

Present:

**Mr. Justice Muhammad Mahbub UI Islam
And
Mr. Justice Md. Hamidur Rahman**

Death Reference No.53 of 2018.

The State.

-Vs-

Md. Sahab Uddin and another.
....Condemned prisoner.

Mr. Mohammad Mujibur Rahman, D.A.G
with

Mr. Chowdhury Shamsul Arifin, A.A.G.
and

Mr. Md. Jasim Uddin Khan, A.A.G.
...For the State.

Criminal Appeal No.7230 of 2018.

(Arising out of Jail Appeal No.141 of 2018).

Md. Sahab Uddin

.... Condemned-prisoner.

-Vs-

The State.... Respondent.

Mr. Md. Ahsanullah, Advocate with

Mrs. Elida Yeasmin, Advocate.

.... For the Condemned-prisoner.

Criminal Appeal No.8311 of 2018.

(Arising out of Jail Appeal No. 142 of 2018).

Zakir Hossain

-Versus-

The State... Respondent.

Mr. Md. Ahsanullah, Advocate with

Mr. Mohammad Rahim Uddin, Advocate
and
Mr. Muhammad Rokunuddin, Advocate.
.... For the Condemned-prisoner.

**Heard on: 30.10.2024, 31.10.2024,
03.11.2024, 18.11.2024, 19.11.2024,
20.11.2024.**

Judgment on:10.12.2024.

Md. Hamidur Rahman, J:

This death reference under section 374 of the Code of Criminal Procedure, 1898 has been sent to us by the learned Special Sessions Judge and Jana Nirrapatta Bighnakari Aparadh Daman Tribunal, Chattogram for confirmation of death sentence awarded to accused namely-1. Md. Sahab Uddin and 2. Zakir Hossain by the impugned judgment and order of conviction and sentence dated 25.04.2018, the learned Sessions Judge of the Court below convicted Md. Sahab Uddin and Zakir Hossain being found guilty for commission of offence punishable under section 302/34 of the Penal Code and sentenced them thereunder to death with a fine of Tk. 10,000/- in Sessions Case No.11 of 2009 arising out of Rangunia Police Station Case No.03 dated 06.01.2008 corresponding to G.R. No.03 of 2008. Against the aforesaid judgment and order of conviction and sentence Md. Sahab

Uddin has also preferred Criminal Appeal No.7230 of 2018(arising out of Jail Appeal No.141 of 2018) and Zakir Hossain has also preferred Criminal Appeal No.8311 of 2018, (arising out of Jail Appeal No.142 of 2018) the same also been sent to us for disposal along with the said death reference. Therefore, the said death reference and criminal appeals are to dispose of by this common judgment.

Prosecution case, in short, is that one Md. Haji Danu Miah, Union Parishad Member, Ward No.8 as an informant lodged a FIR against unknown persons stating inter alia that the Informant came to learn by the local people that at the east side of Gochra Jamia Naimia Toibia Fazil Madrasha on the lower side of the hill a unknown dead body is laid on. After receiving this Information he rushed to the place of occurrence and saw the dead body of the victim. That on 05.01.2008 at night in any time unknown miscreants killed the victim. The Informant also saw marks of violence on the face of the victim was totally distorted and the throat of the victim was slaughter, brains were out of the head and there were various injuries on the different parts of the body of the victim and also a sign of sharp cut on the right wrist.

Having received the FIR police started Rangunia Police Station Case No.03 dated 06.01.2008 and Sub-Inspector Md. Younus Ali (PW13) took the charge of Investigation. At the time of investigation P.W13 visited the place of occurrence and prepared index and sketch map and made the inquest report of the victim and sent the dead body for Post Mortem to the concerned hospital. Thereafter he arrested accused Zakir Hossain, who made confessional statement before the Magistrate. On the basis of confessional statement also shown arrested accused Md. Sahab Uddin after identification by Zakir Hossain. Upon findings the allegations to be established against both the accused persons P.W.15, Md. Hymayun Kabir, submitted Charge Sheet No.112 dated 13.11.2008 under section 302/34 of the Penal Code.

Thereafter, the case, being ready for trial, was sent to the learned Special Sessions Judge and Jananirapatta Bighnakari Aporadh Daman Tribunal, Chattogram for trial. The learned Special Sessions Judge framed charge against Md. Sahab Uddin and Zakir Hossain vide order dated 12.02.2009 under section 302/34 of the Penal Code. The said charge was then read over to Md. Sahab Uddin, but he pleaded not guilty

and demanded trial. At the time of framing of charge the accused Zakir Hossain was absconding and the said charge was not read over to him. During trial prosecution produced 15 witnesses (P.W.1-P.W.15) including some documents and materials which were accordingly, marked as exhibit, respectively.

After completion of recording of evidence, the trial Court examined the accused persons under section 342 of the Code of Criminal Procedure whereupon the accused persons again pleaded not guilty and refused to give any evidence as defence.

Let us first describe, in short, as to what the prosecution witnesses deposed before the trial Court.

In order to prove the charge the prosecution adduced as many as 15(fifteen) witnesses who also cross-examined by the defence.

P.W.1, Haji Md. Danu Mia was the informant of the case. He deposed that the incident took place on 05.01.2008 at night. After hearing the news that an unknown dead body was laid on the west side of Pomra Jamia Naimia Taibia Fazil Madrasa, he went to the place of occurrence on 06.01.2008 at

9.00 a.m. and found that injured and slaughtered of an unknown dead body. In this regard he filed an ejahar before the Rangunia Police Station, Chattogram. He also confirmed the said ejahar which was Exhibit as 1 and his signature thereon as Exhibit-1/1. The Sub-Inspector prepared the inquest report in front of him and he put the signature in the inquest report. He also confirmed the inquest report which was Exhibit-2 and his signature thereon as Exhibit-2/1. During the investigation he came to learn that the accused Md. Sahab Uddin and Zakir Hossain killed the victim Awal. During investigation the Investigation Officer took photograph of the victim as many as 6(six) which was Exhibit as 4. Investigation officer also questioned him about the incident.

In cross-examination by the state defence he deposed that he cannot say who killed the victim. He did not see any incident. He also identified the pictures of the victim.

P.W.2, Md. Shafi is the known person of the Informant. On 06.01.2008 at the time of preparing inquest report he was present and he also put signature in the inquest report which was Exhibit as 2/2. On the same day investigating officer made seizure list of blood stained on earth and one pair

leather sandals from the place of occurrence in his presence. He also identified the seizure list as Exhibit-3 and his signature thereon as Exhibit-3/1.

State defence declined to cross-examination to him.

P.W.3, Jane Alam declared tender and the state defence also declined to cross-examination.

P.W.4, Anowera Begum is the mother of the victim. She deposed that incident took place on 05.01.2008 at night. Her son did the business of scrap materials and the victim was live with his wife separately in the separate house. Her daughter-in-law took a loan from the NGO and gave it to her son to do business. On the date of occurrence the accused Md. Sahab Uddin and Zakir Hossain called over her son and they are in relation brother-in-law and sister-in-law. After called over by them she could not trace her son. After 3 days accused Zakir Hossain came to her house and told that he killed her son and the dead body was on the hill. She went to the place of occurrence and did not find the dead body. Thereafter, she went to Rangunia Police Station after seeing the cloths of the victim she identified her son's dead body. Investigating Officer

questioned her about the incident. She also identified the accused Md. Sahab Uddin on the dock.

In her cross-examination, she deposed that she did not know whether there was enmity between the accused persons and her son. She did not know the informant. It is not true that she gave the statement in the Court which she did not tell the police.

P.W.5, Sahana Begum alias Sahana is the wife of the victim. She deposed that the said incident took place on 05.01.2008 at night. Her husband used to do business of scrap materials. She has given Tk.10,000/- to her husband after taking loan from NGO for her husband's business purpose. The date of incident was approximately 2/2.30 P.M accused persons namely-Md. Sahab Uddin and Zakir Hossain called over her husband from the house and she was present at that time. Thereafter, her husband did not come to the house. After 3 days accused Zakir Hossain came to the house and told that accused Md. Sahab Uddin took her husband to Rangunia hill and killed her husband. After receiving this information she along with others rushed to the place of occurrence but did not find any dead body. Thereafter, she

went to Rangunia Police Station, Chattogram and after seeing the clothes of her husband, she identified the victim as her husband. She also identified the accused Md. Sahab Uddin on the dock.

In her cross-examination she deposed that she cannot remember the date of occurrence but that was in the year 2008. She heard the news after 3 days of incident. She searched for her husband in different places for three days, but she did not go the Police Station during that time. She did not know the informant. She did not remember on which date she gave her statement to the police.

P.W.6, Rekha Begum was declare tender and State defence also declined to cross-examination.

P.W.7, Md. Faruk is the younger brother of the victim. He deposed that the incident took place on 05.01.2008. On the date of incident at 2/2.30 P.M. accused Md. Sahab Uddin and Zakir Hossain called over his brother from his house. After three days of incident accused Zakir Hossain informed to their house that accused Md. Sahab Uddin took the victim to the Rangunia hill and killed him. Thereafter, they identified the victim after seeing his cloths in the Rangunia Police Station,

Chattogram. He also identified the accused Md. Sahab Uddin on the dock.

In his cross-examination, he deposed that his brother lives with his wife separately and it was at about half mile away from his house. He could not say that there was dispute between the accused persons and his brother. After 3 days of the incident Zakir Hossain informed that the accused Md. Sahab Uddin killed his brother. They tried to trace the victim at the residence of the relatives. He did not file any General Diary to the Police Station.

P.W.8, Md. Badsha is the younger brother of the victim. He deposed that the victim used to do business of scrap materials. The said incident took place on 05.01.2008 at night. For the purpose of expanding the said business his sister-in-law took loan of Tk.10,000/- and kept it at home and the accused Md. Sahab Uddin knew about the loan. On the date of incident the accused Md. Sahab Uddin called over the victim from his house along with the said money and took him to Rangunia hill and killed him. Zakir Hossain informed about the matter after three days of the incident.

In cross-examination, he deposed that after missing of the victim, searched him in different places. But he did not file any G.D Entry to the Police Station. After marriage the victim was live in separate house. At the time of incident he did not know the accused persons. He denied the suggestion that the accused persons did not kill his brother.

P.W.9, Md. Mashiur Rahman Khan was a formal witness as he was the Judicial Magistrate who recorded the confessional statement of accused Zakir Hossain. He deposed that on 13.01.2008 he was working as Senior Judicial Magistrate of the Chattogram Judicial Magistracy when the investigation officer of the case brought accused Zakir Hossain to him for recording of his confessional statement under section 164 of the Code of Criminal Procedure. The said accused presented before him at 11.00 a.m. and started recording of the statement at 2 P.M. He also read over the said statement to the accused and took two signatures from the accused. The accused did not claim any torture on him. He also followed the procedure under section 364 of the Code at the time of recording confessional statement. This witness gave signatures on the same and proved the said confessional

statement as Exhibit-5 and his signature thereon as Exhibit-5/1-5/7.

In cross-examination, he deposed that it is not true that at the time of recording confessional statement of the accused he did not comply with the section 364 of the Code of Criminal Procedure.

P.W.10, Dr. Md. Habibur Rahman was a formal witness as he was the doctor who conducted the Post Mortem of the dead body. According to his deposition on 07.01.2008 an unknown dead body was bring to him by one constable namely-Md. Shahjahan who also identified the victim and accordingly conducted Post Mortem of the dead body.

Accordingly, he proved the said Post Mortem Report as Exhibit-6 and his signature thereon as Exhibit-6/1.

In cross-examination, he deposed that he found the dead body after 36 hours of the death of the victim. The injuries of the victim's body were by the sharp, heavy weapons and the dead body was not melt. He, however, denied the defence suggestion that he prepared the Post Mortem Report negligently.

P.W.11, Kari Muhammad Harunur Rashid was the teacher of Gechua Jamia Nainia Taibia Madrasa situated in Rangunia. He deposed that on 06.01.2008 at about 1.30 a.m. on the way to Madrasa he received information that on the west side of Madrasa, down the hill an unknown dead body was laid on. He saw the dead body. Police took the dead body. After few days Police arrested a man but he did not know his name. By interrogation of the Police they said that they came to the place of occurrence to steal the electricity transformer. Awal was slaughtered by the accused Md. Sahab Uddin. He was make witnesses by the police.

In his cross-examination, he deposed that he did not see the incident. He did not know the accused persons.

P.W.12, Md. Nasir Uddin Talukder is a witness, his house is 3/4 K.M. away from Gusra Village. One day after the incident, on the way to his place of business he saw the police on the west side of Madrasa and on enquire to the people, he came to learn that a person had been killed last night. The police was investigated the case.

Defence declined to cross him.

P.W.13, Younus Ali Fakir was the Investigating Officer of the case. He deposed that on 06.01.2008, he was Officer-in-charge of Rangunia Police Station under Chattogram District. That on that day he recorded the FIR and investigated by himself. He accordingly visited the place of occurrence, prepared sketch map and index on different papers, seized some materials and made inquest report of the victim and sent the dead body to the concerned hospital for Post Mortem and after collecting Post Mortem Report perused the same. He also arrested accused Zakir Hossain and transferred him to the Court. At the time of interrogation the accused wanted to give confessional statement and accordingly, said confessional statement was record before the Magistrate. He also found that accused Zakir Hossain's, brother-in-law was connected with the case and who was under arrest by virtue of Hathazari Police Station Case No.22(1)07 and accordingly he applied for shown arrest of the accused Md. Sahab Uddin for the present case. He also recorded the statements of witnesses under section 161 of the Code of Criminal procedure. He was transferred on 30.04.2008 and accordingly he handed over the case docket to the said Police Station.

In cross-examination, he deposed that on 06.01.2008 he first time informed about the incident. The informant Danu Mia did not tell him that he saw the incident. Accused Zakir Hossain made confessional statement under section 164 of the Code of Criminal Procedure. On 13.01.2008 Magistrate Mr. Masiur Rahman recorded the said confessional statement. He did not find any eye witness.

P.W.14, Mohammad Kaikislu is an Inspector of Police of Bakulia Police Station, Chattogram, having received the Inquest slip from Rangunia Police Station he enquired about accused Zakir Hossain and Md. Sahab Uddin and collected information about them.

In cross-examination, he deposed that on the basis of E/S system he submitted the report.

P.W.15, Md. Humayun Kabir was also the Investigating Officer of the case. He deposed that on 05.05.2008 he was Sub-inspector of Rangunia Police Station under Chattogram District. That on that day the officer-in-charge handed over the investigation charge on him and visited the place of occurrence. He investigated the informant and witnesses and deployed source to discover the cause of the incident. He took

accused Md. Sahab Uddin on remand and enquired about the matter. That upon perused of the report of the previous investigating officer, his investigation and other circumstances he found the allegations under section 302/34 of the Penal Code against accused persons Md. Sahab Uddin and Zakir Hossain and, accordingly, he submitted charge sheet under the said sections being Rangunai Police Station Charge Sheet No.112 dated 29.08.2008.

In cross-examination, he deposed that on 05.05.2008 he received the investigation charge of the case. It is not true that on the basis of investigating report of the previous I.O he submitted the charge sheet.

Mr. Mohammad Mujibur Rahman, learned Deputy Attorney General appearing on behalf of the State submits that confessional statement made by Zakir Hossain under section 164 of the Code of Criminal Procedure is true and voluntary. By referring section 32 of the Penal Code, learned DAG further submits that eventually accused Zakir Hossain stated in confessional statement that he did not take part in the killing, but his omission to prevent accused Md. Sahab Uddin

from committing murder would also come with the mischief of murder.

By referring to the depositions of P.W.4, P.W.7 and P.W.8 who categorically and P.W.5 wife of the victim specifically deposed that she saw accused Md. Sahab Uddin and Zakir Hossain called over the victim from her house. Therefore, the doctrine of last scene theory will be applicable in this case.

He further submits it can be seen from many of our decisions that even standing as a guard while other commit the offence charged is sufficient to conclude that the confessions is inculpatory. In this regard reference may be made to the decision in Sree Mishon Chandra Das V. State 68 DLR(AD) 392. Only if it can be seen from his actions that confessing accused was at the scene reluctantly or under duress and the distanced and or dissociated himself from the occurrence, by example, running away from the scene, then the confession may be termed exculpatory.

He also referred a decision reported in 13 BLC (AD) 84 wherein it was held that-

“The convict was present at the time of occurrence and took part in the killing of the victim by standing guard while, according to him, other accused person killed the victim. He not only stood guard but also took part in the jubilation along all other assailants. It therefore cannot say that confession is exculpatory, on that the common intention to kill the victim was about in the case of the petitioner.”

Learned DAG refer to us a decision reported in 12 BLC (AD)(2007)203, ABM Nazmus Sakib Ashik Vs. State wherein it has been held that:

“It appears that the confessional statement can never be treated to be false or not voluntary but the same is statement of fact depicting vividly the occurrence and does not suffer any infirmity so as to render the same illegal due to certain allegation alleged in violation of any provision of law regarding the recording of the same. Moreover, at no point of time during trial the alleged allegation was raised against the confessional statement and the said allegation is an afterthought. The High Court Division has observed that:

On careful scrutiny of the confessional statement of the accused ABM Nazmus Sakir @ Ashik, it appears that the Magistrate put to him six questions including the question that he was not

bound to admit his guilt and make confessional statement and if he confessed, it would be used as evidence against him. He also gave him more than three hours' time for reflection of mind and deciding about giving confession independently keeping him in seclusion as provided under law and thereafter started recording confession at about 6.15 PM. The Magistrate appears to have recorded his satisfaction as to the voluntariness and spontaneous nature of the confession of the accused.

It appears that the confession has not been vitiated by any illegality on the alleged ground. Though the police apprehended the accused on 18-9-2000 but he was produced before the Magistrate for recording confession on 19-9-2000 at 12-15 hours and there is nothing on record that he was allegedly produced after more than 30 hours of the apprehension before the Magistrate for recording his confession. The alleged ground is as a measure of afterthought and assumed as not tenable in law."

The learned DAG lastly submits that the trial Court rightly and legally convicted two accused persons and there is no ground of interference with that impugned judgment and order of conviction and sentence.

Mr. Md. Ahsanullah, the learned Counsel on behalf of the condemned-prisoners submits that the confessional statement made by the accused Zakir Hossain is exculpatory. The confessional statement was recorded after 24 hours which is not a confession in the eye of law.

He also refer to us page 86 of the paper book, relevant portions are quoted below:

“ উপরোক্ত ১ নং আসামী হাটহাজারী মামলা নং ২২(১১)০৭ সংক্রান্তে জাকির হোসন, পিতা মোঃ মোর্শেদ নাম দিয়া গত ৯/১/০৮ ইং তারিখ গ্রেফতার হইলে তাহাকে ২ নং আসামী ও তাহার আত্মীয় স্বজন সহ মোঃ সাহাবুদ্দিন তার আসল নাম না বলিয়া সনাক্ত করিয়া তাহাকে অত্র মামলায় গ্রেফতার দেখানোর প্রার্থনা করিয়া গত ১০/২/০৮ ইং বিজ্ঞ আদালতে প্রতিবেদন দাখিল করা হয়। ”

He also refer to us column 8 of the confessional statement was not filled up by the learned Magistrate. He also submits that sub section 164(3) of the Code was not followed.

By referring section 30 of the Evidence Act he submits that:

“There is no admission of guilt by the accused Zakir Hossain in his confessional statement and in view of the section 30 of

the Evidence Act confession against co-accused is not admissible.

He also submits that the confession made by the accused Zakir Hossain against co-accused is not come within the definition of evidence because actions before, during and after commission of the offence. Zakir Hossain has not stepped in the witness box and that his witness statement has not been subjected to cross-examination.

He also submits that there is no eye witness in the case. Apart from confessional statement the case is based on only circumstantial evidence. He also submits that no neighbour witness was adduced and no address was mention about the witness. He further submits that last scene theory is not applicable in the instant case because after calling over the dead body was found after two days. The prosecution could not bring any witnesses about they saw them lastly. Even if last scene theory is established on the basis of last scene theory the accused cannot be convicted. He refers to us various decision 14 BLC 89, 33 DLR 415, 38 DLR, 235, 43 DLR,(AD)182, 45 DLR, 488.

In order to appreciate the above submissions advanced by the learned Counsels let us examine the evidence on

record and facts and circumstances of the case be carefully scrutinized and critically analysed.

Amongst the 15 (fifteen) witnesses examined by the prosecution five reads, P.W.9 Md. Mashiur Rahman Khan, P.W.10, Dr. Md. Habibur Rahman, P.W.13, Md. Younus Ali Fakir, P.W.14, Mohammad Kaikislu, P.W.15, Md. Humayun Kabir, P.W.9 is the Magistrate who recorded the confessional statement of accused Zakir Hossain, P.W.10 held Post Mortem examination of the dead body. P.W.13 is the Primary investigating officer, P.W.14 is the Inspector of Police who conducted verification of address of the accused and P.W.15 is Sub-inspector who submitted the charge sheet. P.W.1 the informant, P.W.2, Md. Shafi, P.W.3 Jane Alom, P.W.11 Kari Mohammad Harunur Rashid, P.W.12, Md. Nasir Uddin Talukder are the local and private witness. P.W.4 is the mother of the victim, P.W.7 and 8 are the brother of the deceased. P.W.5 is the wife of the victim.

Undisputedly the deceased was slaughtered to death and in the night of 05.01.2008 his throat cut dead body with some other injuries on different parts of body was recovered from west side of Pomra Jamia Nainia Taibia Madrasa,

Rngunia, Chattogram. P.W.1 the informant testified that he along with other found the throat cut dead body of the deceased laid on the hill road. P.W.2 testified that the inquest of the dead body of the deceased, as identified by him.

It appears from materials on record that the prosecution successfully proved the inquest report as prepared by one SI of the Police Station concerned at the enlist opportunity by P.W.13 as Exhibit-2 and his signature thereon 2/1. P.W.13 investigating officer also identified the signature of another of said inquest report as Exhibit-2. On the other hand the post mortem report, as prepared by the doctor concerned namely- Dr. Md. Habibur Rahman (P.W.10) has also been proved by the said doctor as Exhibit. It appears from the said evidence, in particular the post mortem report, the P.W.10 found the following injuries on the victim:

- “1. One sharp cutting injury to front of neck 6" X 1" X 2".
2. Mandible maxilla and nasal bone cut.
3. There are 7 sharp cutting injuries to face each more or less 4" X $\frac{1}{2}$ " X $\frac{1}{2}$ " size.
4. Frontal bone cut.
5. One sharp cutting injury to occipital region 5" X $\frac{1}{2}$ " bone depth, brain matter out.

6. One sharp cutting injury to Rt. forearm 1" X 1" X shin depth (middle part).

7. Another sharp cutting injury to Rt. forearm 1" X $\frac{1}{4}$ " X skin depth."

On dissection করে নিম্নোক্ত জখম পাওয়া যায়।

1. Scan hematoma to frontal Rt. temporal occipital region.
2. Skull-cut occipital area frontal bone. Meninges injured.
3. Brain injured-brain matter out.

In their opinion death was due to hemorrhage and shock from above mentioned injuries and injury to vital organs which were ante mortem and homicidal in nature.

Now the question is who caused such death. There is no eye witness to the occurrence. However, P.W.5 wife of the victim testified that the accused Md. Sahab Uddin and Zakir Hossain called over and taking away the victim from her house. She also testified that at that time she was present. P.W.4, P.W.6, and P.W.7 corroborated the same. After 3 days called over Zakir Hossain informed P.W. 5 that the accused Md. Sahab Uddin killed the victim in the Rangunia hill, these depositions may be connected with the confessional statement of accused Zakir Hossain, if it is found that such confessional statement of the Zakir Hossain is voluntary and true.

As stated above, the confessional statement of Zakir Hossain was proved by the recording Magistrate (P.W.9) before the trial Court as Exhibit-5. For the same of clearly and convenience we are reproducing the confessional statement of Zakir Hossain below:

“ঘটনার রাতে একটি ট্রাসমিটার চুরি হয় মধুপুর গ্রাম হইতে। যেখান আউয়াল আমি শাহবুদ্দিন ছিলাম। যেখান হইতে ওয়াপদার গুজারা পাহাড়ে আমি আউয়াল সাহাবউদ্দিন যাই। সাহাবউদ্দিন এর সাথে আউয়াল এর সাথে মোবাইল নিয়া তর্ক-বিতর্ক হয়। আমি ঝগড়া করতে বারণ করি। সাহাবউদ্দিন শুনেনি। সাধারণ একটি মোবাইল এর জন্য সাহাবউদ্দিন আউয়ালকে লাথি মারে। আউয়াল পড়ে গেলে তাকে সাহাবউদ্দিন দা দিয়া জবাই করে তারপর দুই হাতে মুখে চাপায়া কোপায়, ডান হাতেও কোপায়। তাতে আমি ভয়ে বসে থাকি। মুখে তুলে কিছু বলি না সাহাবউদ্দিন আমাকে বলে আমি সাক্ষী জীবিত রাখি না। তুই আমার শালা বলে ছেড়ে দিলাম। আমাকে আরো বলে যদি এ ঘটনা অন্য কাউকেও বলি তাহলে তোমাকে একইভাবে হত্যা করব এবং রক্তের সম্পর্কের কাহাকেও রাস্তায় পেলে হত্যা করব। এই ভয়ে আমি তিনদিন কিছু বলিনি। তারপর আমি বলে দিয়েছি। আমি কোর্টে আসিয়াও সব বললাম।

ইহাই আমার বক্তব্য।”

It appears from the recording such confessional statement that the accused Zakir Hossain was arrested at 8.30 p.m. on 12.01.2008 and he was taken to the Police Station at 10.00 p.m. on the same day and was produce before the said Magistrate at 11.00 a.m. on 13.01.2008 and the Magistrate started recording his confessional statement at 2.00 p.m. It

further appears from the said form that columns 5 and 6 of the same have been fully complied with and the same have been signed by the Magistrate concerned and the accused.

Submissions of the defence Counsel that the accused without incriminating himself the accused made the confessional statement which is exculpatory and not admissible as evidence. He also submits that the accused was in Police Custody on 10.01.2008 wherein identification was held about the accused Md. Sahab Uddin. He also submits that section 30 of the Evidence Act attracted in this case and on the basis judicial confession of Zakir Hossain trial Court error in law in convicting Md. Sahab Uddin. With regard to the decision reported in 52 DLR (AD)(2000)143 Billal Vs. State in paragraph 13 it was observed by our Apex Court that:

“But in the absence of any evidence that the appellant had inflicted the fatal wounds on the victim his conviction under section 302 of the Code cannot be justified. In the facts and circumstance of the case as discussed above the appellant having been last seen with the victim before murder of the victim, appellant owes an explanation as to the cause of murder of the victim.

[See the case of Amir Hossain Vs. State reported in 37 DLR (AD) 139]. Instead of giving an explanation appellant absconded during the investigation of the case till he was arrested after submission of the charge sheet. As the appellant failed to give a satisfactory explanation as to what happened to the victim he must be found to be guilty of abetment of murder of the victim and, as such, liable to be convicted under sections 302/109 of the Code. This view finds support from the decisions reported in the cases of Hafez Abul Khair Vs State reported in 29 DLR(AD)1 and Afsar Ali Moral Vs State reported in 29 DLR (AD)269. We are, therefore, of the view that the conviction of the appellant should be altered from one under section 302 of the Penal Code to one under sections 302/109 of the said Code. But the sentence as awarded shall remain unaltered. ”

So, in view of the aforesaid decisions of our Apex Court we are of the view that the confession made by the accused Zakir Hossain is partly inculpatory and partly exculpatory. In the instant case the accused Zakir Hossain was present at the time of occurrence. So, the confessional statement, calling over by Md. Sahab Uddin and Zakir Hossain which were confirmed by the P.W.5 wife of the victim that she was present at time, Inquest Report, Post Mortem Report confessional statement of a co-accused can be used against others non-

confessions accused if there is corroboration of that statement by other direct or circumstantial evidence. In the instant case, the accused Zakir Hossain has stated the role played by the co-accused namely-Md. Sahab Uddin in the murder of the deceased which is also supported/corroborated by the inquest report, post mortem report and by the depositions of the witnesses particularly deposition of P.W.5 wife of the deceased that accused Md. Sahab Uddin and Zakir Hossain called over the victim and at that time she was present.

In the present case the accused Zakir Hossain after three days of calling and taking over of the victim Awal informed the wife of the victim that the accused Md. Sahab Uddin killed the victim. He also made a confessional statement explanation/described the murder of Awal. On the other hand the accused Md. Sahab Uddin after taking and calling away did not explain anything about the murder. The accused Md. Sahab Uddin was taken to remand and interrogated by the investigating officer but he did not say anything about the matter. So, we are of the view that accused Zakir Hossain gave explanation after calling and taking over the victim Awal.

In the impugned judgment it was stated that :

“ভিকটিম মৃত আউয়ালের লাশের ছবি দেখিয়া যে কোন সাধারণ বুদ্ধিসম্পন্ন মানুষই বুঝিতে পারিবে যে, শুধুমাত্র একজন আসামীর পক্ষে ভিকটিম আউয়ালকে অন্যজনের সহায়তা ছাড়া একাকি জবাই করা সম্ভব নহে। ”

In the light of the said observation:

When the evidence shows that two views are possible one pointing to the guilt of the appellant Zakir Hossain and other leading to innocence and where circumstances are susceptible of two equally possible for inferences, the Court should accept that inference which founds the accused values than an inference which goes in favour of the prosecution. So, we find no evidence against accused Zakir Hossain that he participated in the killing. Hence, on this ground above the appellant Zakir Hossain, is entitled to get the benefit of doubt resulting in his acquittal.

We also perused the decision referred by the defence counsel reported in 14 BLC, 19 is not similar to present case because Paragraph 29 of the said decision where it has been held that:

“This accused was arrested on 28-09-2002. Next day on 29-09-2002 he was produced before the Magistrate with a prayer for taking him on remand

for seven days. The learned Magistrate allowed remand for two days. After remand he was produced before the Magistrate on 2-10-2002 with a prayer for recording his confession, but he refused to make confession. Accordingly, he was sent to the jail hayat. Then again he was taken on two days' police remand. After such remand he was produced before the Magistrate and again he was taken on remand for three days. After such remand he was produced before the Magistrate on 09-12-2002, when his confession, Exhibit-5, was recorded. Thus, it appears that once he had refused to confess. He was taken on police remand on several occasions. After long detention in police custody his confession was recorded. His confession cannot be held voluntary. The so-called confession is thus inadmissible."

In the present case the accused was not taken in remand and he voluntarily made the confession before the Magistrate. On the other hand, in the section 342 examination of the accused Zakir Hossain, he did not mention a single

word about any sort of torture or illegal detention in respect of him. He also did not file any application for retraction of his confessional statement during the entire course of the trial. So, the submissions made by the learned counsel of the defence do not have any substance at all. Even it is accepted that the confessional statement is exculpatory then there are others incriminating evidence on record against the Md. Sahab Uddin.

Having considered the above evidence, discussions, findings and facts, we are of the view that in the present case only the confessional statement of Zakir Hossain described the scenario of the case. As we have earlier discussed that Zakir Hossain explained of the matter after calling over of the victim Awal. But the accused Md. Sahab Uddin did not explained of the matter rather he was arrested in connection of other case after murder. Md. Sahab Uddin was silent in relation to murder even if he was taken on remand. The instant murder is heinous in nature. So, we are of the view that Md. Sahab Uddin calling over and taken away the victim from the house and P.W. 5 the victim's wife was present at the time and after three days Zakir Hossain came to the victim's house and stated that Md. Sahab Uddin killed the victim. After

arrested Zakir Hossain gave confessional statement about the incident without involving himself. In view of the above we are constrained to hold that accused Md. Sahab Uddin brutally killed the victim Awal and as such prosecution has established the case against Md. Sahab Uddin beyond reasonable doubt under section 302/109 of the Penal Code. So the Death sentence awarded to Md. Sahab Uddin by the trial Court is hereby affirmed and Zakir Hossain is acquitted from the charge which is discussed earlier.

In the result the Death Reference is accepted in part.

The Criminal Appeal No.7230 of 2018(Arising out of Jail Appeal No.141 of 2018) is dismissed. Judgment and order of conviction of sentence dated 25.04.2018 passed by the learned Special Sessions Judge and Jana Nirrapatta Bighnakari Aparadh Daman Tribunal Chattogram in Sessions Case No. 11 of 2009 in respect of Md. Sahab Uddin is hereby maintained/ confirmed.

The Criminal Appeal No.8311 of 2018 (Arising out of Jail Appeal No.142 of 2018) is allowed. Judgment and order of conviction of sentence dated 25.04.2018 passed by the learned Special Sessions Judge and Jana Nirrapatta

Bighnakari Aparadh Daman Tribunal Chattogram in Sessions Case No. 11 of 2009 in respect of Zakir Hossain is hereby set aside and he be set at liberty at once if not connection with any other case.

Let a copy of the judgment along with lower court records be sent down at once.

Muhammad Mahbub UI Islam, J:

I agree.