01.2009, under sections 302/34 of the Penal Code, was started.

Sub-Inspector Md. Mohiuddin, having been appointed as the investigating officer, conducted investigation in part. Thereafter, due to his transfer, Sub-Inspector Md. Sadeque Miah was entrusted with the investigation, who, upon completion thereof, finding a *prima facie* case against convict Md. Jamal

Hossain and acquitted Md. Abul Bashar and Md. Jafor Molla, submitted police report on 18.08.2010 recommending trial under sections 302/34 of the Penal Code.

The concerned Judicial Magistrate, considering the police report, directed for further investigation, and being so directed, Sub-Inspector Dipak Kumar Das, DB, DMP, upon completion of such further investigation, submitted a supplementary police report on 25.03.2014 against the above trio and two others, namely convict Md. Jafor and acquitted Md. Billal.

The convicts Md. Jafor and Md. Jamal Hossain, along with the acquitted accused Abul Bashar, Md. Billal, and Md. Jafor Molla, were ultimately placed on trial before the learned Special Sessions Judge, who on 16.03.2016 framed charges against them under sections 302/34 of the Penal Code. The charge framed against convict Md. Jafor was read over and explained to him, present in the dock, to which he pleaded not guilty and claimed to be tried, while the others remained absconding.

In order to bring home the charges, the prosecution examined 8 (eight) witnesses out of 27 (twenty-seven) cited in the police report, who were cross-examined. However, the defence did not adduce any evidence.

Upon closure of the prosecution evidence, none of the accused persons could be examined under section 342 of the Code due to their abscondment.

The defence case, as evident from the cross-examination of the prosecution witnesses, was that the convicts were innocent and were falsely implicated in a fabricated case. It was further asserted that the convicts neither confessed to the police nor to the local witnesses. Their confessional statements before the Judicial Magistrate were neither true nor voluntary, as the same were procured by physical torture and intimidation, and the investigating officer submitted a concocted report without conducting a proper investigation.

Upon consideration of the evidence on record and the surrounding circumstances, the learned trial Judge held that the prosecution had successfully established the charges under sections 302/34 of the Penal Code beyond reasonable doubt

against the convicts Md. Jafor and Md. Jamal Hossain, and consequently convicted and sentenced them, while acquitting Abul Bashar, Md. Billal, and Md. Jafor Molla, as stated earlier by the impugned judgment and order.

Being aggrieved by and dissatisfied with the said judgment and order of conviction and sentence, convict Md. Jafor preferred the instant jail appeal, while the learned trial Judge made a statutory reference to this Division for confirmation of the death sentences.

The only point for determination in the death reference and the connected jail appeal is whether the impugned judgment and order are sustainable in law.

Mr. Md. Emran Khan, learned Deputy Attorney General, assisted by Mr. Muhammad Safwan, Mr. Zillur Rahman, Mr. Khalilur Rahman, and Mr. Amran Hossain, learned Assistant Attorneys General, appearing for the State–petitioner–opposite party, has opposed the appeal and supported both the reference and the reasoning of the learned trial Judge. He has taken us through the impugned judgment, the FIR, seizure lists, inquest report, police report, oral evidence, other relevant materials on

record, and particularly the confessional statements of both the convicts.

He has again submitted that upon proper appreciation of the prosecution evidence, together with the inculpatory confessional statements of both the convicts recorded under section 164 of the Code by a competent Judicial Magistrate, and the corroborating circumstantial evidence including recovery of the knife used for killing the deceased at the pointing out of convict Md. Jamal Hossain, the trial court rightly found the convicts guilty under sections 302/34 of the Penal Code and correctly imposed sentences upon them.

The learned Deputy Attorney General has further argued that the prosecution proved, beyond reasonable doubt, an unbroken chain of circumstances from inception to culmination of the occurrence; that the convicts' confessions are voluntary and true; and that there is no exculpatory material enabling them to escape liability for the murder of the deceased. He further contended that the convicts' conviction could validly rest solely on their confessional statements, since those confessions had been found to be true and voluntary, relying on *Zakir*

Hossain and another v. The State, 55 DLR 137; *Shamim Beg @ Md. Shamim Beg vs. the State*, 27 BLD (AD) 74; *Hazrat Ali & Abdur Rahman vs. the State*, 42 DLR 177; *the State and another vs. Abdul Kader @ Mobile Kader and others*, 67 DLR (AD) 6; and *Hasmat Ali vs. the State*, 53 DLR 169.

He accordingly prayed for acceptance of the reference and dismissal of the jail appeal.

On the other hand, Mr. Md. Hafijur Rahman Khan, the learned Advocate appointed by the State to represent the convicts, has appeared and contended at the outset that the learned trial Judge erred in law in convicting the convicts under sections 302/34 of the Penal Code without properly weighing and sifting the evidence, thereby occasioning a failure of justice. He has argued that the purported confessional statements are inadmissible, as they were procured by keeping both convicts in unauthorized detention for a long period, in violation of section 61 of the Code, and by means of physical torture, intimidation, inducement, and threats, rendering the statements neither true nor voluntary. He has further submitted that the statements are contradictory and inconsistent in material particulars.

He has also submitted that Md. Jamal Hossain retracted his statement at the earliest opportunity by filing an application, and therefore the convictions based on such statements are unsustainable.

Mr. Khan has further contended that no knife was recovered at the instance of Md. Jamal Hossain, as alleged, since the prosecution did not produce the knife before the trial court and none of the local witnesses to the seizure list supported the prosecution story regarding the recovery of the knife.

Finally, Mr. Khan has submitted that, albeit the case is one of no evidence, the learned trial Judge, without applying proper judicial mind, convicted the convicts and imposed capital punishment upon them, which convictions and sentences are liable to be set aside.

We have heard the submissions of the learned Deputy Attorney General and the counter-submissions of the learned Advocate for the convicts. To arrive at a correct decision, we must examine and scrutinize the relevant evidence and surrounding circumstances, juxtaposing the prosecution and defence versions of the case.

We have already noted that at the trial, the prosecution examined 8 (eight) witnesses out of 27 (twenty-seven) cited in the police report.

Among the prosecution witnesses examined:

PW 1 Md. Mayen, a local witness, testified that on 25.01.2009, while returning home, he saw a slaughtered dead body. Police held inquest, prepared a report, and sent the dead body for medical examination. He proved the inquest report (Ext. 1) and his signature thereon (Ext. 1/1). In cross-examination, he stated that the dead body was of an unknown person and was found lying on the ground in a bloody condition.

PW 2 Nuru Miah, another local witness, on 12.07.2017, stated in his examination-in-chief that about 7/8 years earlier at around 4:00 pm, police recovered a knife from a pond and obtained his signature on the seizure list. He proved the seizure list (Ext. 2) and his signature thereon (Ext. 2/1). In cross-examination, he stated that police showed him the knife after recovering it from the pond, but he did not see any accused.

PW 3 Md. Shahjahan, another local witness, on 12.07.2017, testified that about 7/8 years earlier he saw a

gathering of many people. He heard that a dead body and a knife were recovered. Police took his signature on a paper. He proved the seizure list (Ext. 2) and his signature thereon (Ext. 2/2). In cross-examination he stated that he did not know what was written, it was not read over to him and he did not see any *alamot*.

PW 4 Md. Mominul Hasan, then Metropolitan Magistrate, Dhaka, testified that on 01.02.2009, the investigating officer had produced convict Md Jamal Hossain before him and he gave him sufficient time for reflection. Thereafter, convict Jamal agreed to make a confessional statement voluntarily, and he recorded the same under section 164 of the Code. The statement was read over to him and, having found it correct, Jamal signed it. PW 4 proved the confessional statement (Ext 3) and his signature thereon (Ext 3/1). In cross-examination, he stated that the accused was produced before him at 1:00 pm and he started recording the statement at 4:30 pm He denied the defence suggestions that the investigating officer was present during recording, that the statement was dictated by the investigating officer, that Jamal did not mention Jafor's name but PW 4 inserted it, that the mandatory provisions of section 164 were

not explained, that the confession was extracted through physical torture and intimidation, or that the statement was recorded without following due procedure.

PW 5 Sub-Inspector Md. Mohiuddin, the informant and first investigating officer, testified that on 25.01.2009, while posted at Kadamtali Police Station, he was on patrol duty with his accompanying force. At about 6:00 pm he was informed that the dead body of an unknown youth was lying at Muradpur High School Road between holding Nos. 168 and 169. He rushed to the place of occurrence at about 6:15 pm and found a slaughtered dead body. He held inquest, prepared the inquest report, and sent the body to the morgue of Dhaka Medical College for autopsy. Thereafter, he lodged the FIR. He proved the inquest report, his signature thereon, the FIR, and his signature thereon. He further stated that, being assigned to investigate, he visited the place of occurrence, prepared a sketch map with index, examined witnesses, and recorded their statements under section 161 of the Code. He also stated that on 28.01.2009 he recovered a knife, alleged to have been used for killing the deceased, at the pointing out of accused Jamal and Abul Bashar from the corner of a pond adjacent to a wall beside

the place of occurrence, and seized the same by preparing a seizure list. He further stated that he produced Jamal before the Magistrate, who recorded his confession under section 164 of the Code. On 16.09.2009, due to his transfer, he handed over the case docket to the officer-in-charge. He also proved the sketch map, index, seizure list, and his signatures thereon. He was not cross-examined.

PW 6 Amit Kumar Dey, Metropolitan Magistrate, Dhaka, testified that on 28.08.2012 the investigating officer produced accused Md. Jafor before him for recording a confessional statement. Jafor voluntarily made a confession before him, which he recorded under section 164 of the Code, obtaining his LTI thereon. He proved the confessional statement and his signature thereon. In cross-examination, he denied the defence suggestions that he recorded the confession without giving sufficient time for reflection, without explaining the mandatory provisions, by avoiding legal procedure, or that the confession was the product of physical torture and thus involuntary.

PW 7 Shamim Hossain, a local witness, stated that on the date of occurrence he saw a slaughtered dead body in front of the school and many people gathered there. He stated that

police recovered a knife from accused Jamal and seized the same by preparing a seizure list. He proved his signature on the seizure list. In cross-examination, he denied the defence suggestions that no knife was recovered, that he did not see any knife, or that he gave false evidence.

PW 8 Salam Gazi testified that on the date of occurrence he saw a slaughtered dead body. Police examined the same, prepared a seizure list, and obtained his signature thereon. In cross-examination, he stated that he did not see the dead body and that the inquest was not held in his presence.

These are all the items of evidence adduced by the prosecution in support of its case.

It appears that the doctor who conducted the post-mortem examination of the dead body was not examined by the prosecution and, consequently, the post-mortem report remains un-exhibited. However, inquest over the dead body was held by Sub-Inspector Md. Mohiuddin (PW 5) in the presence of local witnesses such as PW 1 Md. Mayen and PW 8 Salam Gazi. The inquest report has been proved by them as Ext 1 which shows that the dead body of a young man aged about 18 years was

found lying on the road and, during inquest, one cut-throat injury (slaughtered), one long incised injury on the scalp, and five sharp-cutting injuries over the occipital region were found. Considering Ext. 1, the evidence of the witnesses, and the facts and circumstances of the case, we are of the opinion that the deceased was murdered, which falls within the purview of section 300 of the Penal Code.

Now the question is whether the convicts can be fastened with the liability for the murder of the deceased.

This is a case of an unseen murder. The convicts have been convicted and sentenced primarily on the basis of their confessional statements recorded under section 164 of the Code, the alleged recovery of a knife said to have been used for killing the deceased at the pointing out of convict Md. Jamal Hossain, and the connecting facts and circumstances.

The prosecution sought to prove that a knife, purportedly used to kill the deceased, was recovered at the instance of convict Md. Jamal Hossain by the first investigating officer, PW 5 Md. Mohiuddin, in the presence of witnesses such as PW 2 Nuru Miah, PW 3 Md. Shahjahan, and PW 7 Shamim Hossain.

The concerned seizure list has been marked as Ext. 2. PW 5 stated that on 28.01.2009 he recovered the knife at the pointing out of accused Jamal and Abul Bashar from the corner of a pond adjacent to a wall beside the place of occurrence and seized it by preparing a seizure list. In this respect PW 2 and PW 3 during examination-in-chief did not utter the name of convict Md Jamal Hossain although they proved the seizure list (Ext 2). Rather, in their cross examination PW 2 stated, “পুলিশ যে জায়গায় ছুরি পায় সে জায়গায় আমি যাইনি। আমি কোন আসামী দেখি নাই।” And PW-3 stated, “পুলিশ কি লিখছে জানি না। পুলিশ শুধু সহি নেয়। আমাকে পড়ে শুনানো হয় নি। আমি আলামত উদ্বার দেখি নাই।” On the other hand, PW 7 albeit in his chief uttered the name of convict Jamal Hossain, but did not say that the knife was recovered at the pointing out of accused Jamal from the corner of a pond adjacent to a wall beside the place of occurrence, rather, he stated, “পুলিশ আসামী জামাল থেকে ছোড়া উদ্বার করে” which is not the prosecution’s case. Thus, it is found that none of the seizure list witnesses stated in their testimony that the knife was recovered at the pointing out of convict Md. Jamal Hossain. Moreover, it is significant that the alleged knife was not produced before the court as a material exhibit. Therefore, we are of the opinion that the learned trial Judge wrongly found

that the alleged knife was recovered at the pointing out of convict Md. Jamal Hossain.

On 01.02.2009, the confessional statement of convict Md. Jamal Hossain under section 164 of the Code (Ext. 3) was recorded by PW 4 Mohammad Mominul Hasan, Metropolitan Magistrate, who proved the same. It appears that before recording his confession he was not in illegal detention; however, in his retraction application he stated that after his arrest he was inhumanly physical tortured by the investigating officer and, due to the investigating officer's intimidation, inducement, and threats, he made the statement before the Magistrate as taught by the investigating officer. As such, he alleged that the confession was neither voluntary nor true. However, in his confessional statement he stated:

“সাগরকে আমি ২০০০ টাকা ধার দিই। এর মধ্যে সে ২০০/-

টাকা শোধ করে। সাগর মারা যাওয়ার চারদিন আগে আমি নিউ জেনারেশন গার্মেন্টসে চাকরী নেই। চাকরী নেয়ার দুইদিন পর পথে দেখা হলে আমি তার হাত ধরি। সাগর আরও কয়েকজন ছেলে নিয়ে আমাকে মারে। পরে সবাই ভুল বুঝতে পারে এবং পরদিন সাগর

আমার টাকা ফিরিয়ে দিবে বলে। এর পরদিন লাল্দের সময় সাগরকে আমি বাগিচায় নিয়ে আসি। বাগিচায় আসার পর আমি, জাফর, নাদিম,

বিলালকে লাবুর মাঠের সামনে পাই। তাদেরকে আমি বলি যে, সাগর আমাকে মারধর করেছে। জাফর আমাকে বলে যে, তারা মাহিনের বাড়ি (খামারবাড়ী) যাচ্ছে, আমরা যেন পরে আসি। তারা যাওয়ার পর আমি ও সাগর মাহিনের বাসায় যাই। এখানে গেলে আমি জাফরকে দেখাই যে, এটাই সাগর। জাফর হঠাৎ করে দেয়ালের পাশ থেকে ছুরি বের করে সাগরের মাথায় তিন চারটা বাড়ি দেয়। সাগর পড়ে যায়। জাফর ছুরি দিয়ে সাগরের গলায় কাটে। নাদিম সাগরের গলায় ছুরি দিয়ে পাড় দেয়। তখন সময় প্রায় ১.৩০ টা দুপুর। জাফর ছুরি দিয়ে আমাকেও টান দিতে বলে। অমার গা কাপতেছিল। আমি টান দিতে পারিনি। সাগর এখানেই মারা যায়। খামারের একটি গর্তে জাফর ছুরি ফেলে দেয়। লাশ এখানে ফেলে আমরা চলে আসি। ঘটনার পর জাফর কর্মবাজার যাওয়ার জন্য আমার কাছে টাকা চেয়েছিল। আমি বলছি যে, আমি পরে দিব। আমি বাসায় চলে আসি। এই দিনের পরদিন রাত ২.০০-৩.০০ টার দিকে পুলিশ আমাকে ধরে। আমি পুলিশকে কোথায় ছুরি ফেলেছে তা দেখিয়েছি। পুলিশ ছুরি উদ্ধার করে।”

On 28.08.2012 the convict Md Jafor's confessional statement (Ext 9) under section 164 of the Code was recorded by PW 6 Amit Kumar Dey, Metropolitan Magistrate who proved the same. On perusal of the Ext 9 it reveals that in paragraph 2 there has been written by the recording magistrate the confessing accused was arrested 24/25 August 2012 at 11:00

am. It also reveals that he was produced before the magistrate for the first time on 28.08.2012 and his confessional statement was recorded on that day. In the police forwarding letter dated 28.08.2012 it has not been mentioned that on which date and when he was arrested. The record shows that he was not taken in police custody having order of remand. Thus, it appears that before making confessional statement he was illegally detained by the investigating officer for at least more than seventy-two hours and as such, his confessional statement is not admissible in view of principle settled by the apex court.

Be that as it may, in this confessional statement he stated,

“তাঁর চানমিরা ও মাঁর মনোয়ারাকে ১টা ঘর তুলে দেই।
 আমার বন্ধু নাদিম এসে বলে জামালের সাথে মারপিট হইছে তুই একটু
 আয়। আমি যাই। খামার বাড়ী যাই। যে ছেলে জামালকে মারে তারে
 হালকা মারধর করার জন্য যাই আমরা তারে মেরে ফেলার পান ছিল
 না। জামালের হাতে ৩/৪ টা ছুরিয়া ছিল। জামাল নাদিমের হাতে
 ১টা, আমার হাতে ১টা ছুরি দেয়। জামাল এ ছেলেকে (নাম সম্বত
 সাগর) কোপ শুরু করে। এর পরেই আমি ও নাদিম ও কোপাই।
 ছেলেটা মাটিতে পড়ে যায়। আমি ভয়ে বের হয়ে যাই। এর পরের
 ঘটনা জানি না। জাফরকে আমি ঘটনাস্থলে দেখি নাই।”

If, for the sake of argument, both the confessional statements are taken into consideration and examined separately,

it may appear that both the convicts have narrated the occurrence implicating themselves in the killing of the deceased. However, upon careful scrutiny and comparison of the two confessional statements side by side, it is found that there are various contradictions and discrepancies regarding the very same occurrence as narrated by the convicts. Such inconsistencies in material particulars cannot be overlooked. Therefore, it is difficult to hold that the statements made by the convicts in Exts. 3 and 9 are true and consistent with the prosecution case.

It transpires that, according to the inquest report, FIR, police report, sketch map, and index, the occurrence took place on a narrow lane between holding Nos. 168 and 169 at Muradpur High School Road. However, in their respective confessional statements, both convicts stated that the occurrence took place inside the house of one Mahin, and left the dead body inside Mahin's house which clearly indicates the untruthfulness of such confessions.

In fact, except the alleged recovery of a knife at the pointing out of convict Md. Jamal Hossain, the only evidence adduced by the prosecution consists of the confessional

statements discussed above. We have already found that the prosecution has hopelessly failed to prove such recovery of knife. On the other hand, the truthfulness of the confessional statements is highly doubtful.

In the case of *Humayun Kabir (Md.) vs. the State*, reported in 74 DLR (AD) 91, their Lordships accepted the observation made in *Dogdu vs. State of Maharashtra*, AIR 1977 SC 1759, to the effect that where, in a case involving capital punishment, the prosecution seeks conviction primarily on the basis of confession, the court must apply the double test: (i) whether the confession is perfectly voluntary, and (ii) if so, whether it is perfectly true. In the present case, we are clearly of the opinion that, apart from the illegal detention of convict Md. Jafor, the confessional statements of the convicts have lost their credibility due to contradictions and inconsistencies in various material particulars.

In the above-mentioned decision of our apex court (74 DLR (AD) 91) their Lordships were pleased to observe as follows:

“Court’s decision must rest not upon suspicion but upon legal grounds established by legal testimony.

Mere suspicion, however strong, cannot take the place of proof. It is a well-settled principle that where, on the evidence, two possibilities are open—one which goes in favour of the prosecution and the other which benefits the accused—the accused is entitled to the benefit of doubt.”

In view of the foregoing discussion and considering all the facts and circumstances, we hold that the prosecution has failed to prove its case beyond all reasonable doubt against the convicts and, as such, they are entitled to the benefit of doubt. However, the learned trial Judge wrongly convicted and sentenced them by the impugned judgment and order, which are liable to be set aside.

In the result, Death Reference No. 108 of 2018 is rejected and Jail Appeal No. 156 of 2023, filed by convict Md. Jafor, is allowed. The impugned judgment and order of conviction and sentence are set aside. The condemned prisoner Md. Jafor and convict Md. Jamal Hossain (absconding) are acquitted of the charges leveled against them. The appellant-prisoner Md. Jafor shall be released forthwith, if not wanted in any other case(s). If any conviction warrant or warrant of arrest has been issued

against absconding Md. Jamal Hossain, the same shall be recalled.

Let the lower court's record, along with a copy of this judgment, be sent to the learned Special Sessions Judge (Druto Bichar Tribunal No. 4), Dhaka, and another copy be sent to the Senior Jail Superintendent, Dhaka Central Jail, Keraniganj, Dhaka, at once for information and necessary actions.

Mr Biswajit Debnath, J:

I agree.