

Bench:

Mr. Justice Bhishmadev Chakrabortty
and
Mr. Justice K.M. Rasheduzzaman Raja

Death Reference No. 90 of 2019

The State ...petitioner

-Versus-

Nur Mohammed ...condemned-prisoner
with

Criminal Appeal No. 9517 of 2019

and

Jail Appeal No. 231 of 2019

Nur Mohammed ...convict-appellant

-Versus-

The State ...respondent

Mr. Syed Ejaz Kabir, Deputy Attorney General
with Ms. Mahbuba Tasnim Akhi, Mr. Ashraful
Alam, Mr. Al-Amin Siddiqui, Assistant Attorney
Generals

...for the State

(Petitioner in reference and respondents in the appeals)

Mr. Md. Masum Billa, Advocate

...for the condemned-prisoner

(Appellant in the appeals)

Judgment on: 27.07.2026

Bhishmadev Chakrabortty, J:

Learned Judge of Nari-o-Shishu Nirjatan Daman
Tribunal, Pirojpur (the Tribunal) on trial in Nari-o-Shishu
Nirjatan Daman Case 82 of 2010 found condemned-prisoner

Nur Mohammed guilty of offence under section 9(2) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (the Ain, 2000) and sentenced him thereunder to death and submitted the proceedings to this Division for its confirmation. The condemned prisoner filed Jail Appeal No. 231 of 2019 and subsequently regular Criminal Appeal No. 9517 of 2019 challenging the same judgment and order of conviction and sentence, and as such these have been heard together and are being disposed of by this judgment.

The prosecution case, in brief, is that informant Mst. Fatema Begum, mother of Mst. Amena (the victim), lodged first information report (FIR) with Mathbaria police station within the district of Pirojpur at about 16.15 hours on 21.03.2010 alleging that her husband was a poor man who used to work in a flour mill at Dhaka. She resided in her house with her three children. She woke up from sleep at about 06.00 am on 21.03.2010 and went out to the field with four cattle to feed them grass. At that time her daughter victim Amena, who was a student of class eight, her son Al-Amin aged about 8 years and another daughter Taslima aged about 5 years were in the house.

She returned home from filed at about 08.00 am and found her son Al-Amin and Taslima in the house. She asked them about Amena while Al-Amin told her that their uncle Nur Mohammed called away Amena with him to the western side bamboo clump to cut bamboos. But after passing long time Amena did not return home. She looked for the victim but could not find her out. The boys and girls who were taking bath in the canal flowing by the western side of the house raised alarm finding victim Amena dead on the bank of the canal at about 10.00 am. She rushed there and found the deadbody of the victim lying on chest. She brought the deadbody to her house with the help of Lutfu, wife of neighbour Shahidul. Accused Nur Mohammed called away the victim from home and after committing rape killed her by dealing blows on head with the neck of axe and left the deadbody on the bank of the canal. On the aforesaid allegation, Mathbaria Police Station Case No. 25 dated 21.03.2010 corresponding to GR No. 70 under section 9(2) of the Ain, 2000 was started against sole accused Nur Mohammed.

Subsequently, the men of the locality apprehended the accused from Pathorghata of Barguna district on 13.04.2010 and handed over him to police. Police forwarded him to the learned Magistrate PW8 and he (accused) made a confession to him on 13.04.2010 admitting the offence of killing.

PW5 Ruhul Amin, a Sub-Inspector (SI) of police investigated the case. In course of investigation, he collected incriminating articles and material evidence for prosecution and submitted a charge sheet against sole accused on 31.05.2010 under the selfsame section of the Ain. The record of the case was then transmitted to the Tribunal for holding trial.

In the Tribunal, the case was registered as Nari-o-Shishu Nirjatan Daman Case No. 82 of 2010. Learned Judge of the Tribunal took cognizance of offence under section 9(2) of the Ain against the accused on 27.06.2010. Eventually, the Tribunal framed charge against him on 05.01.2011 under the selfsame section of the Ain. The charge so framed was read over to the accused, to which he pleaded not guilty and claimed to be tried.

During trial, the prosecution examined in all 8 witnesses; of them PW1 Fatema Begum alias Fatema, mother of the victim, stated in the same line as stated in the FIR. She further stated that Khalil, a boy of 10 years of neighbouring house told her that Amena was lying dead in the canal. Thereafter, she went there with neighbour Lutfa and found the deadbody of her daughter in the water of the canal. She brought the deadbody to her house. She found marks of injury on the back of victim's head, left side of her back, on her left leg and bruise on her private organ. Accused Nur Mohammed fled away after committing the offence. He (accused) took the victim to the orchard with him on the plea of cutting bamboos and killed her by dealing blows with the neck of the axe after committing rape. She lodged the FIR, exhibit-1. Police held inquest on the deadbody and sent it to the morgue for holding autopsy. Police also seized *alamots*, arrested the accused after 23 days of the occurrence and accused confessed his guilt to the learned Magistrate. Her son Al-Amin also made statement to the Magistrate recorded under section 22 of the Ain, 2000. In cross-examination by the learned Advocate, appointed as a

State Defence Lawyer, she stated that the accused got married but he had no issue. He married for thrice but all the wives left him. The house of the accused was situated beside their house. While the accused called the victim away with him, she was not at home. She searched for the victim at about 10.30 am. She did not find any injury on victim's body caused by *Dao* but she found injuries of axe on her head. She found the rope of the wearing *salwar* of the victim untied and her *urna* at a small distance. Nobody except her son Al-Amin and daughter Taslima told her that the accused called away the victim. They had good relation with accused's family. She denied the defence suggestion that her son Al-Amin did not tell her that the accused called away the victim to the bamboo clump for cutting bamboos. She denied all other material suggestions put to her including the suggestion that they have implicated the accused in the case falsely or that her daughter was not raped and killed by accused Nur Mohammed.

PW2 Al-Amin, a son of PW 1 and brother of the victim, stated that the occurrence took place at about 07.00 am on 21.03.2010. His mother went to the field with their cattle. At

that time he, his younger sister Taslima and elder sister victim Amena were at home. Their uncle Nur Mohammed called away Amena expressing that they would go to the western bamboo clump to cut bamboo. They wanted to go with the accused but he slapt him and told them to go to the neighbour's house to take puffed rice and holy meal. His uncle accused Nur Mohammed killed his sister. They found the deadbody of victim on the bank of the canal. The learned Magistrate recorded his statement. In cross-examination by the defence he stated that his mother went to the field at about 06.30 am. She returned home after half an hour. They went to attend a wedding ceremony. His mother went out to look for his missing sister before calling of *azan*. They had good relation with the accused. He denied the defence suggestion that the accused did not call away the victim on the plea of cutting bamboos. He denied all other material suggestions put to him including the suggestion that he deposed as tutored by police.

PW3 Md. Rasel, a cousin of the informant, stated that the occurrence took place at about 07.00 am on 21.03.2010. He came to know that Amena was found missing. He heard that

accused Nur Mohammed called away the victim on the bank of the canal, killed her dealing blows with the neck of axe and left the deadbody there. Police came, made a seizure and prepared a list exhibit-2 and took away the deadbody. In cross-examination by the defence, he stated that the accused was not insane at the time of occurrence. He did not witness anything except the deadbody. He put his signatures on the papers as asked by police. He denied the defence suggestion that he did not hear that accused committed rape upon the victim and killed her or that the accused was insane to some extent.

PW4 Abdul Khaleque Hawlader alias Md. Khaleque, a brother of PW1, stated that he heard that accused Nur Mohammed killed the victim after committing rape on her. Police visited the place of occurrence, held inquest on the deadbody and he put his signature in the report exhibit-3. In cross-examination by the defence he stated that there was no enmity between the accused and informant's family. The relation between them was good. He heard everything from others but failed to state the names from whom he heard about

the occurrence. He denied the defence suggestion that the uncle of the victim did not kill her or he did not commit rape on her.

PW5 Ruhul Amin, the Investigating Officer (IO), stated that he visited the place of occurrence, prepared sketch map with index, seized *alamots* under a seizure and arrested the accused. He forwarded the accused to the learned Magistrate to record his confession. He examined the witnesses and recorded their statements under section 161 of the Code of Criminal Procedure (the Code). He held inquest on the deadbody and prepared a report and sent it to the morgue for holding autopsy. He received the autopsy report. In the investigation, he found offence against the accused *prima facie* to be true and submitted a charge sheet against him on 31.05.2010 under section 9(2) of the Ain, 2000. He proved the sketch map exhibit-4, index exhibit-5, inquest exhibit- 6 and two seizures through exhibits-7 and 8. He also proved the *alamots*, the axe, *salwar* and *kamij* as material exhibits. In cross-examination by defence, he stated that the bamboo clump located beside an orchard/woods but he did not mention it in the index. He did not send the axe to detect finger print of the accused on its

handle. He did not send victim's *salwar* and *kamij* for chemical examination. He arrested the accused from Kalipur village on 12.04.2010 and forwarded him to the learned Magistrate on 13.04.2010 for recording his confession. He brought witness Al-Amin to the learned Magistrate on 24.03.2010 for recording his statement under section 22 of the Ain, 2000. He did not find any blood stain on the axe. In the investigation he did not find any dispute between the informant and the accused about land. He denied the defence suggestion that the accused did not commit rape upon the victim and killed her or that the accused has been implicated in the case due to land dispute. He denied that he tortured the accused in the police station and extracted the confession. He further denied that the confession was not true and made voluntarily.

PW6 S. Das, a doctor who was posted to Pirojpur General Hospital at the material time, stated that they held autopsy on the deadbody of Amena on 22.03.2010 and found the following injuries:

1) One blackish area over the middle of left side of back (size: 2"x2").

- 2) Irregural swelling over the both labia majora.
- 3) Irregural swelling over the right temporo parietal region of the head.
- 4) Scalp congested at right temporo parietal region with clotted blood size-4"x2".
- 5) Skull fracture at right temporal, parietal and occipital bone.

On dissection he found-

- 1) One congestion in the middle of left side of the back, size (6"x4")
- 2) Scalp was congested at right temporo parietal region of head,
- 3) Fracture found at right temporal, parietal ad occipital bone,
- 4) Brain congested and haemorrhagic blood with clot found over the right hemisphre.
- 5) Heart found healthy and empty,
- 6) Introitus congested.

and opined- “the death was due to haemorrhage and shock caused by above mentioned injuries following rape which was *ante mortem* and *homicidal* in nature”. He proved the autopsy report exhibit-9 and identified his signature and that of the members of Medical Board therein. In cross-examination by the defence he stated that he did not find any injury on the breast, thigh, lip and face of the victim. In his report he did not state the time of death and rape of the victim. He did not take any other step to prove the victim’s death. He denied the defence suggestion that the injuries found on the person of victim can be caused for falling on any hard substance. He did not find any swelling on the thigh of the deceased. He did not find any clotted blood on the vagina of the victim. He did not find presence of semen. He denied the defence suggestion that he deposed against the truth or that the victim was not killed after committing rape.

PW7 Md. Yousuf alias Yousuf Matubbor, an uncle of the victim, stated that the occurrence took place 9 to 10 years ago. At the time of occurrence he lived in Chattogram. His wife informed him that a murder was committed in the area. He

heard that accused Nur Mohammed raped her niece and thereafter killed her. The accused fled away. He received an information, went to the turn of Keratpur college and found the accused apprehended there. They handed over the accused to police. In cross-examination by the defence, he stated that he went home after 1-2 days of the occurrence. After 5-7 days of occurrence, the Superintendent of Police came to Vimrul, Mathbuniya and told them to apprehend the accused. The maternal uncle of the victim apprehended the accused from a house situated near the house of local Member of Parliament. He found the accused fastened. After apprehending, the accused was taken to the informant's house. They informed the fact of apprehension to police. Police arrived and took the accused in their custody. He denied the defence suggestion that he did not hear that the victim was raped and killed.

PW8 Md. Kabir Uddin Pramanik, a Senior Judicial Magistrate who was posted to Mathbaria Chauki at the material time, recorded the statements of accused under section 164 of the Code. He stated that the statement made by the accused was true and voluntary. He proved the statement exhibit-10 and his

signature thereon. In cross-examination by the defence, he stated that police arrested the accused on 12.04.2010 and forwarded to him on 13.04.2010 for recording confession. He did not write anything in columns 8 and 9 of the confession. He did not make any memorandum as to the truth and voluntariness of the confession. He did not write that if the accused did not confess, he would not be handed over to police again. He did not write the answers of the questions in column 6 making the accused understand the questions of column 5. In column 6 he wrote answers of three questions only. He denied the defence suggestion that the confession was not true and made voluntarily. He further denied that he did not follow the procedure under section 364 of the Code in recording a confession.

On conclusion of examination of prosecutor witnesses, learned Judge of the Tribunal examined the accused under section 342 of the Code, to which he reiterated his innocence and prayed for justice. However, the learned Judge found him guilty of the offence charged with and sentenced him thereunder to death.

Mr. Syed Ejaz Kabir, learned Deputy Attorney General taking us through the materials on record submits that by evidence the prosecution proved that the condemned prisoner committed rape upon the victim and, thereafter, killed her dealing blows on her head with the neck of an axe. After committing the offence, the condemned prisoner fled away but the men of the locality subsequently apprehended him and handed over to police. He confessed his guilt to the learned Magistrate PW8 which was recorded under section 164 of the Code. The confession is found true and made voluntarily. For the sake of argument, if the confession is left out of consideration for some mistakes in its recording, the other evidence on record i.e., the fact that the condemned prisoner called away the victim from her house with him at about 7.00 a.m on 21.03.2010 on the plea of cutting bamboos and, thereafter, the victim did not return from his custody safely and subsequently her deadbody was found on the bank of a canal, are enough to hold that none but the condemned prisoner is the killer of victim. Mr. Kabir then taking us through the injury at column 11 of the autopsy report of 'irregular swelling of both

the labia majora and introitus congested' submits that the condition of vagina can be found as above when force is applied from outside and the hymen may be 'lost' for stressing. The aforesaid condition of the private organ of the victim clearly proves that she was raped first and to screen the offence, the condemned-prisoner killed him brutally by dealing blows on her head with the neck of axe. On our query as to the mental soundness of the convict as it appears from the order sheet of the Tribunal, Mr. Kabir submits that nothing is found in the record that the defence took any plea in the trial that the accused was insane at the time of committing offence, and as such he is not entitled to get the benefit of section 84 of the Penal Code. The trial was commenced and ended in the judgment finding the condemned-prisoner of sound mind. Therefore, the question of vitiating the trial does not arise at all. Since this is a brutal murder after committing rape on a 14 years aged girl, the Tribunal rightly imposed death penalty upon the condemned-prisoner which may not be interfered with. The reference, therefore, would be accepted and the appeals be dismissed.

Mr. Md. Masum Billa, learned Advocate for the condemned prisoner-appellant submits that the prosecution by corroborative evidence failed to prove that the condemned-prisoner called away the victim from her house in the occurrence morning. PW2 was a boy of 10 years at the time of deposing in the Tribunal. But the learned Judge before recording his evidence did not test his capacity of understanding to depose as a witness. However, it would be unsafe to rely solely on the evidence of PW2, a child. He then takes us through the evidence of witnesses and submits that there is serious contradictions in the evidence of PW1 with his statement made in the FIR as to when she went out for searching the victim and recovery of deadbody from the place which effects the merit of the case. He then submits that prosecution did not examine one Khalil, who informed PW1 about finding of victim's deadbody. The axe seized by police was not sent to the expert to ascertain the finger print of the condemned-prisoner therein. He then refers to the confession made by the condemned-prisoner exhibit-10 and submits that the confession was extracted by subjecting him to torture.

Moreover, in recording the confession PW8 did not comply with the provisions of sections 364 and 164 of the Code. The confession is neither true nor voluntary and as such it cannot be used against the accused to pass conviction. Mr. Billa then submits that the learned Judge of the Tribunal framed charge against the condemned-prisoner under section 9(2) of the Ain on 05.01.2011 and thereafter appointed a State Defence Lawyer on the very day and, thus, violated the provisions of law of the Code. The condemned-prisoner at the event of framing charge could not defend himself for such post facto appointment. He then refers to the order sheet of the Tribunal and submits that the condemned-prisoner did not appoint any Advocate to defend him. But the learned Judge appointed a State Defence Lawyer subject to the approval of the District Magistrate on the day when PW1 was examined and cross-examined in part. Thus, the condemned-prisoner failed to defend himself properly. He also refers orders 31 and 32 of the Tribunal and submits that the condemned-prisoner was sent to Pabna Mental Hospital for treatment but neither the prosecution nor the defence took any step to ascertain as to his mental recovery

before proceeding with the trial. Therefore, the whole trial has been vitiated. In such a case, the condemned-prisoner has already served more than 16 years in jail including 7 years in the condemned-cell. Further trial will not ensure justice on any Court. In the premises above, the reference would be rejected and the appeal be allowed and the condemned-prisoner be acquitted of the charge levelled against him.

We have considered the submissions of the both sides and gone through the materials on record. To bring home the charge against the condemned-prisoner, the prosecution in all examined 8 witnesses; of them PW1 Fatema Begum is the informant and mother of the victim, PW2 Al-Amin alias Md. Alamin is the brother of victim, PW3 Md. Rasel is the cousin of victim and a witness to the seizure, PW4 Abdul Khaleque Hawlader alias Md. Khaleque is the brother of informant and PW7 Md. Yousuf alias Yousuf Matubbor is the uncle of informant. PW5 Ruhul Amin is the IO who seized *alamots* and held inquest on the deadbody, PW6 S. Das is the doctor who conducted autopsy on the deadbody exhibit-9 and PW8 Md. Kabir Uddin Pramanik is the Magistrate who recorded the

confession of the condemned-prisoner exhibit-10 and they are (PWs 5, 6 and 8) formal witnesses.

The prosecution by the evidence of PWs 1 and 2 has been able to prove that PW1 left the house in the morning on 21.03.2010 with her cattle keeping victim Amena and her other two children, son Al-Amin and daughter Taslima in the house. She returned home at about 08.00 am but did not find her victim daughter in the house. On query, son Al-Amin PW2 disclosed that condemned-prisoner Nur Mohammed called away victim Amena with him in the western woods standing a little bit away from their house on the pretext of cutting bamboos from bamboo clump. In evidence PW2 Md. Al-Amin, brother of the victim corroborated the aforesaid facts that while his mother went out to the field with cattle to feed them grass then condemned-prisoner Nur Mohammed came to their house and called away his sister victim Amena with him. When PW2 and his other sister attempted to go with him, the convict slapt him and told them to go to the nearby house to take puffed rice and holy meal. Although PW2 Al-Amin was a boy of 10 years at the time of deposing in the Court but in his reply to the cross-

examination by defence he is found quite capable of understanding the questions put to him and giving rational answers of those. Although he was a boy of teen age but in the above position his evidence can safely been relied upon under section 118 of the evidence Act. As per the evidence of PW2, we can safely hold that the condemned-prisoner called away the victim from her house at about 07.00 am on 21.03.2010. It is found that the victim did not return safely from the custody of the condemned-prisoner and subsequently her deadbody was found at about 10.30 am on the same day on the bank of the canal. The condemned-prisoner did not explain the death of the victim but fled from the locality. He was apprehended by the villagers after 23 days and handed over to police. After his arrest, he made a judicial confession to PW 8 Magistrate Md. Kabir Uddin Pramanik. The confession is reproduced below:

“আমি যাহাকে হত্যা করি তাহার নাম আমেনা (১৪)। আমেনারা ০৩ ভাই বোন। আলামিন, তাছলিমা এবং আমেনা সবার বড়। ঘটনার দিন আমি আটার সিরনি রান্না করি এবং আমেনার ছোট ভাই আলামিন ও তাছলিমাকে খাইতে দেই। আমি আমেনাকে সঙ্গে নিয়ে কুড়াল হাতে করিয়া খাল পারের নিকট ভিটিতে বাঁশ কাটার জন্য যাই। তখন আলামিন ও তাছলিমা আমার সাথে

যাইতে চাইলে তাহাদের বলি তোরা সিরনি খাইতে যা। তোদের যাওয়ার দরকার নাই। এরপর আমেনাকে খাল পারে নিয়ে সুযোগ বুঝে কুড়ালের উল্টো পিঠ দিয়ে মাথায় আঘাত করলে সে ঘটনাস্থলে মারা যায়। আমি নামাজ কালাম বেশি পড়তাম। রাতের বেলা ঘুমের মধ্যে আমেনার সাথে আমি খারাপ সম্পর্কের স্বপ্ন দেখতাম, আমার কাপড় নষ্ট হয়ে যেত। সেই জন্যই আমি এই পরিকল্পনা অনুযায়ী ঘটনার তারিখ ও সময়ে আমেনাকে হত্যা করি।”

In the confession, the condemned-prisoner admitted of killing the victim by dealing blows on victim's head with the neck of an axe. He did not admit of committing rape upon the victim. The learned Deputy Attorney General submits that the confession is partly true, he has suppressed the fact of committing rape upon the victim. We have gone through the autopsy report exhibit-9 and evidence of PW6 Dr. S. Das. In the autopsy, the doctor found the private organ of the victim- (i) irregular swelling of both labia majora (ii) introitus congested and (iii) hymen lost. The aforesaid condition of the genital organ of the victim is not found to be the conclusive proof of committing rape upon her. 'Irregular swelling' of both labia majora can be found for other reasons including hormonal disorder. 'Introitus' may be congested for other reasons, it does

not mean that forceful penetration was done. Hymen was found 'lost' but not ruptured which may be for other reasons. In cross-examination PW6 doctor stated that he did not find any injury on the breast, thai, lip and face of the victim. He did not find any swelling on deceased's thai. He did not find any clotted blood on the vagina of victim. He did not find any semen. If the findings of the autopsy report at column 11 as to the overview of genital organ of the victim is considered together with the evidence of PW6 doctor, we can safely hold that the victim was not raped. Therefore, the confession made by the accused, so far it was related to the killing can be treated as true. But PW8, Magistrate Md. Kabir Uddin Pramanik recorded the confession very casually. He did not fill up the columns and put the questions to the accused in column 6 as required by the law. He did not write any memoranda at the bottom of confession as required under sub-section 3 of section 164 of the Code. He did not take any signature of the accused on the prescribed places of the form of recording confession but he took only one signature in the additional sheet. Even he did not fill up columns 8 and 9 of the form of confession. In column 10, he

wrote that accused was forwarded to him at 9.30 hours. The defence cross-examined the IO as to the truth and voluntariness of it that it was extracted on duress and coercion. In the evidence of PW7 it appears that public apprehended him and handed over to police and, therefore, it cannot be treated as made voluntarily. If confession is not qualified in both the counts that it is not found true and made voluntarily, it cannot be used against the accused to pass conviction.

But in the absence of aforesaid confession, the prosecution has been able to prove that the condemned-prisoner called away the victim from her house at about 07.00 am on 21.03.2010 and, thereafter, the deadbody was found on the bank of the canal and there were injuries on her parietal region with heavy weapon. Since the victim was with him but she did not safely depart from him, therefore, we hold that none but the condemned-prisoner was the killer of victim. Therefore, his conviction and sentence under section 9(2) of the Ain, 2000 may be converted into under section 302 of the Penal Code by us [reliance place on the State Vs. Nurul Amin Baitha, 75 DLR (AD) 187].

The question of insanity of the victim comes before us because order sheet of the Tribunal reflects that the accused was sent to Pabna Medical College Hospital for treatment. It is to be decided by us whether at the time of committing offence the condemned-prisoner was unsound in mind and whether he is entitled to get the benefit of general exception provided in section 84 of the Penal Code. In the last part of confession, the condemned-prisoner stated the cause of killing the victim as under:

“আমি নামাজ কালাম বেশি পড়তাম। রাতের বেলা ঘুমের মধ্যে আমেনার সাথে আমি খারাপ সম্পর্কের স্বপ্ন দেখতাম, আমার কাপড় নষ্ট হয়ে যেত। সেই জন্যই আমি এই পরিকল্পনা অনুযায়ী ঘটনার তারিখ ও সময়ে আমেনাকে হত্যা করি।”

If we see the aforesaid statement in plain eyes, it proves that the condemned-prisoner being superstitious committed the offence of killing. It was suggested by the defence to one witness that the condemned-prisoner was insane to some extent which was denied. It came out in evidence that the convict married for thrice but his wives left him. But such statement made in the confession and the aforesaid evidence do not come

within the meaning of his unsoundness at the time of committing offence for which his act of killing may be treated as not an offence under section 84 of the Penal Code. No one alleged or brought to the notice of the Tribunal that the condemned-prisoner at the time of committing the offence was unsound in mind. Neither by the prosecution nor by the defence at any stage of the trial claimed so, therefore, he is not entitled to get the aid of general exception provided under section 84 of the Penal Code.

But the fact remains as it appears from the order sheet of the Magistrate Court as well as the Tribunal that during whole period the condemned-prisoner did not appoint any Advocate to defend him. In order 5 dated 05.01.2011, learned Judge of the Tribunal framed charge against the condemned prisoner under section 9(2) of the Ain, 2000 and after framing charge appointed Alhaj Md. Alauddin Khan, Advocate as a State Defence Lawyer to defend the condemned-prisoner. The allegation brought against the convict and charge framed under the section provides for capital punishment, if the charge is proved. In such a case the accused is to be defended by the

State by appointing a State Defence Lawyer under section 340 of the Code and under the provision of chapter XII of the Legal Remembrancers Manual, 1960 which was not done in this case. Section 265 C and 265 D of the Code provides that charge shall be framed after hearing the submissions of the accused and the prosecution. If charge had been framed before appointing the State Defence Lawyer, the condemned-prisoner was seriously prejudiced failing to make submission against the charge so brought. The learned Judge of the Tribunal appointed the State Defence Lawyer for the condemned-prisoner at a very belated stage. It further appears that the firstly appointed State Defence Lawyer did not take any step for the condemned-prisoner for long time. The Tribunal appointed a State Defence Lawyer namely Kanai Lal Biswas afresh in order number 25 on 16.07.2013 subject to the approval of the District Magistrate and on that very day a witness of the prosecution PW 1 was examined and cross-examined in part. The State Defence Lawyer so appointed did not get enough time to defend the condemned prisoner properly.

Apart from the aforesaid facts, it is further found that as per orders 29 and 30 dated 25.03.2014 and 16.06.2014 respectively the condemned-prisoner was not produced in the Tribunal. In orders 31, 32 and 33 dated 13.08.2014, 24.09.2014 and 27.10.2014 respectively the learned Judge of the Tribunal wrote “হাজতি আসামী চিকিৎসার জন্য পাবনা মানসিক হাসপাতালে চিকিৎসাধীন আছে।” But subsequently in order 34 dated 25.01.2015 the accused was produced in the Tribunal and in order 35 dated 25.02.2015 some witnesses were found to have been examined and cross-examined by the defence. It is settled position of law that, if an accused is seen to be unsound in mind and it comes to the knowledge of the Court, the learned Judge would then and there postpone the trial of the case under the provisions of section 465 of the Code and wait until the accused is cured from mental unsoundness after treatment and after getting report from competent authority in positive, he/she will write it in the order sheet and shall proceed with the trial. It is found in order numbers 31, 32 and 33 that although it came to the knowledge of the learned Judge of the Tribunal that the accused was admitted to Pabna Mental Hospital for treatment but he did

not postpone the trial of the case rather proceeded with trial. Even before starting trial again, order 35 dated 25.02.2015, learned Judge was not satisfied that the concerned hospital found the accused mentally sound which was a prerequisite in holding trial against the accused. In the record of the case, we do not find any document of Pabna Mental Hospital that the condemned-prisoner became sound in mind after treatment.

Therefore, in the aforesaid position of fact of examining witnesses without appointing a State Defence Lawyer in time and proceeding with the trial and its conclusion without ascertaining the mental soundness of the condemned-prisoner, we find that subsequent trial held against the condemned-prisoner was a mistrial resulting in the miscarriage of justice and he has been seriously prejudiced for it. We cannot hold in any way that the condemned-prisoner was able to understand the charge whereupon the trial was held against him. We find that the learned Judge did not comply with the provisions of law of sections 465, 467, 468, 469 and 471 of the Code in proceeding with the trial against the condemned-prisoner and as such, the trial is treated as a mistrial.

Here considering the facts and provisions of law, the concerned Tribunal can be directed to proceed with the trial afresh after complying with the provisions of law as discussed herein above. But in the case in hand, we find that in the meantime 16 years have passed. The condemned-prisoner was never granted bail in the case. He was in jail for 9 years during trial and in the condemned-cell for 7 years after delivery of judgment, in total 16 years. Therefore, we find that it would be serious injustice to the condemned-prisoner and fatal exercise of process of law on our part to send the case on remand for trial afresh after complying with the legal formalities of determining the mental soundness of the convict. But considering the period of his custody for 16 years and the fact of mistrial for appointing of the State Defence Lawyer at the very belated stage and for non compliance of the provision of sections 465, 467, 468, 469 and 471 of the Code, we find that the condemned-prisoner should be acquitted from the charge level against him.

In the attending facts and circumstances, the reference is rejected and the Appeal is allowed. Accordingly, the Jail

Appeal is disposed of. The condemned-prisoner is acquitted of the charges levelled against him.

But considering the nature of confession, the cause of killing the victim and mental unsoundness as reflects in the orders passed by the Tribunal, we find that it would be proper for safety of others to direct the concerned authority to examine the condemned-prisoner through a specialist. The concerned Authority is hereby directed to take steps for examining the condemned-prisoner by a specialist of mental hospital and if after examination he is found sound in mind, in that case he will be released from jail. If he is found unsound in mind, he will be kept in any asylum.

Before parting with the case, we would like to address the recording of confession by the then Senior Judicial Magistrate Md. Kabir Uddin Pramanik posted to Mathbaria Chauki, Pirojpur now Joint Secretary, Ministry of Law, Justice and Parliamentary Affairs. The condemned-prisoner Nur Mohammed was produced before him on 13.04.2010. He placed him (accused) in the charge of SI Ruhul Amin (PW5, IO) and thereafter he recorded the confession exhibit-10. We

find that in recording the confession, he did not at all follow the provisions of section 364 and 164 of the Code. He did not take steps to make the accused understand the questions of column 5 and write the answers of the question in column 6. Only three questions were put to the accused very casually and answers written in column 6. He did not make any memorandum at the bottom of the statement so recorded in column 7 to ascertain the truth and voluntariness of the confession. He just put his signatures in columns 8 and 9. In column 10 he wrote that the accused is forwarded to 'me' at 09.02 hours. The act of recording confession is a very solemn act and in discharging his duties, the Magistrate must be careful to see that the requirements of sub-section (2) of section 164 are fully satisfied. The provision of sub-section (3) of section 164 is mandatory and, therefore, he is required to fill up column 7 of the form in recording confession [reliance place on State Vs. Babul Miah, 63 DLR (AD) 10]. We called Mr. Pramanik to appear in person before us. He appeared today. We placed before him the confession he recorded and supplied the book of the Code of Criminal Procedure to read the provisions of

sections 164 and 364 of the Code. He has gone through the both. But on our query, he simply stated that he did not write anything in columns 8 and 9. His gesture and posture before us proves that till today he does not understand the importance of the provisions of law of sections 164 and 364 of the Code to record a confession. He is now posted to Ministry of Law, Justice and Parliamentary Affairs as Joint Secretary. He is holding the position of District and Sessions Judge. He is found incompetent to deal with any criminal matters being a District and Sessions Judge. We orally advised him to go through the provisions of law and after gaining proper knowledge to teach a Judicial Magistrate in each month. If Mr. Pramanik himself is unable to consume the provisions of law, the advice so given would be fruitless. However, we find his recording of confession is beyond the mandate of the provisions of law and it proves his incompetency and professional misconduct. Therefore, it requires to take steps against him under the provisions of law which was applicable for him at the material time. We find him incompetent to hold the Session's power in case of his posting in Courts or Tribunals.

Let a copy of this judgment with a photostat copy of the confession exhibit-10 he recorded be sent to the Ministry of Law, Justice and Parliamentary Affairs, for taking appropriate steps against him.

Communicate this judgment and order and transmit the records of the Tribunal.

K.M. Rasheduzzaman Raja, J:

I agree

Shohel ABO