

Present:

Mr. Justice Zafar Ahmed
And
Mr. Justice Shathika Hossain

Death Reference No. 38 of 2018
with
Criminal Appeal No. 4265 of 2018
with
Jail Appeal No. 137 of 2018

The State

-Versus-

Md. Nayem @ Mohiuddin Nayem
 ...condemned-prisoner.

Mr. Zahurul Islam Mukul, Senior Advocate,
 with

Mr. Manabendra Roy, with

Mr. Mir Shahadat Hossen, with

Ms. Tamanna Khanam Irin, with

Mr. Abul Kalam, with

Mr. Oaliullah Sarowar Sourav, Advocates

...For the condemned-prisoner

Ms. Shiuli Khanom, with

Mr. Kh Bahar Romy, DAGs, with

Mr. Md. Sabbir Hossain, with

Mr. Md. Mijanur Rahman, with

Mr. Razaul Karim, and

Mr. Mir Moniruzzaman, AAGs

.....For the State.

Heard on: 22.04.2026

Judgment on: 30.04.2026

Zafar Ahmed, J.

Learned Sessions Judge, Gazipur, vide judgment and
 order dated 25.03.2018 passed in Sessions Case No. 1663 of

2017 arising out of Joydevpur Police Station Case No. 116 of 2013 dated 29.11.2013 corresponding to G.R. No. 1335 of 2013 convicted **Md. Nayem @ Mohiuddin Nayem** (in short, '**Nayem**') under Section 302 of the Penal Code, 1860 and sentenced him to death and also to pay a fine of Tk. 10,000. Nayem was also convicted under Section 379 of the Penal Code and was sentenced to suffer rigorous imprisonment for 03 years. Co-accused Md. Hasan Imam @ Rabbi, Md. Jahirul Islam @ Farhad and Md. Raihan Uddin @ Nirob were acquitted of the charges under Section 302 read with Section 34 and Section 379 read with Section 34 of the Penal Code.

Learned Sessions Judge submitted the reference to the High Court Division under Section 374 of the Code of Criminal Procedure, 1898 (in short, the 'Cr.P.C.') for confirmation of the death sentence. Nayem also preferred a jail appeal and thereafter, an appeal under Section 410 of the Cr.P.C. The death reference, criminal appeal and the jail appeal are heard together and disposed of by this single judgment.

On 29.11.2013 at around 4.30 pm, Chunnu Molla (PW1) lodged an FIR with Joydevpur Police Station, Gazipur stating

that his son Julhas (aged about 18 years) had bought an auto rickshaw and drove it around the locality for his income. He used to return home at noon for lunch. On 28.11.2013, at around 3 pm, the informant called Julhas on his mobile phone, but it was switched off. On search by the informant and others, at around 7.30 pm, the dead body of Julhas was found in a Gazari forest at a place called Hatiab Noail Tek under Joydevpur Police Station. His throat was cut. His mobile phone and the auto rickshaw could not be found. The informant came to learn that on 28.11.2013 at around 12 pm, the condemned prisoner Nayem and 3 unknown persons boarded the auto rickshaw of Julhas as passenger from Chatar Bazar to Hatiab Khilpara and they left from Hatiab Khilpara at around 2 pm.

During the investigation, Nayem made a judicial confession before the Magistrate on 11.05.2014. He retracted the confession in writing on 29.07.2015. Police submitted charge-sheet against Nayem and three others (since acquitted) under Sections 302, 379 and 34 of the Penal Code on 18.02.2016. Learned Sessions Judge, Gazipur framed charge against Nayem and others under Sections 302, 379 and 34 of

the Penal Code on 26.10.2017. They pleaded not guilty to the charge and claimed to be tried.

Prosecution examined 7 witnesses. Nayem and others were examined under Section 342 of the Cr.P.C. Nayem claimed that he was innocent. He neither examined any defence witness nor submitted any document. Co-accused Jahirul Islam @ Farhad (since acquitted) examined 4 defence witnesses including himself as DW1.

The defence case, as appears from the trend of cross-examination of the PWs, is that the condemned prisoner is innocent and that he had not committed any offence as alleged by the prosecution.

PW1 (informant and father of victim deceased Julhas) gave deposition in examination-in-chief supporting the FIR story. He stated in cross-examination that he did not know the accused persons beforehand. He further stated that he did not know whether the accused persons had previous enmity with Julhas.

PW2 (mother of Julhas) deposed that she saw the throat-cut dead body of Julhas at the place of occurrence. After being

apprehended, Nayem admitted to killing the victim in the presence of others. PW2 stated in cross-examination that she did not know Nayem beforehand.

PW3 (independent witness) deposed in examination-in-chief that Julhas and condemned prisoner Nayem belonged to the same area of Chatar Bazar; he knew both of them; the people of Chatar Bazar also knew both of them; the condemned prisoner Nayem had a muffler around his neck which was identified by many people belonging to the victim Julhas [the muffler was not seized as alamot]. PW3 further deposed that Police were informed of the matter. Nayem was arrested and admitted his guilt. PW3 deposed in cross-examination that he was present close to Nayem and Julhas when Nayem rented the auto rickshaw of Julhas.

PW4 [another independent witness] deposed that on 28.11.2013, Nayem and 3 others rented the auto rickshaw of Julhas and went towards Khilpara. After being apprehended, Nayem admitted that he and others had killed Julhas. PW4 stated in cross-examination that he did not know the accused persons beforehand.

The deposition of PW Nos. 1 to 4 stood firm during cross-examination. Their evidence was neither contradicted nor shaken by the defence.

PW5 is the Magistrate who recorded the confession of Nayem.

PW6 is the doctor who held the post-mortem examination of Julhas as one of the members of the 3-member medical board. He proved the post-mortem report as exhibit-4. The injuries sustained by Julhas as described in the post-mortem report (exhibit-4) are as follows:

- “1. 1 cut throat wound over upper throat (8"×3"×bone depth).
2. Abrasion over right subscapular region of back of the chest (1"×1/2"). Larynx-Injured, Oesophagus-Injured.

On deep dissection: Clotted blood present in the injured sites described above. Throat muscles, great vessels of neck and trachea found injured. In our opinion, death was due to shock and haemorrhage resulting from above mentioned cut throat injury which was antemortem and homicidal in nature”.

PW6 deposed, “তার গলা কাটা তথা জবাই করার কারণে তার (জুলহাসের) মৃত্যু ঘটে থাকে ও অতিরিক্ত রক্তক্ষরণ হয়”. Statements made by the PW6 in examination-in-chief could not be shaken or contradicted in cross-examination.

PW7 is the investigating officer of the case who submitted the charge-sheet.

The defence witnesses (DW Nos. 1-4), who were examined at the behest of co-accused Md. Jahirul Islam @ Farhad (since acquitted), deposed to prove the innocence of co-accused Farhad. DW Nos. 1-4 did not say anything about the murder of Julhas.

Admittedly, there is no eyewitness to the occurrence. The case entirely rests upon judicial confession of the condemned prisoner Nayem and circumstantial evidence. The relevant portions of the confession run as follows:

“আমি, রাব্বি, ফরহাদ, নীরব, আমরা ৪ জন মিলে ঠিক করি একটি অটো রিকসা ছিনতাই করব। ব্যাটারী চালিত ইজিবাইক। পরে আমরা একটা ইজিবাইক ভাড়া নেই ২৮/১১/১৩ ইং তাং সকাল ১১.৩০ মিনিটে শিমুলতলী থেকে চতর বাজার যাওয়ার কথা বলে। চতর বাজার জঙ্গলে নিয়ে গিয়ে আমরা ছুরি দিয়ে গলা কেটে ইজিবাইক নিয়ে চলে আসি। তারপর ইজিবাইক নরসিংদী এনে ৪০ হাজার টাকায় বিক্রি করে দেই।

আমরা ২০ হাজার টাকা হাতে পাই। তারপর যে যার বাড়ি চলে যাই। এই আমার জবানবন্দী”।

In the confessional statement, Nayem did not mention the name of the victim. The place of occurrence is mentioned as ‘চতর বাজার জঙ্গল’ (Chatar Bazar Jungle) whereas in the F.I.R, the place of occurrence is mentioned as ‘হাতিয়াব নোয়াইলের টেক, গজারী বন’.

PW1, PW2 and PW3 went to the place of occurrence and described the same as ‘হাতিয়ার নোয়াইলের টেক, গজারী বন’.

PW7 (investigating officer) deposed in cross-examination that Chatar Bazar and Noail Tek Gazari Bon is the same area (আসামী নাইমের জবানবন্দীতে চতর বাজার জঙ্গলের কথা লিখা আছে তা সত্য। চতর বাজার এলাকা এবং নোয়াইলের টেক গজারী বন একই এলাকা)। This piece of evidence of PW7 was not challenged by the defence. Therefore, the place of occurrence is not disputed and the same is proved.

According to the FIR, the date and time of occurrence is 28.11.2013 between 2 pm to 7.30pm. The PWs corroborated the date and time of occurrence. As to the manner of occurrence, PW Nos. 1 to 3 deposed that they had seen the throat-cut dead

body of the victim. The post-mortem report corroborates the testimony of PW Nos. 1 to 3.

The judicial pronouncements have well settled the proposition of law that in order to determine the voluntariness of a judicial confession, the endeavour of the Court should be to apply its mind to the question whether the accused was free from threat, duress, inducement or promise at the time of making the confession. The attending facts, circumstances and evidence on record of the case in hand suggest that the condemned prisoner made the confession voluntarily.

Voluntariness and truth together make the confession worthy of acceptance. For the purpose of deciding whether a confession is true, the Court must carefully examine its contents and must then compare them with the other prosecution evidence and apply to them the test of probability (*Sarwar*, AIR 1957 SC 637). The same view was expressed in our jurisdiction in the case of *Ali Kibria*, 43 DLR 512. Broadly, there should be corroboration so that the confession taken as a whole fits into the facts proved by other evidence. In substance, the Court should have assurance from all angles that the confession was, in

fact, voluntary and it must have been true [*Parmananda Pegu*, (2004) 7 SCC 779]. There must not be any reason for doubt as to the truth of the statements, be it circumstantial or proved otherwise [*Babul*, 42 DLR (AD) 186].

Now, the question is whether the confession made by Nayem was voluntary and true. Mr. Zahurul Islam Mukul, learned Advocate appearing for the condemned prisoner Nayem submits that Nayem was beaten up and tortured before making the confession and thus, the same was not made voluntarily.

Judicial Magistrate, who recorded the confession, deposed as PW5. During cross-examination, the defence did not put any question to the PW5 at all as to the alleged beating or torture. The defence just gave a mechanical suggestion to the PW5 that the confession was not voluntary, true and that Nayem made the confession out of fear. PW5, of course, denied the suggestion.

Now, I turn to the retraction of the confession. The general principle is that retraction of a confession has no bearing whatsoever if it is voluntarily made so far as the maker is concerned [*Abdul Kader @ Mobile Kader*, 67 DLR (AD) 6].

In *Fazu Kazi @ Kazi Fazlur Rahman*, 29 DLR (AD) 271, it was held that a conviction of the confessing accused based on a retracted confession even if uncorroborated cannot be said to be illegal if the Court believes that it is true and voluntary. In *Sukur Ali*, 9BLC 238, it was held at para 30 that Courts ordinarily consider it unsafe to convict any accused based on his retracted confession except where the truth of such confession is established by corroboration in material particulars by the dependable evidence. A conviction of an accused can be given even after retraction if it is found that the confessional statement has not been procured on fear, duress or promise. Similar view was express in *Habibur Rahman @ Habib*, 1988 BLD 210.

In the instant case, the condemned prisoner was arrested on 11.05.2014 at 12 pm. He was taken to the S.P. office at 1 pm. He was sent to the Magistrate at 1.10 pm. He was given 3 hours' time for reflection. After recording the confession, he was sent to the jail at 5 pm. The Magistrate asked him the required questions. The condemned prisoner categorically answered that he was making the confession at his free will

without fear or inducement. At the time of recording the confession, he did not complain about any physical or mental torture.

The condemned prisoner retracted the confession long after on 29.07.2015. After conclusion of examination of PWs, while the condemned prisoner was examined by the Court under Section 342 of the Cr. P.C., his attention was drawn to the confession made by him. He was asked whether he would submit any document and whether he would say anything to the Court. The answer was negative. The Court further noted, “বিদ্র: আসামীকে বিজ্ঞ ম্যাজিস্ট্রেটের নিকট প্রদত্ত জবানবন্দি প্রদানের বিষয়ে বিশেষভাবে জিজ্ঞাসা করলে সে বিষয়ে আসামী কোন বক্তব্য প্রদান করেনি”.

I have no hesitation to hold that in the attending facts and circumstances of the case, the belated retraction of the confession can safely be kept out of consideration.

The evidence on record has proved that the victim Julhas was last seen with Nayem on 28.11.2013, hours before he was killed. On 11.05.2014, Nayem was found in the locality wearing the muffler of Julhas. He was apprehended by the local people and made extra-judicial confession admitting to the

killing of Julhas. The manner of killing as described in the confessional statement is supported by the post mortem report. It can be concluded without any slightest hesitation that the confession is corroborated by strong circumstantial evidence. Therefore, the confession was true. Facts, circumstances and evidence on record establish that the killing of Julhas by Nayem does not fall within any of the exceptions laid down in Section 300 of the Penal Code. The confession of Nayem read with the deposition of PWs and the post-mortem report gives a crystal clear picture that in the afternoon of 28.11.2012, Nayem killed Julhas at the place of occurrence to take away the auto rickshaw of Julhas. It is a case of murder and Nayem was rightly convicted under Section 302 of the Penal Code for which the maximum penalty is death sentence and the minimum punishment is imprisonment for life.

While awarding the death penalty to Nayem, the trial Court observed, “যদিও আসামী নাইম এর বয়স তেমন বেশী নয় তথাপি শুধুমাত্র তার বয়সের কারণে তাকে শাস্তি প্রদানের ক্ষেত্রে কোনরূপ করুণা বা অনুকম্পা দেখাবার সুযোগ দেখা যায় না”. The trial Court’s view is not correct. In *Nalu*, 17 BLC (AD) (2012) 204, the Apex Court observed that the

tender age of the offender, the PC and PR (previous conviction and previous records), prolonged confinement of the condemned prisoner in the cell and the likelihood that condemned prisoner would not commit acts of violence if released, can be considered as mitigating circumstances to commute the death sentence to one of imprisonment for life.

In *Nalu*, the condemned prisoner murdered the victim for the purpose of snatching away his gold chain. Naul's age, at the time of commission of the offence was about 22 years. His PC and PR were nil. He was confined in the death cell for more than 7 years. In the instant case, Nayem murdered the victim for taking away his auto rickshaw which he sold at Tk. 40,000. Nayem's age was recorded as 20 years in the confessional statement. His PC and PR are nil. Nayem has been confined in the condemned cell since 25.03.2018 till date i.e. for more than 8 years during which period the sword of death has been hanging on his death. Considering these aspects of the case, we are inclined to commute the sentence of death to one of imprisonment for life for the offence committed under Section 302 of the Penal Code. The offence committed by Nayem under

Section 379 of the Penal Code for committing theft by taking away the auto rickshaw of Julhas has been proved beyond reasonable doubt. The conviction of Nayem for the said offence and the sentence of 3 years' rigorous imprisonment are upheld. The sentences under Sections 302 and 379 would run concurrently.

In the result, the death reference is rejected. The criminal appeal and jail appeal are dismissed. The conviction of the condemned prisoner Md. Nayem @ Mohiuddin Nayem under Sections 302 and 379 of the Penal Code is upheld, but the death sentence awarded for the offence of murder under Section 302 is commuted to one of imprisonment for life. The sentence of fine is upheld. The sentence of 3 years' rigorous imprisonment for the offence of theft under Section 379 is upheld. Both the sentences would run concurrently.

Communicate the judgment and order at once.

Shathika Hossain , J.

I agree.