

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Present:

Mr. Justice Bhishmadev Chakraborty
And
Mr. Justice K.M. Rasheduzzaman Raja

Death Reference No. 77 of 2019

The Statepetitioner
-Versus-
Md. Liton and 4 others

.....condemned-prisoners

with
Criminal Appeal No. 8024 of 2019 and
Jail Appeal No. 190 of 2019

Md. Litonconvict-appellant

-Versus-

The Staterespondent
with

Criminal Appeal No. 8102 of 2019 and
Jail Appeal No. 189 of 2019

Abu Sayeed @ Abu Syeed Hossain
.....convict-appellant

-Versus-

The Staterespondent
with

Criminal Appeal No. 8112 of 2019 and
Jail Appeal No. 186 of 2019

Azizur Rahman alias Polashconvict-appellant

-Versus-

The Staterespondent
with

Criminal Appeal No. 8757 of 2019 and
Jail Appeal Nos. 187 and 188 of 2019

Saiful Islam alias Pitil and Shoriful Islam
.....convict-appellants

-Versus-

The Staterespondent

Mr. Syed Ejaz Kabir with Mr. Mohammad Imam Hossain (Tarek), Deputy Attorney Generals with Ms. Mahbuba Tasnim Akhi, Mr. Mustafizur Rahman Mukul, Mr. Ashraful Alam, Ms. Rohani Siddiqua, Mr. Al-Amin Siddiqui, Assistant Attorney Generals

.....for the State

(Petitioner in reference and respondents in the appeals)

Mr. Muhammad Tajul Islam, Senior Advocate with Mr. Syed Al Asafur Ali Reza, Advocate

.....for the informant

(With the leave of the Court to assist the State)

Mr. S.M. Shahjahan, Senior Advocate with Mr. Mizanur Rahman Khan, Advocate

.....for the convict-appellant

(In C.A. No. 8024 of 2019 and J.A. No. 190 of 2019)

Mr. Md. Saiful Islam, Advocate

.....for the convict-appellant

(In C. A. No. 8102 of 2019 and J. A. No. 189 of 2019)

Mr. Md. Hamidur Rahman, Advocate

.....for the convict-appellant

(In C. A. No. 8112 of 2019 and J. A. No. 186 of 2019)

Mr. Md. Sheikh Atiar Rahman, senior Advocate

.....for the convict-appellants

(In C. A. No. 8757 of 2019 and J. A. No. 188 of 2019)

Heard on: 21.07.2026 and 22.07.2026

Judgment on: 23.07.2026.

K.M. Rasheduzzaman Raja, J:

The Hon'ble Chief Justice sent this reference to this Division for hearing with Death Reference No. 76 of 2019 as both the cases arose out of the same occurrence. Receiving the record we have heard both the references simultaneously. However, since the cases have been disposed of by the separate

judgments on separate set of evidence, therefore, we are also to dispose of these two references by separate judgments.

This reference under Section 374 of the Code of Criminal Procedure, herein after ‘the Code’, is for confirmation of the death sentences awarded upon the condemned prisoners by the learned Judge of the Nari-o-Shishu Nirjatan Daman Tribunal No. 3, Khulna in Nari-o-Shishu Case No. 103 of 2018 corresponding to G.R. No. 89 of 2015 arising out of Lobanchara Police Station Case No. 03 dated 19.09.2015 by the judgment and order dated 16.07.2019. Criminal Appeal No. 8024 of 2019, Criminal Appeal No. 8102 of 2019, Criminal Appeal No. 8112 of 2019, Criminal Appeal No. 8757 of 2019 and Jail Appeal No. 186 of 2019, Jail Appeal No. 187 of 2019, Jail Appeal No. 188 of 2019, Jail Appeal No. 189 of 2019 and Jail Appeal No. 190 of 2019 are also arisen out of the same conviction and sentence and, therefore, all these matters be disposed of by this judgment.

The prosecution case, in short, is that PW.1 Rezaul Alam Chowdhury Biplob received a phone call from his Sister P.W. 7 Nargis Sultana living in Dhaka at 10:00 p.m. on 18.09.2015 and went to the house named “Dhakaya House” at Lane No.-3 Buro

Moulovir Dargah, Lobanchara P.S., Khulna at 10:30 p.m. on 18.09.2015. He found the main gate under lock. He called his father and sister from outside but getting no response from them he went to the neighbouring house of P.W. 15 Goam Rasul. Returning with Golam Rasul and his son P.W. 14 Sayeed he let Sayeed enter the house by climbing over the boundary wall. Sayeed came out from the house and disclosed that aunt and grandfather were not there. The goods of the house were found scattered. Then he and Golam Rasul entered the house by climbing over the wall and found the goods scattered in the rooms. Upon found his father and sister nowhere he opened the lids of the septic tank and found the bodies of his father and sister kept upside down. He found the body of his father naked and strangled with the *urna*. He pulled out the dead bodies from the septic tank. He found the dead body of his sister wearing a kamiz but she had no salwar and she was also found strangled with another *urna*. He raised alarm drawing presence of the neighbours. The local people informed the police who arrived and entered the house by breaking open the lock. The inquest reports were prepared having inquest over the dead

bodies. PBI team arrived and seized the alamot. The dead bodies were sent to Khulna Madical College Hospital for holding autopsy. He searched rooms of the house later and found ornaments and cash money missing. Receiving the dead bodies after autopsy he buried the same at around 3:00/4:00 p.m. On such occurrence he lodged FIR in Labonchara police station and accordingly Lobanchara P.S. Case No. 03 dated 19.05.2015 was started. After investigation police submitted charged sheet against the accused persons under section 396 of the Penal Code.

Learned Magistrate took cognizance of the offence and transmitted the case record to the Metropolitan Sessions Judge, Khulna for holding trial. Learned Metropolitan Sessions Judge, however, sent the case to the Nari-o-Shishu Nirjatan Daman Tribunal-3, Khulna for holding trial as Nari-o-Shishu Nirjatan Case No. 284 of 2016 arising out of the same occurrence was pending in the same Tribunal. Accordingly, learned Judge of the Tribunal held trial of the Metropolitan Sessions Case No. 49 of 2017 registering the same as Nari-o-Shishu Nirjatan Case No. 103 of 2018.

Although the learned Judge of the Tribunal converted the case as a Nari-o-Shishu Nirjatan case but he framed charge against the accused persons under section 396 of the Penal Code and explained and read over the same to the accused persons except absconding accused Shariful Islam to which they pleaded not guilty and demanded the trial.

The prosecution examined 21 witnesses to prove the charge brought against the accused persons. Thereafter all the accused except absconding Shariful Islam were examined under section 342 of the Code whereupon they claimed their innocence again and expressed their desire not to adduce any counter evidence. However, accused Md. Liton and Md. Abu Sayeed, in explanation of their state of facts, stated that their confessions were extracted by police under torture. The accused condemned prisoners did not adduce any counter evidence.

The defence case as transpires from the trend of cross-examination of the prosecution witnesses is that of innocence and the accused persons have been falsely implicated in the case although the friends of deceased Parvin Sultana have killed her along with her father after having engagement with her.

Learned Judge of the Tribunal considering the evidence on record and hearing both sides found the condemned prisoners guilty under section 302 and 201 of the Penal Code and therefore, convicted and sentenced each of them to suffer death sentence under section 302 with a fine of tk. 10,000/- and 7 years rigorous imprisonment with a fine of tk. 5,000/- under section 201 of the Penal Code and thereafter made this reference to this Division for confirmation of sentences.

Mr. Md. Imam Hossain Trek, learned Deputy Attorney General appearing for the state submits that the prosecution has produced 21 witnesses to prove the charge brought against the accused persons. The learned Judge of the Tribunal, being satisfied with the material evidence produced by the prosecution against the condemned prisoners, has rightly awarded the death sentences upon them, leaving no room for interference therewith. Two accused Liton and Abu Sayeed have given confessional statements voluntarily which were found be true as well. The other witnesses of the prosecution have corroborated the subsequent events of the occurrence. The search and seizure were properly done and the witnesses have corroborated the

search and seizure and holding of inquest over the dead bodies. There are sufficient evidence both oral and circumstantial to connect the responsibility of the condemned prisoners with commission of the offence. Therefore, the reference should be accepted. He has referred to the cases of Md. Zahangir Alam Vs. The State 27 ALR (AD) 250 and Shukir Ali Vs. State 74 DLR (AD) 11, Abdur Rouf Mollah Vs. The State 2 LG (AD) 104 and relied on the principles laid down in those case.

One the other hand Mr. S.M. Shahjahan, learned senior Advocate appearing for the condemned prisoner Md. Liton opposed the reference and in support of Criminal Appeal No. 8024 of 2019 filed by condemned prisoner Md. Liton submits that the FIR was lodge accusing Nowab Ali Gazi and Aslam Mistry where upon police recorded Labonchara P.S. Case No. 3 dated 19-05-2019 under section 396 of the Penal Code and police also submitted a charge sheet under section 396 of the Penal Code after investigation. The learned Judge of the Tribunal illegally convicted and sentenced the condemned prisoners under section 302 of the Penal Code. There is no eyewitness to the occurrence. The learned Judge of the Tribunal has relied only on

the confessional statements of the condemned prisoners Md. Liton and Abu Sayeed which were not voluntary. Condemned prisoner Liton was produced before the Magistrate after 29 hours of his arrest without any explanation about such delay. There is no corroborative evidence in favour of confession of the accused Liton. No motive or intention in committing murder was found. Moreover, accused Md. Liton has retracted his confessions and no valid sentence can be passed on such retracted confession. Medical slip is found in the record which indicates that accused Md. Liton got treatment in the hospital; whereas the recording Magistrate found no marks of injury on the person of this condemned prisoner. So the confession of condemned prisoner Md. Liton cannot be treated to be true as well. Mr. Shahjahan has relied on the principles laid down in the cases of Abul Malik and others Vs. the State 1985 BLD 67, the State Vs. Mukhter Ali reported in 10 DLR (1958), The State Vs. Md. Monir Ahmed 4 BLC 426 and the State Vs. Kamal Ahmed 49 DLR 381.

Learned Advocate Mr. Abidul Hoque appearing for the condemned prisoner Abu Sayeed in Criminal Appeal No. 8102 of 2019 submits that Abu Sayed has retracted his confession. He

was put under physical torture after his arrest. His confession was extracted putting him under fear and torture. So the confession of Abu Sayeed cannot be the basis of conviction and sentence. Moreover, confession of Liton cannot be used against other accused including accused Abu Sayeed.

Mr. Sheikh Atiar Rahman, learned Senior Advocate appearing for the condemned prisoners Saiful Islam Pitil and Shariful Islam in Criminal Appeal No. 8757 o 2019 submits that their names were not in the FIR. Shariful Islam surrendered on 21.07.2019. There are no eyewitnesses to the occurrence. Nothing was recovered from the condemned prisoners. The accused persons who did not make any confession cannot be convicted relaying on the confession of the co-accused. Mr. Rahman has relied on the principles laid down in the cases of State and another Vs Mobile Kader 67 DLR (AD) 6, Abdus Salam Mollah Vs. The State 13 MLR (AD) 268, Majid Sheikh Vs. State 11 BLC (AD) 249, Babor Ali Molla and another Vs. State 44 DLR (AD) 10, Lutfun Nahar Begum Vs. The State 27 DLR (AD) 29.

Mr. Hamidur Rahman, learned Advocate appearing for condemned prisoner Azizur Rahman Polash in Criminal Appeal No. 8112 of 2019 has made the same argument as has been argued by Mr. Shahjahan and Mr. Rahman and relied on the ratio of the case of Majid Sheikh @ Majid and others Vs. the State 11 MLR (AD) 271 in support of his submissions to the effect that the confession made by an accused cannot be used against the other non-confessing accused.

Let us examine the sum and substances of evidence on record to examine whether the sentence awarded upon the condemned prisoners by the learned Judge of the Tribunal is sustainable in the eye of law.

P.W. 1 Rezaul Alam Chowdhury Biplob, the informant, has deposed that he received a phone call from his elder sister Nargis Sultana living in Dhaka at 10:00 p.m. on 18.09.2015 and came to know that his father and sister living in her house at Buro Moulovir Darga, Lane No. 3, Khulna were not responding to her phone call. Going there at 10:30 p.m. on 18.09.2015 he found the main gate of the house under lock. He called his father and sister from outside but getting no response from them he

went to the neighbouring house of Goam Rasul. He along with Golam Rasul and his son Sayeed returned to the house of his father and let Sayeed enter the house by climbing over the boundary wall. Coming out from the house Sayeed disclosed that aunt and grandfather were not there. The goods of the house were found scattered. Then he and Golam Rasul entered the house by climbing over the wall but found them nowhere. He opened the lids of the septic tank and found the bodies of his father and sister upside down. He pulled out the dead bodies from the septic tank and then raised alarm drawing presence of the neighbours. The local people informed the police who arrived and entered the house by breaking open the lock. Police, RAB and CID personas arrived together. The inquest reports were prepared having inquest over the dead bodies. PBI team arrived and seized the alamot. The dead bodies were sent to Khulna Madical College Hospital for holding autopsy. Receiving the dead bodies after autopsy he buried those at around 3:00/4:00 p.m. He searched the house later and found ornaments and cash missing. On such occurrence he lodged FIR in Labonchara Police Station. In cross-examination he has stated that he lives

3/4 kilometer away from the place of occurrence. After making a phone call when he got no response from his father and sister he went to the house of the occurrence. He himself pulled out the dead bodies from the septic tank. The house of witness Golam Rasul stands 100 cubits away across the road. He went to the house of Golam Rasul at 10:30 p.m. The floor of the rooms of house were scattered with goods. No cloth or Almari were not seized by police. Police broke open the lock found on the gate. Deceased Parvin Sultana had been doing job in Exim Bank for 2 years and earlier she was a student. He has denied that deceased Parvin Sultana used to live a wayward life or she used to have gossip regularly with her friends of the Bank or his sister and her 3/4 other friends were amusing in the house of the occurrence on the rainy day and her friends killed his father and sister or he has falsely implicated the accused persons.

P.W.2 Md. Siraj Vandari, father-in-law of the informant, has deposed that his son-in-law Biplob informed him the occurrence on 19.09.2015. Going to the place of occurrence he found the gate of the house under lock at 11:00 p.m. and his son-in-law was crying inside the house. Police arrived and entered

the house by breaking open the lock. Thereafter police allowed them to enter the house. He found two dead bodies lying beside the septic tank. Police sized alamat and held inquest over the dead body of Elyas Chowdhury and prepared inquest report with his signature. He has marked the seizure-list, the inquest report and his signatures thereon as exhibits. In cross-examination he has stated that deceased Elyas Chowdhury was the father of his son-in-law. He does not know how the occurrence happened.

P.W. 3 Aleya Begum, mother-in-law of the informant, has deposed that her son-in-law informed her about the occurrence and going to the place of occurrence he found the gate of the house under lock. Thereafter, police appeared and entered the house by breaking open the lock. She entered the house and found two dead bodies lying beside the septic tank. She signed the inquest report prepared for the dead body of Parvin Sultana. In cross-examination she has stated that she cannot say whether the neighbours appeared when she was there.

P.W. 4 Sima Akter @ Eti has deposed that he is the sister in-law of the informant. She came to know about the occurrence at 10:00 p.m. on 18.09.2015. The gate was found under lock and

key. Police arrived and entered the house breaking open the lock. Thereafter they entered the house and found two dead bodies lying beside the septic tank. Police held inquest over the dead bodies and prepared inquest report. She has signed the inquest report prepared for dead body of Parvin Sultana.

P.W. 5 Sayed Aslam Ali, brother-in-law of the informant, has deposed that he received a phone call at 10:45 p.m. on 18.09.2015 and came to know about the occurrence. He went to the place of occurrence and found two dead bodies lying. Police sized alamat and prepared a seizure list for 13 items with his signature. He has marked his signature on the seizure list as exhibits.

P.W. 6 Selim Ahmed Panna has deposed that he is the owner of the house and the deceased, his father-in-law and sister-in-law Parvin Sultana, used to live in his house. His wife Nargis Sultana was crying receiving a phone call at 10:30 p.m. on 18.09.2015. He came to know on query from his son that his father-in-law and sister-in-law were killed in his house. Hearing such occurrence he along with his wife and the husband of deceased Parvin Sultana, started for Khulna instantly. Going to

250 bed hospital at Khulna he found two dead bodies. After autopsy the dead bodies were buried. Later he came to know that an accused was apprehended and he gave confession disclosing the manner of occurrence. In cross-examination he has stated that he lives in Dhaka. He went to police station after hearing that accused Sayeed, Pitil were apprehended.

P.W. 7 Nargis Sultana Sathi has stated that she tried to reach her father and sister living in her house over mobile phone at 10:30 p.m. on 18.09.2015 but failed to contact them. Having failed to contact them she called her brother, the informant, at 10:00 p.m. and asked him to look for them. The informant went to the house of the place of occurrence and informed him over mobile phone that somebody has killed his father and sister brutally. Hearing such occurrence she started for Khulna on the same night and going to 250 beds hospital she found the dead bodies. Police sized some alamot at 5.00 p.m. on 19.05.2015 and prepared a seizure-list for a ladder, nylon rope and a small quantity of excreta. Police also seized other articles including the wearing fotua of her father, a towel found on the pillow and the sim used by deceased Parvin Sultana at 10:35 a.m. on

10.10.2015. She has marked the seizure-list and her signatures thereon as exhibits. She found the inside of rooms of the house ransacked and empty. Searching the house she found that the ornaments of her sister deceased Parvin Sultana and her mother along with cash money were missing. In cross-examination she has stated that she never visited the Police Station. She came to know from her brother that the police arrested the accused. She heard about the occurrence from none other than her brother, the informant.

P.W. 8 Md. Babul Miah, husband of deceased Parvin Sultana, has deposed that he was in Dhaka on 18.09.2015. She talked with his wife Parvin Sultana between 2:45 to 3:00 p.m. for the last time on the same date. He found the mobile phone of his wife switched-off at 7:00 p.m. He then made a phone call to his father-in-law and also found his mobile phone switched-off. He then called Nargis Pervin, elder sister of his wife. She also failed to contact her father and sister over mobile phone and then phoned his brother, the informant. He also phoned the informant and asked him to visit the house of the occurrence. From 10:30 to 11:00 at night the son of Nargis Pervin informed him that

somebody has killed his aunty and maternal grandfather. Hearing the occurrence he became senseless. He lived in a mess and the boarders of the mess sent him with Nargis Pervin and her husband Selim to Khulna arranging their tickets for travel. On the next day they directly went to the hospital and found two dead bodies. After post-mortem examination the dead bodies were buried. Thereafter accused Liton was arrested who disclosed the names of accused Pitil, Sayed, Shariful and disclosed how the occurrence took place. One the next day he went to the Police Station and found two accused Sayeed and Pitil there. His wife deceased Parvin Sultana informed him that the neighboring environment of their residence was not good and she disclosed the names of the accused Sayeed, Shariful, Pitil and Liton and told that they used to tease his wife on her way. Thereafter he was trying to transfer his wife and change their residence. Going to the place of occurrence he did not find 70/80 thousands cash money and ornaments of his wife having a search on 19.05.2015. He found those articles missing. In cross-examination he has stated that he was in Dhaka at the time of occurrence. He has denied that his wife did not disclose the

names of the accused persons to him or all the accused persons are not involved with the occurrence.

P.W. 9 A.M.A. Mahmud Opu, brother-in-law of the informant, has deposed that the informant informed him at 10:30 p.m. on 18.09.2015 that some miscreants have killed his father and sister entering their house and left the dead bodies in the septic tank. He went to the palace of occurrence at 10:45 p.m. but found the gate under lock. He heard informant Biplob crying inside the house. After a while police arrived and entered the house by breaking open the lock. Then they were allowed to enter the house and entering the house he found the dead bodies of the deceased. Police held inquest over the dead bodies and prepared inquest report with his signature. He has marked his signatures on the inquest report as exhibits.

P.W. 10 Constable No. 3648 Sudorshon Chakraborty has deposed that he was posted at Labonchara Police Station. Hearing about the commission of murder at 'Dhakaya House' at Buro Moulovir Darga he went there along with S.I. Rafiqul Islam at 11:00 at night. He carried the dead bodies to Khulna Medical College Hospital. Police seized wearing apparels of the deceased

at the police station and prepared a seizure-list thereof with his signature. He has marked the seizure-list and his signature thereon as exhibits. In cross-examination he has stated that he was present at the time of holding post mortem on the dead bodies.

P.W. 11 Constable No. 5361 Sumon Al Faruk has deposed that he was posted at Labonchara Police Station. Police prepared seizure-list for the wearing cloths of the dead bodies in his presence and prepared seizure-list with his signature. He has marked the seizure-list and his signature thereon as exhibits. The defence did not put him under cross examination.

P.W. 12 Constable No. 6292 Selim Shahabuddin has deposed that he was posted at Lobanchara Police Station on 21.09.2015. Accused Liton was apprehended and brought in Police Station and his body was search in his presence. Police recovered a money bag with two 10 taka notes and a ticket of Sangkor Cinema Hall and prepared a seizure-list with his signature. He has marked the seizure-list and this signature thereon as exhibits. In cross-examination he has stated that he

does not know wherefrom accused Liton was apprehended. He has denied that nothing was recovered from Liton.

P.W. 13 S.I. Kazi Akram Hossain has deposed that he was posted at Labonchara Police Station. The O.C. of the Police Station told him about commission of a murder on 18.09.2015 at night. He along with S.I. Mosarraff Hossain went to the place of occurrence at 9:30 p.m. They entered the house and found the dead bodies of Elyas Chowdhury and his daughter Parvin Sultana. They found informant Biplob crying beside the dead bodies. Thereafter several forces arrived at the place of occurrence. CID preserved the crime scene. Police held inquest over the dead bodies. S.I. Rafiqul Islam prepared seizure-list. The defence did not put him under cross-examination.

P.W. 14 Md. Abu Sayeed has deposed that the occurrence took place on 18.09.2015 at Buro Moulovir Darga Para, Khulna. Informant Biplob called him from his house. Going to the place of occurrence he found the gate of the house under the lock. He informed the informant Biplob that having search he found Parvin Sultana and her father nowhere. Then he returned home and went to sleep. At 12:00 at night Police arrived and called

him. On query of police he told that he knew nothing. Police took his signature on a paper. He has marked his signature on the inquests report as Ext. The prosecution declared this witness hostile and put him under cross-examination. In cross-examination of the prosecution he has stated that deceased Parvin Sultana and Elyas Chowhury were living in the house of the occurrence for 3 years. Their house stands across the road and he is the neighbour of the house. The informant called him and took him to the place of occurrence. He has denied that he entered the house climbing over the wall. He, however, has stated that the goods inside rooms of the house were found ransacked and untidy. All the doors of the houses were open and the gate was under lock and key from outside. He found the dead body of Elyas Chowhury naked. In cross-examination of the accused he has stated that he found police at the place of occurrence and they were not allowing the public entering the house.

P.W. 15 Md. Golam Rosul has deposed that his house is at Buro Moulovir Darga Para. The occurrence took place on 18.09.2015. Upon found a lot of people in the house at the place

of occurrence he went there and found two dead bodies. Police obtained his signature on inquest report.

P.W. 16 Constable No. 5076 Sharifa Khatun has deposed that she was posted in Labonchara Police Station. Receiving a phone call she went to 'Dhakya House' at Lane No. 3, Buro Moulovir Darga Para at 11:00 p.m. with S.I. Rafiqul Islam. He found other police officers there. The gate of the house was under lock and it was broken open at the instance of O.C. They entered the house and found the dead bodies of the father and her daughter lying beside the septic tank. S.I. Rafuqul Islam held inquest over the dead bodies. The dead bodies were sent to hospital for holding autopsy. In cross-examination she has stated that she witnessed the inquest held by S.I. Rafiqul Islam on the dead body of Parvin Sultana. They were outside of the house for 5/10 minutes before breaking open the lock. She has denied that the lock was broken before their arrival. She found the dead bodies lying beside the septic tank located at the left side of the *verandah* of the house.

P.W. 17 S.I. Md. Rafiqul Islam has deposed that he was in mobile duty at 11:00 p.m. on the date of occurrence. O.C. of the

Labonchara Police Station directed him to go to 'Dhakya House' at Lane No. 3, Buro Moulovir Darga Para area. Going to the place of occurrence he found the main gate of the house under lock and key. The lock was broken open at the direction of O.C. The dead bodies of a male and a female were found lying beside the septic tank. At the instance of O.C he held inquest over the dead bodies and prepared inquest reports with the signatures of the witnesses. He seized alamot preparing seizure-list. He sent the dead bodies to morgue for holding autopsy. He has marked the inquest report, seizure-list, and chalan and this signatures thereon as exhibits. He has marked the seized articles as material exhibits. In cross-examination he has stated that the RAB, PBI personnel and the reporters arrived at the place of occurrence. He seized 13 items of alamot. PBI seized article from the house of the occurrence and he also entered the house with them.

P.W. 18 Md. Faruk Iqbal, a Metropolitan Magistrate, has deposed that accused Abu Sayed was produced before him on 16.10.2015. for recording his confessional statements. He made him understood the consequence of making confession. Thereafter he asked him whether he wanted to make confessional

statements. As he answered affirmative he gave him time for deliberation. Thereafter, he put the stipulated questions to him and wrote down his replies. After recording his confessional statements he read over the same to him. He signed the statements in his presence. He has marked the confessional statement and his signatures thereon as exhibits. In cross-examination he has stated that accused Abu Sayeed was apprehended from Magura on 14.10.2015. The accused was produced before him within 24 hours. A medical ticket issued by emergency department of the General Hospital, Khulna was found in the record wherein public assault was written. He found no marks of injury on the body of the accused. He allowed deliberation time from 2.00 p.m. to 5.00 p.m but he did not mention when he started recording of the confessional statements as there was no column for that. He has denied that he did not record the confessional statements following the provisions of law or even knowing that the accused was compelled to give confessional statement under physical torture, he did not mention that in the form.

P.W. 19 Aysa Akter Mousumi has deposed that she was Senior Judicial Magistrate at Chief Metropolitan Magistrate Court, Khulna on 21.09.2015. G.R.O. Mominul Islam produced accused Md. Liton before her at 10:00 a.m. When the accused expressed his desire to make confession she gave him 3 hours time for deliberation and, thereafter, she put stipulated questions to him and wrote down his answers in the form. She found no marks of injury on his body. She asked him whether police compelled him to make confession. Thereafter she recorded his confession. She has marked the confessional statement and her signatures thereon as exhibits. In cross-examination she has stated that she made the accused understood that he was not bound to make confessional statements. She was writing as the accused was telling. She has stated that she found no marks of injury on the body of the accused Md. Liton. She found no medical prescription along with the forwarding. She has denied that she found marks of injury on the body of the accused. The accused was apprehended at 5:00 a.m. on 20.09.2015 and was produced before her at 10:00 a.m. She understood that the accused made confession voluntarily. She has denied that the

accused did not confess voluntarily and she did not record his statements following section 164 of the Code properly.

P.W. 20 Dr. Md. Wahid Mahmud has deposed that he is a lecturer in Khulna Medical College Hospital. On 19.09.2015 dead bodies of Parvin Sultana and Elyas Chowdhury were produced before him for holding autopsy. He held autopsy over the dead bodies and prepared autopsy reports. He has found following injuries on the dead body of Parvin Sultana—

One circular continuous ligature mark was low down of the neck.

On dissection: the soft tissue, nerve and vessels of the neck was highly congested. High vaginal swab was preserved for pathological examination.

Opinion was kept pending till the receipt of the pathological examination report. Receiving the pathological report from micro Biology Department he finally opined that—

Considering post mortem examination and histopathological examination of high vaginal swab my opinion is the cause of death was due to asphyxia as a result of

strangulation followed by rape which was ante mortem and homicidal in nature.

He found following injuries on the dead body of Elyas Chowdhury—

I) One circular ligature mark was present low down of the neck injury 13 inch x 1 inch. II) Abrasion was present on the ala of the nose-1/2 inch x 1/2 inch. III) One bruish was present on the right forehead 1/2 inch. IV) Bruise of left shoulder 1/2 inch x 1/2 inch. V) Multiple abrasions on back of the shoulder 1 inch x 1 inch.

On dissection- soft tissue of neck, vessels and nerves of the neck was highly congested. The larynx trachea and pharynx were highly congested.

Opinion: The cause of death was due to asphyxia as a result of strangulation which was ante mortem and homicidal in nature.

He has marked the autopsy reports and his signatures thereon as exhibits.

In cross-examination he has stated that he prepared the autopsy report following the forensic rules. He noted down the

external injuries found on the dead bodies. He again noted the injuries found on the dead bodies after dissection. He found ligature marks in the both dead bodies. He has denied that he did not hold autopsy following the forensic rules or did not prepare reports properly.

P.W. 21 S.I. Kazi Babul Hosen, Investigating Officer, has deposed that he was posted in Labonchara Police Station when Labonchara P.S. Case No. 3 dated 19.09.2015 was registered. Having charge of investigation he visited the place of occurrence, prepared sketch-map with index, recorded statements of the witnesses under section 161 of the Code and seized the alat including a wooden ladder, nylon rope, a small quantity of excreta preparing seizure lists with the signature of the witness. He arrested accused Md. Liton at 5:30 a.m on 21.09.2015 from the *verandah* of the kitchen of their house at Buro Moulovir Darga Para. Md. Liton admitted his involvement with the occurrence. Having several raids with him he reached Police Station at 10:45 a.m. As Md. Liton expressed his desire to make confession he sent the accused Md. Liton to Magistrate. RAB apprehended accused Abu Sayed and Pitil and handed over

them to him. Accused Abu Sayeed also expressed his desire to make confession and, therefore, he was also sent to Magistrate. He verified the call lists of the accused persons. He obtained finger prints of Saiful Islam Pitil, Md. Liton, Md. Abu Sayeed and sent the same for expert opinion. However, he did not get positive report of the finger prints as those were not collected properly. Upon found primary evidence he submitted a charge sheet against the accused persons under section 396 of the Penal Code. He has marked the sketch-map, index, seizure-list and the alamot as exhibits. In cross-examination he has stated that he found no liquor in the house of the occurrence. He did not consult the doctor on the autopsy report. He did not find any bottle in the house of the place of occurrence. He started for Court from P.S. at around 10:00 a.m. and reached the Court at around 10:45 a.m. He handed over the accused to G.R.O of the Court. He has denied that accused Md. Liton was apprehended from in front of Cinema hall. He has denied that after apprehending accused Liton he kept him under custody for 8/9 hours and subjected him to severe torture and thereby extracted his confession. He has denied that the finger prints were properly

collected but he did not accept the report as that was not found favourable to his investigation. He has denied that Polash is not the name of the accused Azizur Rahman. He sent requisition to RAB for arresting accused Shariful, Pitil, Sayed and Polash. They apprehended accused Sayeed from Vainarmore Bus-stand at Magura District and handed over to him at 15:05 hours on 15.10.2015. He kept accused Sayeed in Sona Danga police station for security purpose as it was a sensitive case. He found no marks of injury on the body of accused Sayeed. He did not take accused Sayeed to hospital. He has denied that in the name of investigation he subjected accused Abu Sayeed to brutal torture and thereby extracted his confession. He has denied that deceased Parvin Sultana used to live a wayward life or she was engaged in an amusing party in her house with her friends at the time of occurrence or her friends killed them or he submitted false charged-sheet without having any investigation properly.

On perusal of the above evidence as produced by the prosecution it is apparent that there is no eyewitness to the occurrence of killing of 2 persons in the house of the occurrence. Learned Judge of the Tribunal convicted and sentenced the

condemned prisoners under section 302 of the Penal Code relying on the confessions of the condemned prisoners Md. Liton and Abu Sayed.

Learned Advocates for the condemned prisoners submit that the condemned prisoners were produced before the learned Magistrate after more than 24 hours of their arrest violating the provisions of law. Police extracted confessions from the condemned prisoners, Md. Liton and Abu Sayeed, by subjecting them to torture. So, those are not voluntary and true. Both of them have retracted their confessions and, therefore, awarding conviction and sentence relying on the retracted confessions is not legally safe. Relying on the principles laid down in the cases of *The State Vs. Mukhtar Ali and others* 10 DLR 155 and *Majid Ali alias Majid and others Vs. The State* 11 MLR (AD) 270 learned Advocates further submit that the confessions of the co-accused cannot be basis of conviction of other co-accused in the absence of other independent evidence. Confession of a co-accused cannot corroborate the confession of other co-accused.

It appears in the record that the condemned prisoner Md. Liton retracted his confession on 11-11-2015 after almost two

months of making his confession. Condemned prisoner Abu Sayeed Hossain retracted his confession on 30-12-2015 after more than 2 months of his confession. All of them have retracted their confessions on the ground of committing torture on them in the police custody before producing them to the Magistrate.

In support of alleged torture on the confession maker Mr. Shahjahan, learned Advocate for condemned prisoners, has drawn our attention to the evidence of P.W. 18 Md. Faruk Iqbal, the recording Magistrate, who has stated that he has seen the medical slip wherein public assault has been mentioned. But he has categorically stated that he found no mark of injury on the body of accused Abu Sayeed. On the other hand P.W. 21 S.I. Kazi Babul Hossain, Investigating Officer, has deposed that he sent requisition to RAB for arresting accused Shariful, Pitil, Sayeed and Polash and acting on such requisition RAB apprehended accused Abu Sayed from Vainarmore Bus-stand under Magura District at 3:00 p.m on 15.10.2015 and handed over the aforesaid accused to him at 15:05 hours on 15.10.2015. The I.O. further stated that he kept accused Abu Sayed in Sonadanga police station instead of Lobonchara police station

where the occurrence took place because of security of the accused as the case was a sensitive one. We find no evidence on record to support that accused Abu Sayeed was subjected to torture by Investigating Officer as he was not taken in remand for interrogation. Mere public assault as mentioned in the medical slip cannot be interpreted to be a serious torture. Since I.O. has admitted that for security reason accused Abu Sayeed was kept in another Police Station, therefore, it cannot be ruled out that he might have been assaulted by public in any way at the time of his arrest.

As to delay in production of accused Abu Sayeed before the Magistrate we find that he was apprehended from another District and then handed over to the I.O. After receiving the condemned prisoner Abu Sayeed, the I.O. is not found to have caused delay more than 24 hours in producing him before the Magistrate for recoding his confession. So we find no substance in the submissions of the learned Advocate to the effect that accused Abu Sayeed was produced before the Magistrate after expiry of the stipulated period of 24 hours.

On the other hand, P.W. 19 Ayesa Akter Mousumi, another recording Magistrate, has stated that she received the condemned prisoner Md. Liton for recording his confession after 29 hours of his arrest. However, she has admitted that she received the accused from his G.R.O. Mominul Islam. P.W. 21 S.I. Kazi Babul Hossain has stated that accused Md. Liton was apprehended at 5:30 a.m. on 21.09.2015 and he handed over the accused to G.R.O. at 10:45 a.m. It appears in the confessional statement exhibits.-12 that he was produced at 10:00 a.m. on 21.09.2015 in the Court chamber of the learned Magistrate by the G.R.O. Although there is a little discrepancy regarding time of production of accused Md. Liton before the learned Magistrate but that does not support that he was produced after 29 hours of his arrest. Time of arrest as shown in the form of confession might be an error. However, since the accused was handed over to the G.R.O. Mominul Islam, he might have delayed a little bit to produce the accused before the Magistrate for any other reason. We find no long delay which may create any doubt in our mind regarding subjecting the accused to any manner of threat or

torture by the I.O. before producing him for recording his confession.

Now let us examine the submissions of the learned Advocates regarding the acceptability or reliability of the confessional statements as those were retracted by the makers. Retraction petitions were submitted after 2 months of the confession. No explanation has been given for causing such delay in submitting retraction application. The manner of torture as disclosed in the retraction petitions has not been put before the investigating officer P.W. 21 S.I. Kazi Babul Hossain or the recording Magistrates P.W. 18 Md. Faruk Iqbal and P.W. 19 Ayesha Akter Mousumi specifically. Moreover, we found no basis for the allegations of torture made by the makers of confession in their retraction petitions in the above discussions.

It has been ruled in the case of Khalilur Rahman A.S.P.S.B. Vs. Md. Kamrul Ahsan and others 2LG (2005) AD that—

It is now well settled that the confessional statement if it is found to be true and voluntary may form the

sole basis of conviction as against the maker even if it is subsequently retracted.

So, let us now examine whether the confessions of the condemned prisoners Md. Liton and Abu Sayeed are true and voluntary. Since we have found that the police did not extract the confessions from them subjecting to torture, we can therefore rely on the evidence of P.W. 18 Faruk Iqbal and P.W. 19 Ayesha Akter Mousumi that the accused persons made their confessions voluntarily. Both the learned Magistrates are found to have recorded their confessions following the provisions of law. The minor lapses as found are not fatal enough to render the confessional statements unworthy of belief. We are satisfied as to the voluntariness of the confessions in question. Now let us explore the truth of the said confessions. For that purpose, we are to reproduce the confessions in brief.

Condemned prisoner Md. Liton has given confessional statements, Ext. 12, stating that—

“-----সেদিন ১৮-০৯-২০১৫ তারিখ শুক্রবার ছিল। আমি বাসায় ফিরে খাওয়া দাওয়া করে বিকেল ৪ চরটায় বের হই। তখন প্রচণ্ড বৃষ্টি হচ্ছিল। এ সময় অন্য ৪ জন

শরীফুল, সাঈদ, পলাশ আর পিটিল আসে। সাঈদ ওই বাসায় (ঘটনাস্থলের বাসায়) দেয়াল টপকে ভিতরে ঢুকে। বাসার ভিতরে একটা মই ছিল। সেই মই দেয়ালে লাগিয়ে আমরা বাকি ৪ জন ভেতরে ঢুকি। ঘরের সামনের দরজা দিয়ে আমরা ভিতরে ঢুকি। তখন সন্ধ্যা ৬ টা বাজে। তবে বৃষ্টির কারনে চারিদিক অন্ধকার ছিল। আমি দরজায় দাড়িয়ে থাকি। বাকি ৪ জন প্রথমে মুরমব্বীর (মৃত বয়স্ক ব্যক্তি) ঘরে ঢুকে। মুরমব্বী তখন ছোফায় বসে বসে টিভি দেখছিল। মুরমব্বী ওদের দেখেই তোমরা এখানে কি কর? জিজ্ঞেস করলে শরিফুল বলে ‘চুপ কর’। পলাশ মুরমব্বীর গলায় নাইলনের দড়ি দিয়ে প্যাচ দিয়ে জোরে টেনে ধরে। মুরমব্বী কিছুড়াগের মধ্যেই ঢলে পড়ে সোফায়। ঐ বাসায় ৩ টা রুম। মুরমব্বী ছিল বসার রুম। মুরমব্বীর আলমারী ভেঙ্গে পলাশ, সাঈদ ৮০,০০০/- এর মত টাকা নিল। আর স্বর্ণের গয়নাগাটি নেয়। শরীফুলের কাছে বাজারের ব্যাগ ছিল। সেই ব্যাগে ঐ মালপত্র তোলে। এরপর ঐ ঘর হতে মেয়ের (মৃত/ভিকটিম) ঘরে ঢুকে। মেয়ে তখন বিছানায় বসে কাজ করছিল, লেখালেখি করছিল বোধ হয়। মেয়ের রুমমে শরিফুল আগে ঢুকে। এরপর পলাশ, সাইদ, পিটিল, আমি ঢুকি। মেয়ে টের পেয়ে বলে তোমরা বাসার ভেতরে ঢুকছ কেন? বের হও তখন শরীফুল, পিটিল মিলে মেয়েকে ওর বিছানায় শোয়ায়ে ফেলে। -----সাইদ মেয়েকে ধর্ষন শেষে মেয়ের ওড়না গলায় পেচিয়ে মেরে ফেলে। -----সাইদ ওকে মারার পরই বসার ঘরের সোফার পাশে অস্থিরতায় পায়খানা করে দেয়। এর পর $\frac{1}{2}$ ঘন্টা পর ঐ বাসার ট্যাংকির মধ্যে দুই জনের লাশ ঢুকায়ে রেখে ঢাকনা দিয়ে আসে। আমি তখন নিচে দাঁড়ানো ছিলাম। এরপর আমরা বের হয়ে আসি বাসা থেকে। তখন রাত প্রায় ৯টা সাড়ে ৯টা বাজে। আমরা মই ব্যবহার

করেই গেটের বাইবে বের হই। শরীফুল আমকে একটা তালা দেয়। আমি ঐ তালা গেটে মেরে চাবিটা শরীফুলকে দেই। সে টাকা স্বর্ণালংকার রাখার ব্যাগে চাবিটা রাখে।”

Another condemned prisoner Abus Sayeed Hossain has stated in his confession, Ext. 11, that—

“-----ইতিমধ্যে মুরন্মব্বী চাচা (ভিকটিম) গেল খুলে বাসায় প্রবেশ করে। শরিফুল এসে মুরন্মব্বী চাচা (ভিকটিম) কে চেপে ধরে। তখন পলাশ তার নিয়ে এসে মুরন্মব্বীর গলায় পেঁচিয়ে ধরে এবং তারের একমাথা আমাকে ধরতে বলে। আমি ও পলাশ তারের দুই মাথা দুই দিক দিয়ে টান দিয়ে মুরন্মব্বীকে হত্যা করি। তারপর মুরন্মব্বীর লাশ শরিফুল ও পলাশ টানতে টানতে নিয়ে গিয়ে বাথ রুমের সেফটি ট্যাংকির মধ্যে ফেলে দেয়। তখন শরিফুল আমাকে বলে মেয়ের ঘরের ভিতর যা। আমি মেয়ের ঘরের ভিতরে যাই, গিয়ে দেখি বিবস্ত্র অবস্থায় মেয়েটিকে পিটিল, পলাশ, শরিফুল ও লিটনরা মিলে ধরে আছে এবং তারা মেয়েটির গলায় ওড়না পেঁচিয়ে মেয়েটিকে হত্যা করে। এরপর পিটিল ও লিটন মেয়েটির লাশ ঘাড়ে করে নিয়ে সেফটি ট্যাংকির মধ্যে ফেলে দেয়। আমি সবার আগে ঐ বাড়ির প্রাচীরের সাথে একটি মই লাগানো ছিল এবং আমি মই বেয়ে উঠে প্রাচীর পার হয়ে চলে আসি।”

It appears in the confession of Md. Liton that he has given the statements mentioning that he along with accused Shariful, Sayeed, Polash and Pitil were present at the place of occurrence. Although he did not implicate himself in killing the deceased Elyas Chowdhury and Parvin Sultana but he has disclosed that

they entered the house climbing over the boundary wall with the help of a ladder. Entering the house accused Azizur Rahman Polash fastened the neck of the old man Elyas Chowdhury by a nylon rope when he asked them what they were doing there. Just after the killing of Elyas Chowdhry condemned prisoner Polash and Sayed broke open the Almirah of the deceased and took away tk. 80,000/- therefrom. They also took away gold ornaments and those were kept in the shopping bag carried by the condemned prisoner Sharif. Thereafter, they entered the room of deceased Parvin Sultana. Sensing their presence she shouted saying why they entered her room and asked them to exit. They all committed rape on her and condemned prisoner Sayeed fastened her urna around her neck and done to death. He has further stated that condemned prisoner Abu Sayeed got nervous after killing the deceased Parvin Sultana and passed excreta on the floor near the sofa. Shariful disclosed that the looted goods and cash would be distributed among them after 4/5 days. Accordingly he went to receive the part of his booty on the date fixed but he did not get his part as no distribution took place.

On the other hand, condemned prisoner Abu Sayeed has stated that he along with the other accused persons entered the house of the deceased. He has stated in the same way of Md. Liton that keeping him standing in the gate accused Polash entered the house. After 4/5 minutes Polash called him there. He entered the house with Polash and found accused Shariful, Pitil and Liton. Accused Shariful caught hold of the deceased Elyas Chowdhury. Thereafter, accused Polash fastened a wire around the throat of the deceased Elyas Chowdhury and asked him to hold the other end of the wire. Then both of them pulled both ends of the wire and tightened it around the neck of the deceased resulting in his death. Accused Pitil, Polash, Shariful and Liton killed the woman fastening her urna around her neck. Thereafter, accused Shariful and Polsah threw the dead bodies in the septic tank.

It appears from the above confessions of the condemned prisoners Md. Liton and Abu Sayeed that although there are minor discrepancies in the narration of the killing of the deceased, both of them have corroborated each other by stating that they were present inside the house of the place of

occurrence along with the other condemned prisoners. Md. Liton has categorically stated that the accused persons looted cash amounting to Tk. 80,000/- and gold ornaments from the wardrobe of Elyas Chowdhury. Therefore, it is found that the occurrence was committed by the common participation of the condemned prisoners.

In the confessional statements we find the following common facts—

- a) all the accused persons were 5 in number and they entered the house of the occurrence by climbing over the boundary wall with the help of a ladder which was seized by the I.O. and produced before the Court at the time of trial and accordingly it was marked as material exhibits.
- b) condemned prisoner Md. Liton has stated in his confessions that the condemn prisoner Md. Shariful Islam caused death of the deceased Elyas Chowdhury by fastening a nylon rope around his neck. The nylon rope

was also seized by the I.O. and produced before the Court at the time of trial and accordingly it was marked as material exhibits.

- c) condemned prisoner Md. Liton has stated that they left the house putting the main gate under lock and key. All the PWs have corroborated each other deposing that they found the main gate of the house under lock and key and police broke open the lock and thereafter they entered the house and found the dead bodies. The lock was also seized and produced before the Court.
- d) accused Md. Liton has stated in his confession that accused Abu Sayeed passed excreta out of tension and nervousness after killing Parvin Sultan. P.W. 21 Kazi Babul Hossain has stated that he seized a small quantity of excreta from the floor. P.W. 5 Sayed Aslam Ali and P.W. 7 Nargis

Sultana have corroborated the seizure of excreta from the floor of the house of the place of occurrence.

- e) P.W. 1 Rezaul Alam Chowdhury Biplob has stated that entering the house by climbing over the boundary wall he found the dead bodies of his father and sister in the septic tank.
- f) all the accused persons were found to be hiding just after the occurrence.
- g) P.W. 20 Dr. Md. Wahid Mahmud opined that the cause of death was due to asphyxia as a result of strangulation which supports the confessions as well.
- h) condemned prisoners have stated that tk. 80,000/- and ornaments were looted breaking open the wardrobe of the deceased Elyas Chowdhury. P.W. 1 Rezaul Alam Chowdhury Biplob, P.W. 7 Nargis Sultana Sathi, owner of the house, have stated that

after the occurrence they found cash money and ornaments missing.

It appears from the above facts and circumstances that the confessions of the condemned prisoners are sufficiently corroborated by the circumstantial evidences, which satisfies us as to the truth of the said confessions. Since the confessions are found to be true and voluntary, the same can form the basis of conviction and sentence in the instant case.

Now let us examine the substance of the submissions of the learned Advocates for the condemned prisoners that the confession of co-accused cannot be used for awarding sentence upon the other accused. In the case of *Abdus Salam Mollah Vs. The State* 13 MLR (AD) 268 it has been opined that—

Law as in section 30 of the Evidence Act, as to consideration of the confession of a co-accused in a trial when more persons along with confessing accused are being tried jointly for the same offence, is that confession so made by one of such persons affecting himself and some other who are being tried

along with confessing accused persons and the confession so made is proved voluntary and true the Court may take into consideration such confession as against other accused as well as the accused who has made such confession.

It appears from the aforesaid principle that the confession of a co-accused can be used against other non-confessing accused in a joint trial, if the confession is found to be voluntary and true and receives some corroboration from either direct or circumstantial evidence. We have already found that confessions of the condemned prisoners Md. Liton and Abu Sayeed have passed such test having been corroborated and found to be true and voluntary.

The learned Judge of the Tribunal convicted and sentenced the condemned prisoners under sections 302 and 201 of the Penal Code, that too, without the aid of section 34, although the charge was framed under sections 302, 201/34 of the Penal Code. We find that the 5 condemned prisoners entered the house of the occurrence and conjointly committed the offences of robbery and

murder, which constitutes the offence of dacoity with murder punishable under section 396 of the Penal Code. The police registered the FIR as a case of dacoity and the I.O. also submitted charge-sheet under section 396 of the Penal Code. Even the learned Judge of the Tribunal framed charge under section 396 of the Penal Code and the trial was held on that charge. The learned Judge of the Tribunal closed the recording of evidence on 18.11.2017 and thereafter altered the charge on 23.11.2017. After alteration of the charge, the learned Judge only examined the accused under section 342 of the Code on 29.11.2017, i.e., 6 days after the alteration of the charge. But from the discussions above, we find no ingredients of the offence of murder simpliciter in the occurrence. Rather, it is a clear case of dacoity with murder punishable under Section 396 of the Penal Code, for which charge was framed and the condemned prisoners faced the trial on such charge. Therefore, alteration of the charge to sections 302 and 201/34 of the Penal Code was unnecessary and based on a misconception. However, we find no difficulty in convicting and sentencing the condemned prisoners under section 396 of the Penal Code for which the original

charge was framed against the condemned prisoners and they were tried thereunder.

We have found in the confessions of the condemned prisoners that Polash killed the elderly Elyas Chowdhury when he asked seeing them inside the house, what they were doing. Then they safely looted money and ornaments breaking open his wardrobe. Thereafter they killed Parvin Sultana when upon found their sudden presence she asked them to exit the house. Such murder is not pre-planned, rather an action in course of smooth commission of dacoity. Therefore, looking for motive or intention in the killing during commission of dacoity is a futile exercise. Dacoity is recognized by its nature. It is determined by the nature and character of the offence itself after its commission. No motive or intention is required. In these circumstances, we hold that although the learned Judge of the Tribunal awarded the death sentence to the condemned prisoners under sections 302/201 of the Penal Code on a wrong premise, the said sentence is equally sustainable under the proper provision, i.e., section 396 of the Penal Code.

Mr. Sheikh Atiar Rahman, however, at the last leg of his arguments submits that the commission of dacoity is doubtful as no booty was recovered from any of the condemned prisoners. We have found in the confessions of the condemned prisoner Md. Liton that the looted money and ornaments were kept in the shopping bag carried by condemned prisoner Shariful Islam who assured the others about distribution of the booty after 4/5 days which he did not do. This Shariful Islam was hiding for long time. He surrendered after pronouncement of the judgment. Since he could not be apprehended at the relevant time, the booty could not be recovered. That does not make the occurrence of dacoity non-existence or unbelievable. Two persons were killed by the condemned prisoners while committing dacoity. Therefore, the death sentence is found to be proportionate to the offence committed by them. Accordingly, the death sentences awarded to the condemned prisoners by the Tribunal under sections 302/201 of the Penal Code is hereby converted to one under section 396 of the Penal Code, with a fine of Tk. 10,000/- on each, in default to suffer 6 months rigorous imprisonment more.

In the result, the reference is accepted on modification, the appeals filed are hereby dismissed and the Jail Appeals are disposed of.

Communicate the judgment and order and transmit the lower Court records.

Bhishmadev Chakrabortty, J:

I agree.

BO. Kabir